

Implications of the Facebook case

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Overview

- Complementarity of competition and data protection
- Need for competitive harm
- Future challenges of exploitative abuses

Link between dominance and data protection violation

- None of the lawful grounds for processing in Art. 6(1) GDPR were considered met:
 - Data subject **consent** was not freely given
 - Data processing was **not necessary for the performance of the contract**
 - Facebook's interest in processing data **did not outweigh the interests of data subjects**
- Bargaining power of Facebook over users seems to have been considered in this assessment

Comparing two versions of the GDPR

Commission's proposal

Article 7(4) GDPR:
*Consent shall not provide a legal basis for the processing, where there is a **significant imbalance** between the position of the data subject and the controller.*

Recital 34 GDPR:
*This is especially the case where the data subject is in a **situation of dependence from the controller**, among others, where personal data are processed by the employer of employees' personal data in the employment context. Where the controller is a public authority, there would be an imbalance only in the specific data processing operations where...*

Final text

Recital 43 GDPR:
*In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a **clear imbalance** between the data subject and the controller, **in particular where the controller is a public authority** and it is therefore **unlikely that consent was freely given** in all the circumstances of that specific situation.*

Link between dominance and data protection violation

- Bundeskartellamt: '*The violation of data protection requirements found is a manifestation of Facebook's market power [...] it is not necessary to determine that the conduct [...] was only possible in the first place because of market dominance [...] it is sufficient to determine that the two aspects are linked by a causality which is either based on normative aspects or the outcome.*'
- Causality in normative aspects: would there have been a breach of data protection law in the absence of Facebook's dominance? **Risk-based approach** of the GDPR
- Causality in outcome: reference to Facebook having impeded competitors through '*inappropriate processing of data*' and having '*gained a competitive edge over its competitors in an unlawful way*'
- Reinforcing effect: once dominant, '*illegal*' collection of data further strengthened market power

Complementarity of competition and data protection

- Use of indicators from other regimes is not foreign to competition law: AstraZeneca – exclusionary abuse
- Complementarity also recognised for other fields – 2016 Commission Guidance on the Unfair Commercial Practices Directive states:
‘data protection violations should be considered when assessing the overall unfairness of commercial practices under the UCPD, particularly in the situation where the trader processes consumer data in violation of data protection requirements, i.e. for direct marketing purposes or any other commercial purposes like profiling, personal pricing or big data applications’

Need for competitive harm

- Complementarity, but need for independent harm
- Data protection (or any other) infringement by dominant firm should not in itself equal abuse of dominance
- Is Bundeskartellamt merely enforcing data protection?
- Remedy seems to confirm this: combination of data sources not stopped, but subject to consent
- But competitive harm does not need to relate to foreclosure of competitors
- Article 102 TFEU '*covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition*'

Need for competitive harm

- Background information, p. 5: '*The damage for the users lies in a loss of control*'
- But reference is then made to exclusion of competing social networks, advertisers and advertising customers
- Why including foreclosure? Reflecting doubts about whether exploitation can constitute an abuse in itself?
- Loss of control can be a competitive harm if clearly beyond what consumers would have accepted in a competitive market

Revival of exploitative abuses?

Price-based exploitation

Excessive pricing

(Perfect) Price
discrimination

Non-price-based exploitation

Unfair contract terms

Undue influence

Revival of exploitative abuses?

- Impact beyond Germany?
- Unfairness of contract terms in EU competition law
- Relevant precedents:
 - *SABAM* (1974): balance of interests – whether the contract terms at issue exceed what is necessary for attaining objective
 - *DSD* (2009): principle of proportionality and balance of interests
- Analogy can be made with balancing Bundeskartellamt conducted in the context of validity of consent

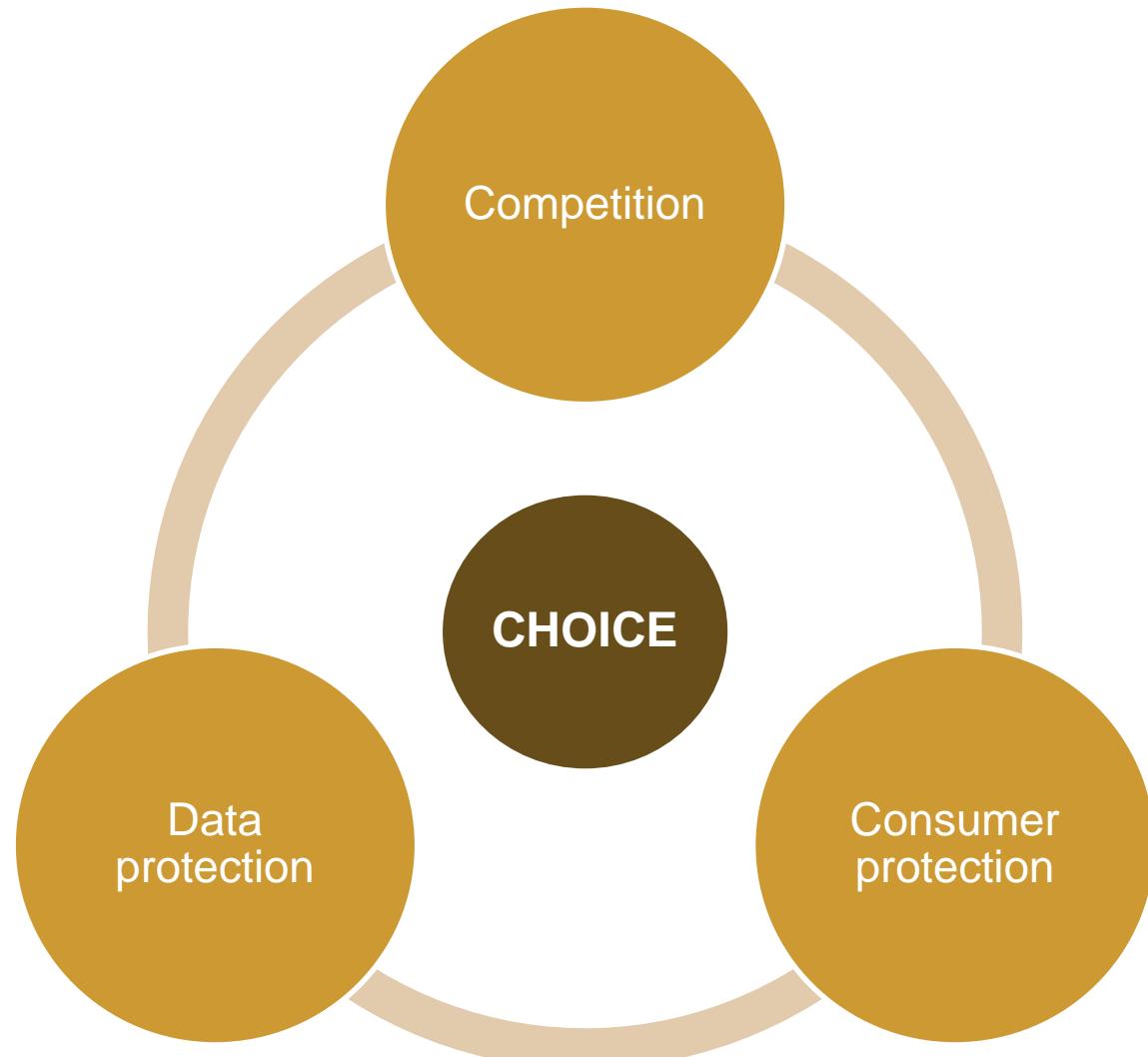
Challenges of personalisation

- Personalised offers change market dynamics
- Relevant markets for and market power over an individual consumer?
- Restoring **consumer sovereignty** rather than simply promoting consumer welfare?
- Can behavioural targeting and personalisation also become relevant to competition law as limitation on consumer choice?

Challenges of personalisation

- Commission Notice on market definition (1997):
 - Par. 7: '*A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*'.
 - Par. 43: '*The extent of the product market might be narrowed in the presence of distinct groups of customers. A distinct group of customers for the relevant product may constitute a narrower, distinct market when such a group could be subject to price discrimination*'

Challenges of personalisation



Challenges of personalisation

- Commercial practices in digital markets blur boundaries between regimes
- If consumer is nudged towards one option by restricting its ability to choose freely, the effect may be the same as having only one option
- Data protection and consumer remedies aiming at improving the ability to choose can also benefit competition by creating new demand
- At the same time, competition enforcement may be used to address problems relating to data/consumer protection – role of market power

Conclusion

- Criticism mainly targets reasoning (subject to full decision), and not so much the outcome of the case
- Reasoning matters for future cases
- Digitisation and personalisation lead to more scope for exploitative commercial practices
- Need for competition law to step in will only increase



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