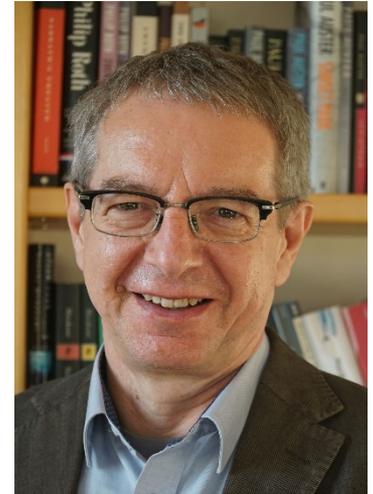


# Consumer Data Rights and Competition

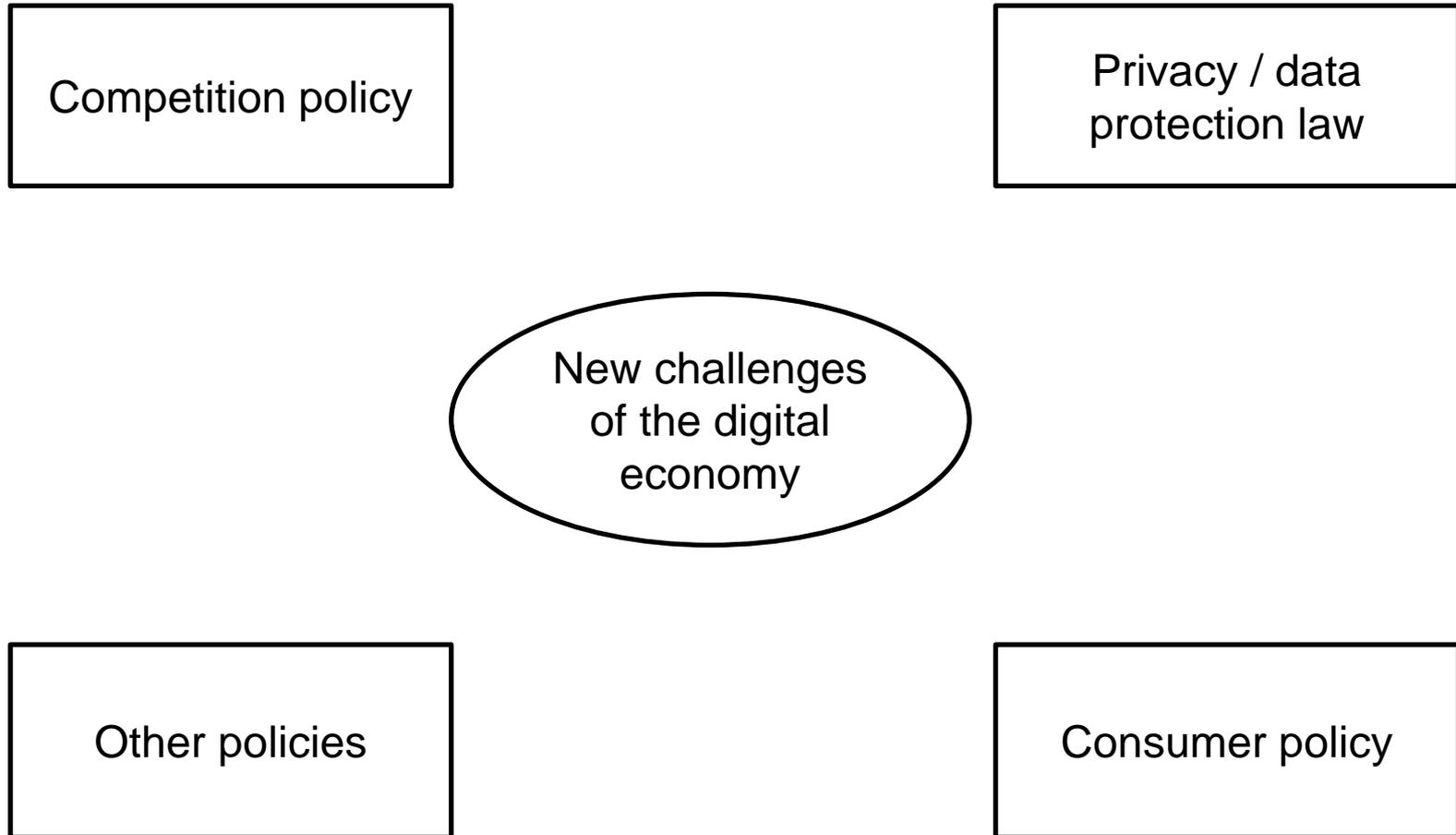
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OECD Competition Committee  
„Consumer Data Rights and Competition“  
12 June 2020

# 1. Introduction



## 2. Consumer data and consumer data rights

### Consumer data:

- data about consumers (collected, traded or used in a commercial relationship)
- better analytical concept than legal concept of personal data
- relevance of consumer data for competition, privacy, and innovation

### Consumer data rights and consumer data governance:

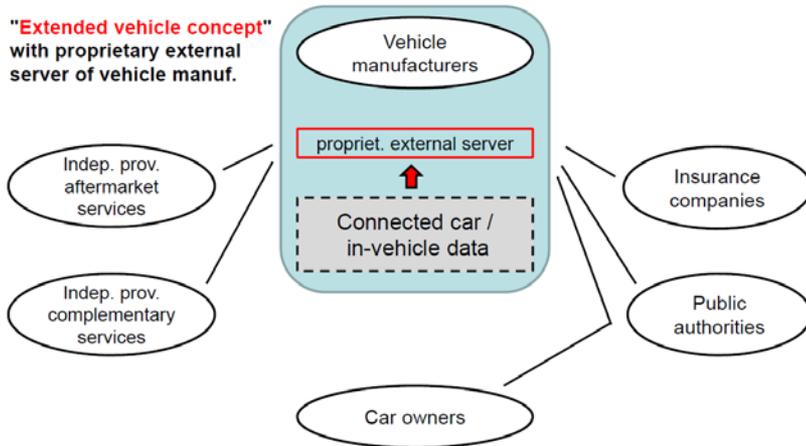
- „bundle of rights“ on consumer data (as economic concept)
- consumers can have rights on their data through
  - + privacy laws (e.g. data portability / Art. 20 GDPR)
  - + other laws and regulations (e.g., Australia: consumer data rights, EU: PSD2)
- Also firms can have rights to access consumer data for market entry / innovation (e.g., access to anonymized sets of such data for AI / training of algorithms)

=> Policy question about governance of consumer data:

Who should have what rights on consumer data with regard to the objectives privacy, competition, and innovation? (including trade off problems)

### 3. Data governance in connected cars

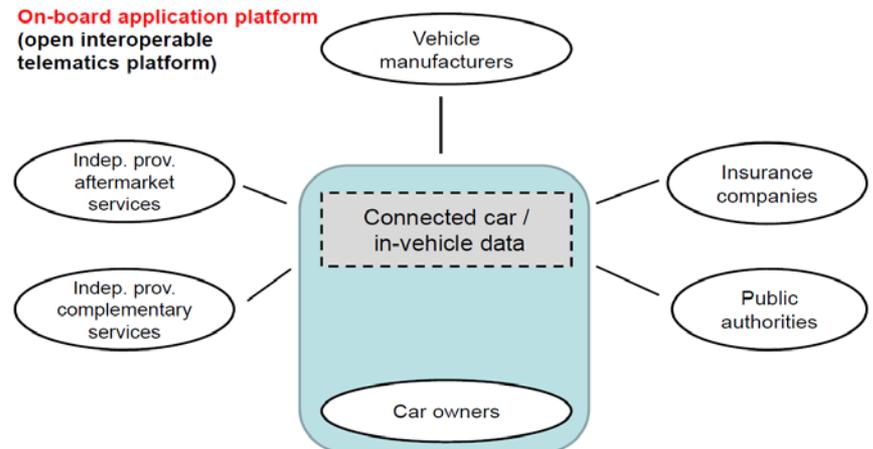
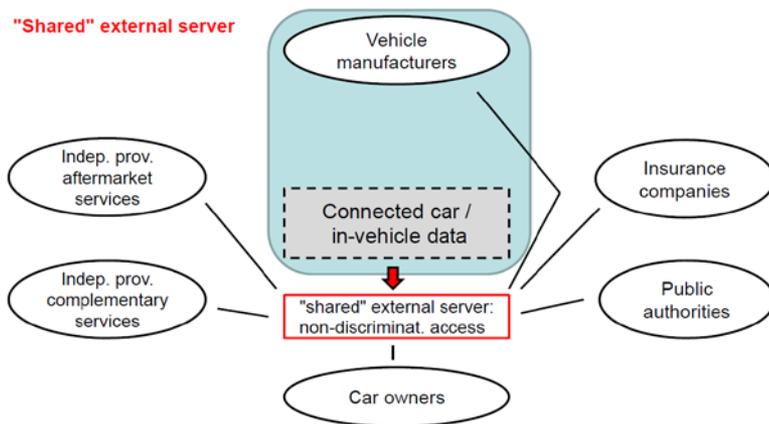
Current governance concept of vehicle manufacturers (VM):



Implications and problems:

- all data directly transmitted to proprietary server of VMs
- exclusive control of access to data and car (closed system / no interoperability) => gatekeeper position
- allows VM to control all secondary markets and fore-close indep. service providers / leverage market power
- problem of lack of access to data and interoperability with negative effects on competition, innovation, and consumer choice on secondary markets

Alternative governance concepts: would eliminate monopolistic gatekeeper position

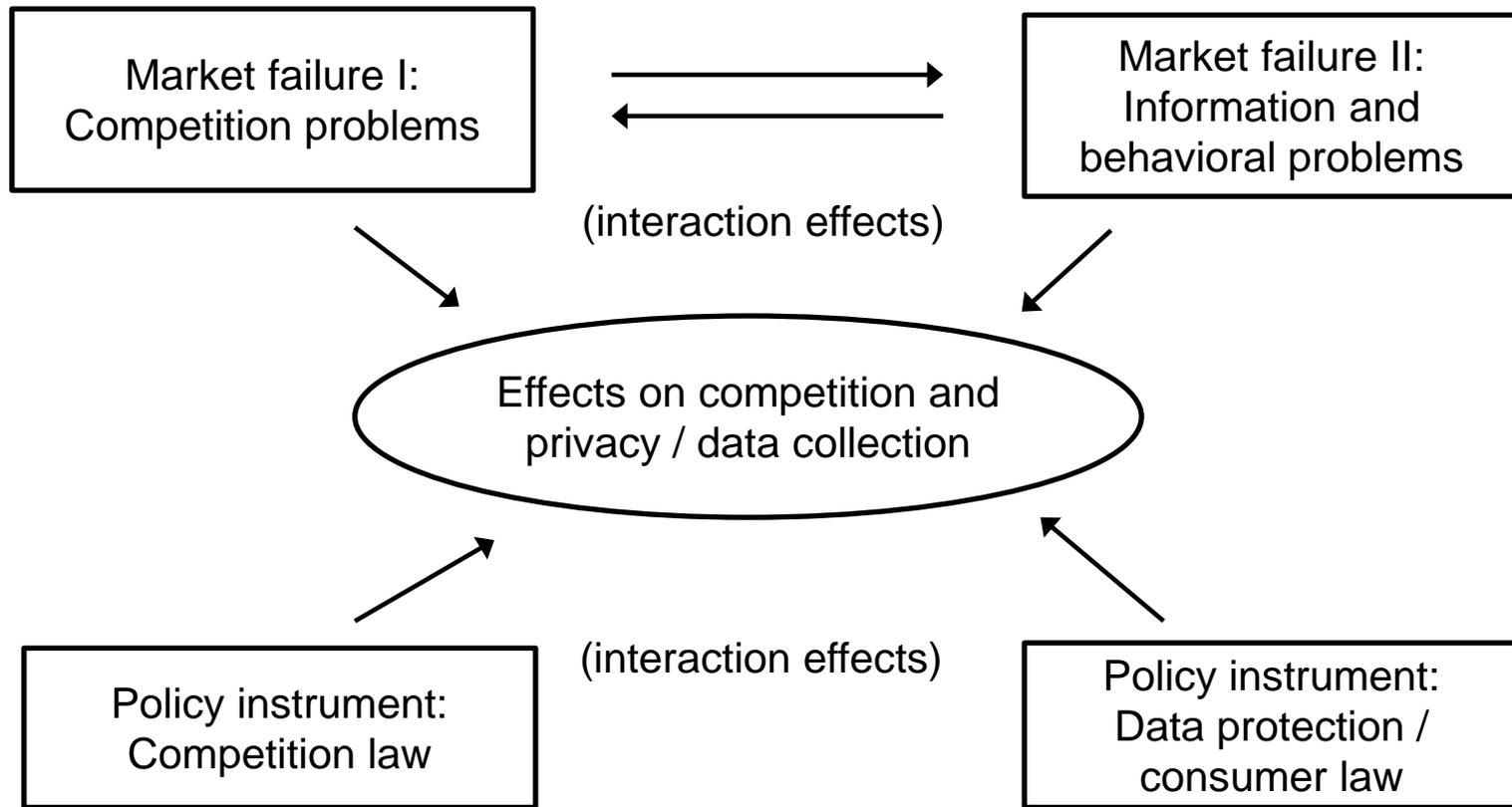


## 4. Competition policy and privacy protection: Introduction

Should competition law consider effects on privacy / collection of consumer data?

- Example: controversial „Facebook“ decision of German Bundeskartellamt (data-collecting practices as an exploitative abuse of a dominant position)
- Although it is clear that privacy / data collection can be considered in competition law, both with regard to competition and welfare of consumers (privacy risks!) ...
- ... it is however difficult in what respect and how to assess this => many problems !
- OECD paper offers a comprehensive discussion of these issues and an excellent analysis of the so far existing case law (mergers, abuse of dominance, cartels)
- Main critique of the Facebook decision:  
Competition law should focus on effects on competition, whereas the problem of protection of privacy / excessive collection of personal data should be solved by data protection / privacy law (or consumer law)
- Questions: Relationship betw. competition law and data protection law?  
What can we say about this from an economic policy perspective?

#### 4. Competition policy and privacy protection: Two market failures, two policies, and their interactions (1)



Problem: often simultaneous existence of two market failures (e.g., Facebook case) with complex interaction effects between the market failures and the policies

#### 4. Competition policy and privacy protection: Two market failures, two policies, and their interactions (2)

Implications for competition policy:

- Competition law has to consider also
  - + the effects of the second market failure (on competition) and
  - + the extent that data protection authorities can solve this market failure
- Danger of over-reliance of competition law on effectiveness of data protection law

Implications for data protection / privacy law:

- Question: Should data protection law take into account competition problem?
  - + e.g., dominance as a criterion for the validity of consent (would be compatible with a risk-based approach in data protection law)
- Important: consent-based models for privacy protection /collection of consumer data lead to markets for data that can only work well with effective competition
  - => privacy law enforcement agencies cannot ignore competition problems but they presumably cannot solve them
  - => competition law has to solve these problems!

## 4. Competition policy and privacy protection: Conclusions

Conclusions for relationship of competition law and data protection / privacy law:

- (1) In cases of a simultaneous existence of both market failures we might need the application of both policies for solving the problems  
(it is primarily not a question of either competition law or data protection law)
- (2) In addition to that, each of these two policies cannot only focus on their own market failure problem but might also have to consider the other market failure and the effects of the other policy
- (3) More research is necessary about
  - (a) the interaction of both market failures and their aggregate effects, and
  - (b) the interaction effects of both policies, i.e. competition policy on privacy, and privacy policy on competition
- (4) Necessary is the development of a more integrated policy approach asking for sophisticated combinations of competition law and data protection law remedies
- (5) Such an integrated approach would require co-operation of the enforcement agencies of competition law and data protection law (and also consumer law), and perhaps also a larger alignment of the laws themselves

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