Max Planck Institute
for Innovation and Competition

Can GDPR compliance constitute an abuse of dominance under Art. 102 TFEU?

Competition Law and Policy in a Data-Driven Economy
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Overview

- *Under which circumstances can data protection friendly conduct constitute an abuse of dominance?*
  - Undertakings engage in conduct that (supposedly) promotes data protection but harms the competitive process
  - **not** exploitative abuse through **breach** of data protection law
- Two prominent cases:
  - *Apple ATT*
  - *Google Privacy Sandbox*

Overview

1. *Common Objectives of Data Protection and Competition Law*

2. *Analysis: (When) does Data Protection harm Competition?*
   - *Only then Art. 102 TFEU may apply*
   - *Proposal: Differentiation between three scenarios*

Common Objectives of Data Protection and Competition Law

Primary objectives

- **GDPR** primarily protects the right to the protection of personal data
  - Control and transparency
- **Competition law** protects the competitive process in the internal market
  - ‘competition as such’ is protected (ECJ)

Common Objectives of Data Protection and Competition Law

Common objectives

1. Both legal regimes protect the EU internal market

- Arts. 101 and 102 TFEU: 'prohibited as incompatible with the internal market'
  - Protocol No. 27 on the internal market and competition
- GDPR refers to this objective numerous times (*cf.* Recital 2: '… contribute … to the strengthening and the convergence of the economies within the internal market…')
  - Art. 1(3) GDPR 'free movement of personal data'

Common Objectives of Data Protection and Competition Law

Common objectives

2. Both legal regimes protect consumers from power imbalances (and ultimately from the imposition of unfair conditions upon them)

- Art. 102 lit. a TFEU: '…imposing … unfair trading conditions' can be abusive
- GDPR protects data subjects in situations of unequal power distribution
  - Art. 5 lit. a: fairness principle
  - Art. 7(4) and Recital 43: no consent 'where there is a clear imbalance between [the parties] and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation'

Common Objectives of Data Protection and Competition Law

Common objectives

3. Both legal regimes aim at protecting competition

- Self-evident for Arts. 101 and 102 TFEU
- Right to data portability, Art. 20 GDPR: Right to have certain personal data transferred from one controller to another
  - Aims, *inter alia*, **at protecting the competitive process**
    - Lack of enforcement
    - Art. 6(9) Digital Markets Act – data portability on steroids!?

(When) does Data Protection harm Competition?

- *What impact does the data protection friendly conduct have on the competitive process?*

	Impact on competition	Art. 102 TFEU?
First Scenario	pro-competitive or neutral effect	(-)
Second Scenario	anti-competitive, but (strictly) mandated by the GDPR	(-)
Third Scenario	anti-competitive, but legitimized by a data protection friendly business model?	**It depends!**

(When) does Data Protection harm Competition?

First Scenario: Conduct is data protection friendly and pro-competitive

- No damage to competition → no abuse of dominance
- Control and transparency can be pro-competitive
  - Reduction of power imbalances and information asymmetries
- Users can take an informed decision if they know what they receive in return for 'their data'
  - 'Do I receive good value for my data payment?'
  - Ideally, undertakings would compete on their privacy terms

(When) does Data Protection harm Competition?

First Scenario: Conduct is data protection friendly and pro-competitive

- **In practice** barely possible to properly assess these ‘deals’
- Arguably not too many incentives to engage in data protection friendly conduct
  - Misleading and broad privacy statements
  - Illegal tracking
  - Use of dark patterns
- **Yet**
  - Data protection and privacy issues are now addressed more openly by Big Tech

(When) does Data Protection harm Competition?

Second Scenario: Anti-competitive conduct is mandated by the GDPR

- **Example** Data sharing
  - Can foster innovation and competition
  - **But** GDPR restricts data flows

    → data protection bottleneck?
- Obligation to share (NCA decision, statutory sector-specific sharing obligation etc. …)
  - How to align this with the GDPR?

(When) does Data Protection harm Competition?

Second Scenario: Anti-competitive conduct is mandated by the GDPR

- ECJ, *Deutsche Telekom* (C-280/08 P), para 80:
- '…if anti-competitive conduct is **required of undertakings** by national legislation, or if the latter creates a legal framework which itself **eliminates any possibility of competitive activity on their part**, [then Arts. 101/102] do not apply. In such a situation, the restriction of competition is **not attributable … to the autonomous conduct of the undertakings**.
- [Arts. 101/102] may apply, however, if … national **legislation leaves open the possibility of competition** …'

(When) does Data Protection harm Competition?

Second Scenario: Anti-competitive conduct is mandated by the GDPR

- **Problem** Which data sharing is *strictly forbidden* by the GDPR?
  - Very narrow scope of application for this defence
  - Difficult to draw the line (*e.g.* when balancing of interests necessary)
  - Only few cases will be sufficiently clear (sharing of health data)

(When) does Data Protection harm Competition?

Third Scenario: Data protection friendly, but anti-competitive conduct

- Can an undertaking argue that an increased level of personal data protection is part of its business model and that this conduct is therefore necessary to protect its legitimate business interests?
- *United Brands* (C-27/76, para 189):
- ‘the fact that an undertaking is in a dominant position cannot disentitle it from protecting its **own commercial interests** if they are attacked, and that such an **undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests** [yet] such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it’

(When) does Data Protection harm Competition?

Third Scenario: Data protection friendly, but anti-competitive conduct

- *Apple ATT* Decision (French NCA)
- A high level of data protection and privacy can be considered a **legitimate objective**
  - Are the means taken to reach this objective **necessary** and **proportionate**?
- Interests of all parties must be taken into consideration
- **Holistic approach** Data protection and competition policy aspects play a role

(When) does Data Protection harm Competition?

Third Scenario: Data protection friendly, but anti-competitive conduct

- **Problem** Data protection used as a pretext for strengthening one's own position
- **Problem** An undertaking is in a position to set rules for third parties and can shape these rules in its own favour
  - Apple ATT: *prima facie* neutral rules → but Apple does not fall under its own definition of third-party tracking (self-preferencing)

  → Only possible because of its economic strength and because it has access to all data in the Apple ecosystem

Thank you very much for your attention!