Taming Tech Giants: The Neglected Interplay Between Competition Law and Data Protection (Privacy) Law

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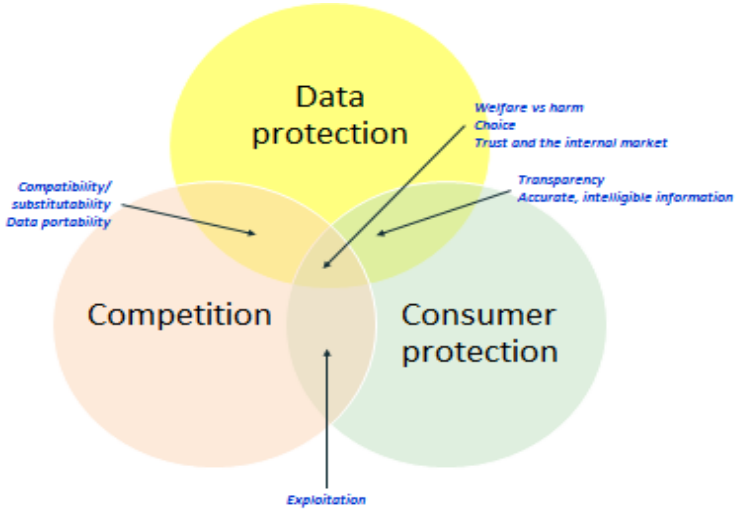
1. Introduction

- Basic idea: very surprising and puzzling observation that
  + in traditional competition law considering of privacy effects is increasingly seen as important (plus insight in complexity of this relationship)
  + in recent reform discussions that focus on power of tech firms on digital platforms privacy aspects and interplay with data protection law play no role
- Structure:
  (1) Why is interplay between competition law and data protection law important?
  (2) Discussion about privacy effects in traditional competition law
  (3) Analysis of reform discussions, e.g. ex-ante regulation of platforms (esp. DMA)
  (4) Toward a more integrated and collaborative approach

[paper published in Antitrust Bulletin 2/2022,
based also upon previous research on:
  + German Facebook case (Kerber/Zolna 2022)
  + vzbv report „Synergies between competition law and data protection law“ (Kerber/Specht-Riemenschneider 2021)

2. Interplay betw. competition and data protection law: Why is it relevant? (1)

- early report of EDPS (2014)



- EDPS emphasized the necessity

  (1) to analyze the interfaces between competition law, consumer protection, and data protection (with their "convergences and tensions") and

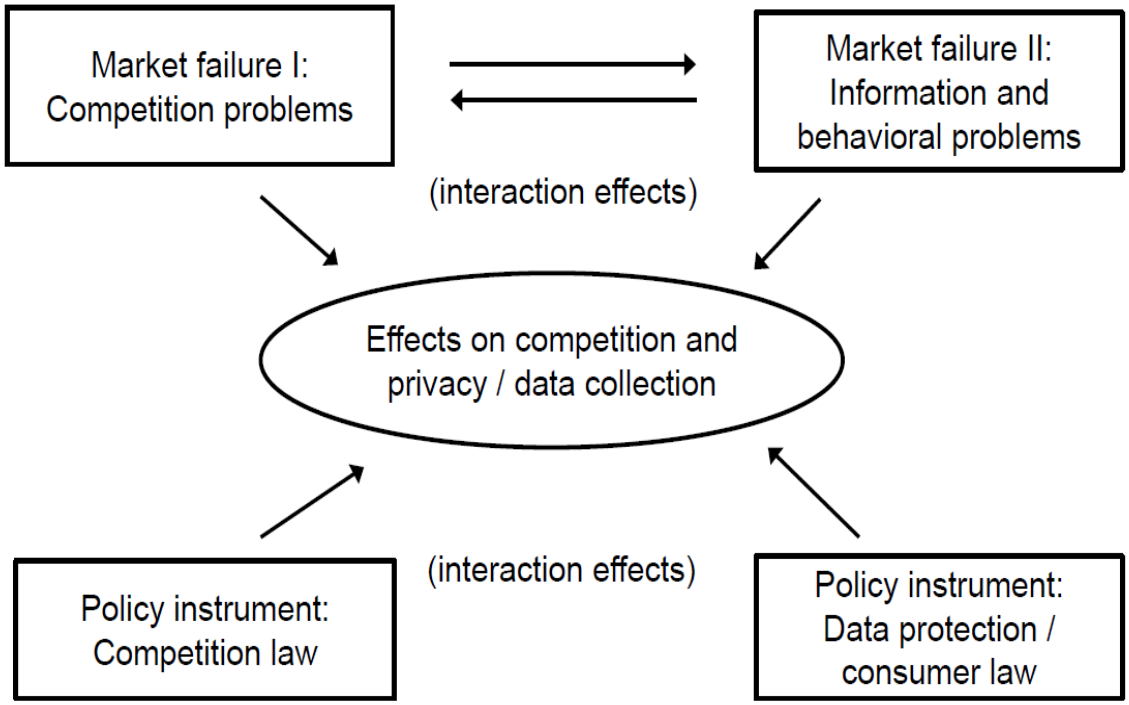
  (2) "to explore the scope of closer coordination between regulators."

- EDPS claimed:

  "the lack of interaction in the development of policies on competition, consumer protection and data protection may have reduced both the effectiveness of competition rules' enforcement and the incentive for developing services which enhance privacy and minimise potential for harm to the consumer"

2. Interplay betw. competition and data protection law: Why it is relevant? (2)

- Economic analysis of the interplay in situations with two market failures (as in the digital platform situations) (Kerber/Zolna 2022)



=> traditional separation approach does not work any more in digital markets; need for a broader analysis that takes into account the interplay between both market failures and both policies, and need for more collaboration

3. Integration of privacy aspects into traditional competition law: An emerging discussion (1)

- traditional position: strict separation of competition and data protection law
  + but: German Facebook case
- emerging insight in competition law that relationship is complex
  + see surveys by OECD 2020 and Douglas 2021
  + discussions about conflicts (e.g., Apple, effects of GDPR …)
  + discussions about synergies (e.g., data portability right, …)
- How can privacy effects be included in traditional competition law assessment?
  + no problem as far as privacy effects can be interpreted as consumer harm
  + broadly accepted: „privacy as quality“ theory

3. Integration of privacy aspects into traditional competition law: An emerging discussion (2)

- Merger cases:
  + can merger have negative effects on privacy as parameter of competition?
  + but: problem if privacy competition does not exist due to second market failure
  + but: very reluctant on not competition-related („pure“) privacy harms of mergers
  + much easier if data combination leads to exclusionary effects
- Unilateral behavior of firms:
  + exclusionary strategies that make it harder for competitors to collect personal data (exclusivity agreements, tying/bundling strategies, …) fit well into traditional competition assessments
  + much more reluctant about exploitative behavior of dominant firms regarding collection / use of pesonal data
- German Facebook case:
  + is discussed all over the world as a competition law case regarding privacy (incl. decision of Federal Court of Justice about protecting „choice“)
  + however: it is still seen as an outlier in these competition law discussions

3. Integration of privacy aspects into traditional competition law: An emerging discussion (3)

A critical assessment of this competition law discussion:

- integration of privacy aspects is big step forward in competition law but also large challenges, e.g. need for new methods (measuring privacy effects) etc.
- although second market failure (information / behavioral) is regularly mentioned in competition law discussions, it still remains on the sideline
  + its interplay with competition problems on digital markets is not taken into account properly
- need for a „realistic“ view of the effects of data protection law in competition cases, e.g. that it is not well enforced (e.g. ineffectiveness of data portability right)
- discussion still remains largely within competition law community; nearly no integrated discussion with data protection / privacy scholars
  + leads to much uncertainty how to deal with conflicts
- traditional competition law should also be much more open to exploitative abuse with respect to collection and use of personal data in digital contexts

4. New approaches for dealing with the economic power of the large tech firms

4.1 Reform discussion: The reports

- since 2018: „revolution“ in competition policy with introduction of ex-ante regulation for digital platforms in addition to traditional competition law
- entire new discussion:
  + many reports: how to deal with the new challenges …
  + Furman report, EU report, reports in Germany, Australia, US etc.
  + old competition law (ex-post control) not sufficient any more …
  + but also: going beyond traditional concepts of market power/dominance and (perhaps) also consumer welfare standard
- analysis of these reports: despite focusing only on digital platforms and acknowledging key role of personal data on digital markets
  + considering of privacy effects play no role
  + second market failure (information / behavioral) does play nearly no role
  + interplay betw. competition law, consumer law and data protection law is not an issue in this debate

4.2 Discussion in Europe: The Digital Markets Act (1)

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Legislative projects in Europe:

- Sect. 19a German competition law: additional control of abusive behavior for firms with „paramount significance for competition across markets“
- UK: plans for new procompetitive regime for firms with „strategic market status“
- Digital Markets Act proposal

Analysis of data protection / consumer protection issues in DMA proposal (1)

- DMA with the two objectives
  - + „contestability“ and „fairness“
  - + controversial discussion what they mean, but clear that they lead to different assessment criteria than traditional (economic) consumer welfare assessment
- Commission and majority of commentators: interpret DMA as a pure competition-oriented instrument
  - + second market failure does not play a role (e.g. for „fairness“)
  - + privacy effects and interplay with data protection law do not play a role (except acknowledging the need to comply with GDPR)

4.2 Discussion in Europe: The Digital Markets Act (2)

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But what about Art. 5(a) DMA proposal?

- prohibition of combination of personal data without additional consent
- emergence of German Facebook case remedy in the DMA as an obligation for all gatekeepers was very surprising
- but recital 36 claims only exclusionary effects of data combination, i.e. additional consent as an instrument for supporting contestability
  - + unclear whether it also should strengthen privacy
  - + very different to German Facebook case with its focus on exploitative abuse and ensuring choice for the end users
  - + confusing: additional consent of end users is presumably an ineffective instrument for solving competition problems (why not prohibiting data combination?)
- only through EP slipped the discussion about „dark patterns“ and behavioral manipulation (second market failure!) into DMA
  - + now additional typical consumer protection measures
  - + but still unclear whether only an instrument for contestability

4.2 Discussion in Europe: The Digital Markets Act (3)

Why not view obligations as having also objective of protecting directly end users?

- Art. 5(a):
  + more logical to view it from a privacy and consumer protection perspective
- other obligations for protecting freedom of choice of business and end users:
  + for example, Art. 5(c), (e), (f), Art. 6(1)b, c, e
  + viewing them as directly protecting this choice („autonomy“), and not only as an instrument for protecting contestability
- also: new data portability right of Art. 6(1)h (for informational self-determination)

Why does DMA protect business users against unfair behavior of gatekeepers but not consumers, who are at least as dependent on these core platform services?

- data protection and consumer protection based upon „fairness“ objective:
  + protection of choice of end users
  + protection against behavioral manipulation (second market failure)
  + protection against excessive collection and use of personal data (privacy)

4.2 Discussion in Europe: The Digital Markets Act (4)

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Suggesting an alternative „vision“ of the DMA:

- extending asymmetric regulatory character of DMA over gatekeeper platform services also to data protection and consumer protection (not only competition)
- Rationale: huge economic power of gatekeepers with its combination of market power and information power has much larger negative effects on consumers and privacy than in the case of other firms
  - + problem: consumer law and data protection law have the same rules for all types of firms and therefore cannot deal with the specific dangers of large tech firms (with regard to privacy / behavioral manipulation)
- why not also have more obligations for better privacy protection and consumer protection in the DMA (e.g., „dark patterns“/behavioral manipulation)?
- otaking into account the interplay through combinations of obligations that target competition, consumer protection, and privacy problems through gatekeepers

Another alternative solution:

- direct collaboration between competition-oriented DMA enforcement with data protection authorities and consumer law enforcement: this is no issue in DMA !

4.3 Discussion in the US

- US Antitrust discussion:
  + partly very different through new discussion about „reinvigoration“ of US antitrust („New Brandeisians“ ⇔ antitrust establishment)
  + partly very similar with regard to digital platforms
- US privacy discussion: no US federal privacy law, state privacy laws, sectoral privacy laws, some privacy protection through FTC as part of consumer protection
- but: traditionally strict separation of antitrust law and (data) privacy law in US
- New legislative antitrust law proposals in US Congress:
  + e.g., „American Choice and Innovation Online Act“ (focus on digital platforms)
- New federal privacy law proposals in US Congress
- However: so far no clear hints that these legislative projects take into account the interplay between antitrust law and privacy law
- FTC: has mandates for both antitrust and consumer law (sect. 5 FTC act)
  + could perhaps be combined more … (hints in recent FTC documents)

5. Toward a more integrative and collaborative approach

- thesis: for dealing successfully with the economic power of large tech firms, need to align competition, data protection and consumer protection in a targeted way
- negative effects on privacy and competition through both market failures and both policies (plus interaction effects) might require use of remedies of both policies

  => what is the optimal combination of policies and remedies?
- more collaboration/alignment between both policies / enforcement authorities
  + at level of policy reforms in competition law and data protection law
  + at level of investigations in cases
- main results of the paper:
  + more awareness of privacy effects and complexity of relationship between competition law and data protection law in tradit. competition law discussion
  + than in the new reform (regulatory) discussion about power of large tech firms; this is very puzzling and worrisome (DMA as a step back … ?)
- more integrated policy approach necessary with additional policies, as consumer policy, data policy (DGA, Data Act), standardisation policy, AI regulation etc., …