

# **Competition policy, data protection law, remedies, and Digital Markets Act**

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# 1. Introduction

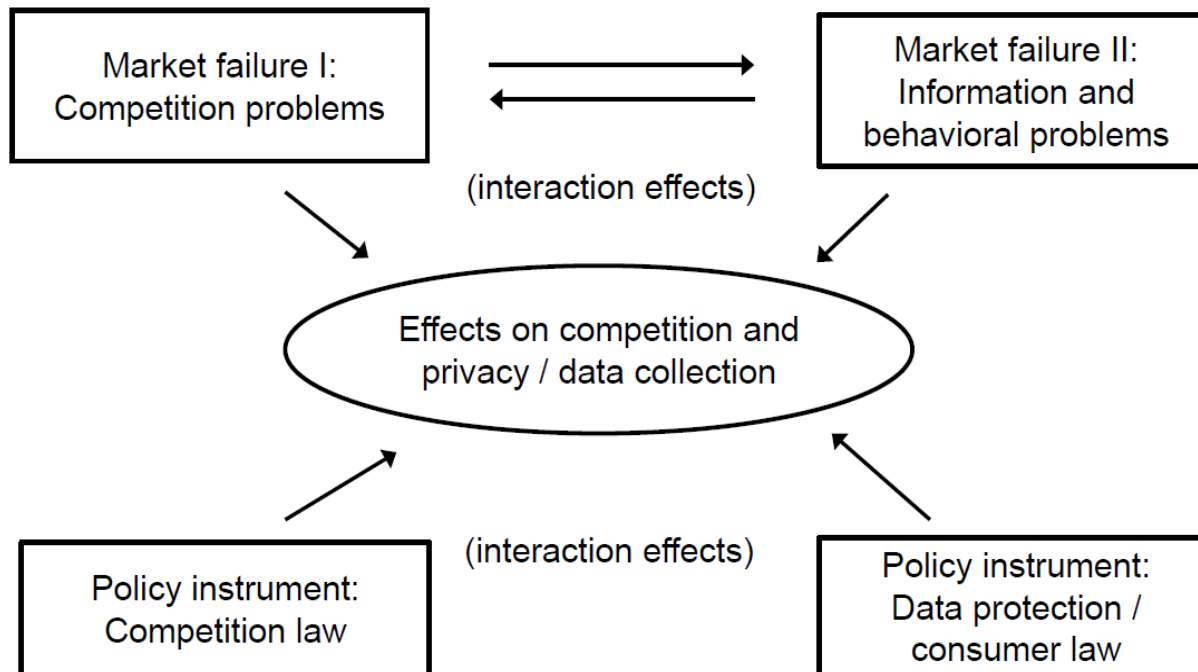
- Digital platforms regarding personal data: simultaneously market power (competition problem) and information power (info/behavioral probl.)  
=> large problems for both competition law and data protection law  
=> complex relationship between competition law and data protection law
- Question 1: Discussion of unilateral solutions
  - + how to deal with privacy in competition law
  - + how to deal with competition in data protection law
- Question 2: Digital Markets Act: towards a broader asymmetric regulation?

[based upon:

- Kerber/Zolna: The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law, *European Journal of Law and Economics* 54, 2022, 217-250
- Kerber/Specht-Riemenschneider: Synergies Between Data Protection Law and Competition Law. Report for Verbraucherzentrale Bundesverband (vzbv), 2021 (127 pp.)
- Kerber: Taming Tech Giants: The Neglected Interplay Between Competition Law and Data Protection (Privacy) Law, *The Antitrust Bulletin* 67(2), 2022, 280-301.

## 2. Analytical framework and basic policy strategies (1)

Economic framework for the analysis of the relationship: Two market failures, two policies, and interaction effects (Kerber/Zolna 2022)

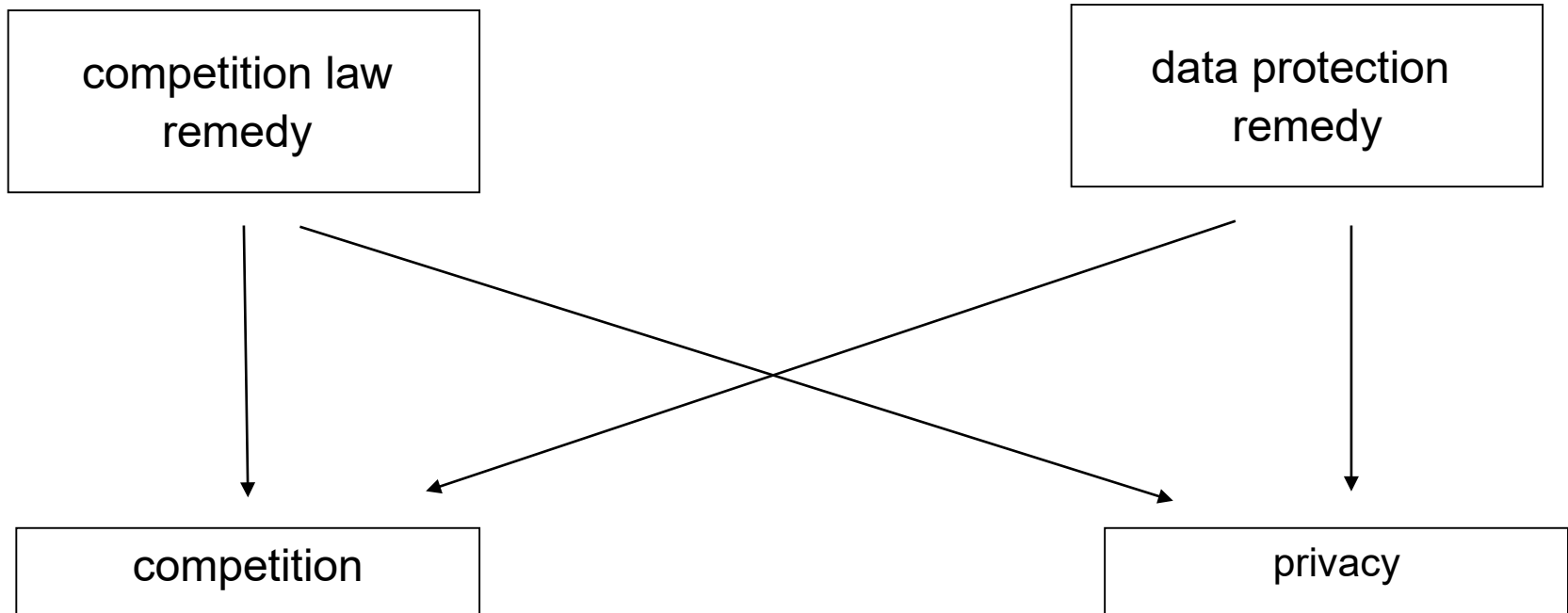


=> complex interplay between competition law and data protection law regimes

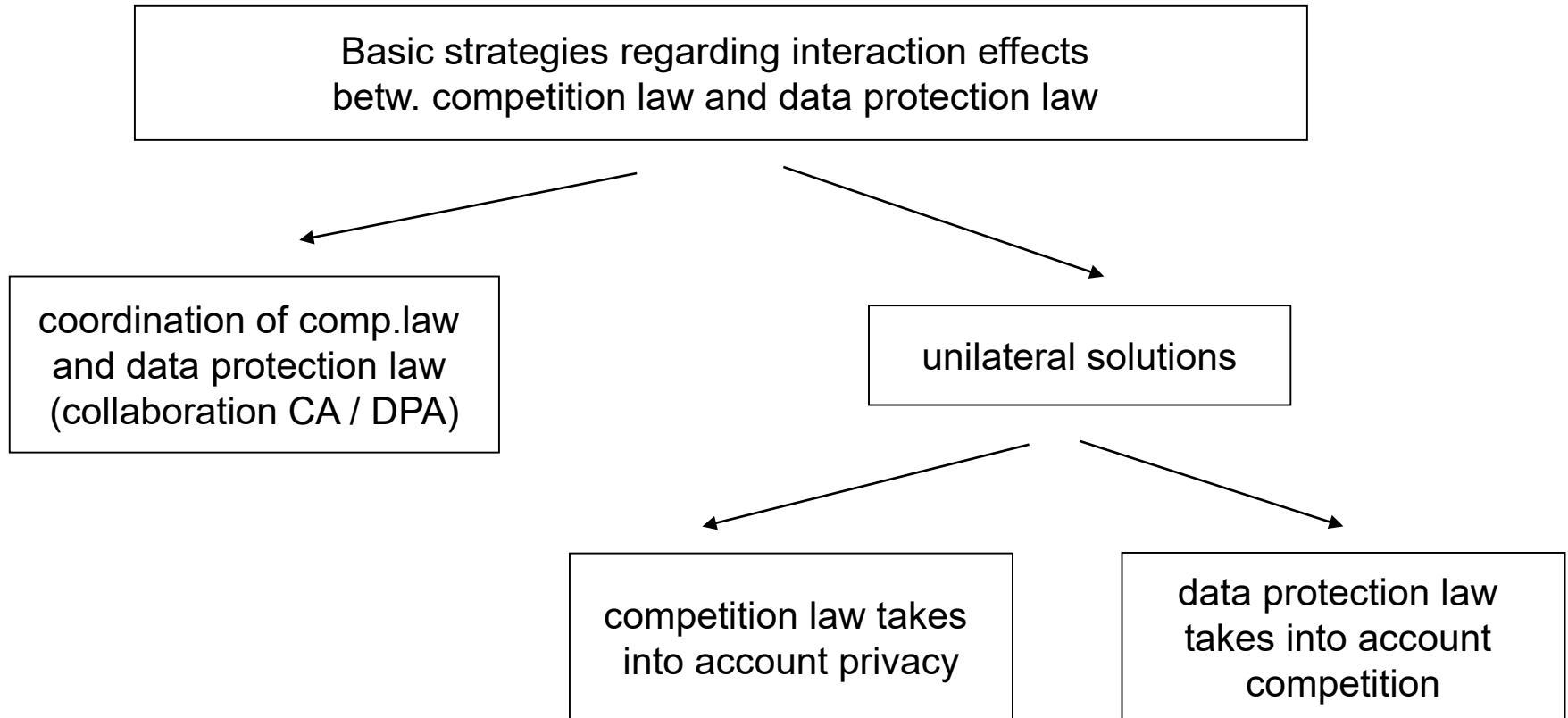
## 2. Analytical framework and basic policy strategies (2)

Remedies: (in case of digital platforms with two market failures)

- perhaps important: combination of remedies from both policies



## 2. Analytical framework and basic policy strategies (3)

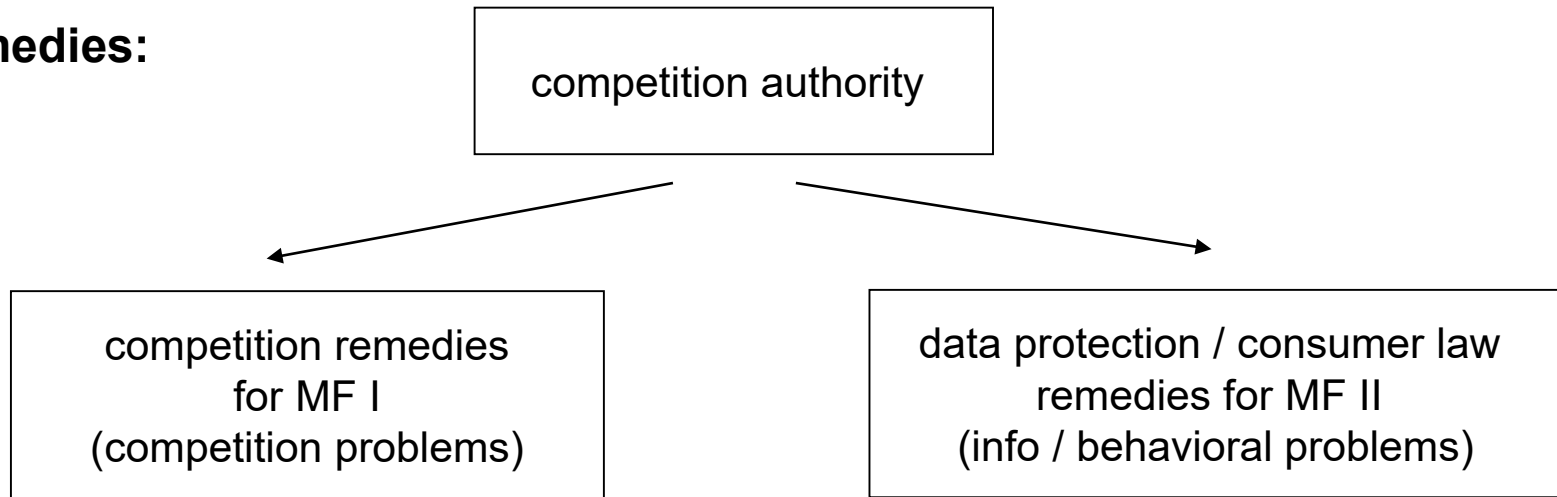


### 3. Competition law takes into account privacy (1)

- German Facebook case: addressing negative effects of market power on privacy as abusive behavior of a dominant firm (here: exploitative abuse)
- But: How to include negative privacy effects in competition law?
- **Option I:** Violation of data protection law as criterion for abuse
  - + problem: competition law is only an additional method of enforcement of a behavior already prohibited in data protection law
  - + does not take into account privacy effects through competition problems
- **Option II:** negative privacy effects through market power as part of an analysis in competition law (e.g., consumer welfare)
  - + if data protection law seen as a minimum standard, then competition might lead to higher levels of data protection
  - + violation of GDPR might not be the correct benchmark: also GDPR-compliant behavior can be abusive and not each GDPR-violation need to be abusive
  - + important: development of a broader and more flexible consumer welfare concept (e.g., also including fundamental values, extent of choice)

### 3. Competition law takes into account privacy (2)

#### Remedies:



#### - German Facebook case

- + additional „consent“ for combination of data is a data protection remedy
- + effectiveness?
  - > gives formally more choice to users; but still unclear whether users can deal with it (info / behavioral problems)
  - > presumably not effective for solving competition problems (only if many users deny this additional consent / collective good problem)

## 4. Data protection law takes into account competition (1)

- Discussion: whether „dominance“ should be considered for validity of „consent“ (Graef, I./Clifford, D./Valcke, P. (2018), Graef/van Berlo (2020))
    - + problem whether consent is „voluntary“ if an „imbalance of power“
    - + „market dominance“ as example for „imbalance of power“
    - + so far: all firms are treated equally in data protection law
    - + dominance as criterion could lead to „special responsibility“ for dominant firms regarding data protection
      - > could be compatible with the risk-based approach of the GDPR
  - Can „dominance“ in competition law be directly used in data protection law?
  - AG Rantos (opinion Facebook case) is skeptical:
    - + market dominance can be a criterion, but alone it is not sufficient, and
    - + dominance can also be interpreted differently than Art. 102
- => leaves much open !



## 4. Data protection law takes into account competition (2)

Critical discussion about „market dominance“ as a direct criterion:

- dominance is defined on a market
    - + also medium-sized firms with no particular threat to privacy can be dominant
    - + large firms that collect many data and with considerable dangers for privacy might not be dominant in competition law
  - Do we really mean „market dominance“ or more that this service is „unavoidable“ for users (for participating in digital society / digital „infrastructure“)?
    - + German Federal Court of Justice (Facebook case): Is it dominance or dominance plus access to an essential infrastructure-like service?
    - + this is unclear ... perhaps „unavoidability“ more important than „dominance“
  - but broad consensus that gatekeepers (DMA) might be the problem:
    - + (gatekeeper status is not the same as „market dominance“)
    - + consumers are dependent from digital platform services of gatekeepers
- => need for an asymmetric regulation of gatekeepers regarding data protection!

## 4. Data protection law takes into account competition (3)

More fundamental question: Relevance of competition in data protection law?

- Market for personal data is de facto established by GDPR with „consent“ and far-reaching freedom of contract about processing of personal data
  - + info / behav. problems: can be addressed directly in data protection / consumer law (transparency, dark patterns etc.)
  - + but: also competition problems should be solved ...
- Does data protection law implicitly require competition on markets for pers. data?
- Should data protection law also address directly competition problems?
  - + negative effects of market dominance / gatekeeper power on privacy?
  - + horizontal agreements / collusion regarding data protection?  
(problem of lacking competition for more user-friendly privacy terms?)
  - + mergers: Is their data combination a problem for data protection law?
- Problem: DPAs have no expertise and remedies for dealing with negative privacy effects through competition problems

=> much more research is necessary!

## 5. DMA: Towards a broader asymmetric regulation? (1)

Intermediate result: unilateral solutions might help to some extent but will run into difficult problems, because their effectiveness remains limited

=> leading back to a more integrative / collaborative approach !

What about the DMA? (as ex-ante regulation for gatekeeper platforms)

- Usual DMA interpretation: another form of competition policy
  - + DMA as asymmetric regulation regarding competition (contestability)
  - + data protection (and consumer protection) are not part of the objectives, and DMA does not focus on information / behavioral problems
  - + fairness primarily with respect to P2B, and not P2C
- Effectiveness of Art. 5(2) DMA as remedy?
  - + Art. 5(2) DMA: prohibition of data combination with option for „consent“ wants to address primarily competition (contestability) concerns (recital 36)
  - + very unclear Art.5(2) can help contestability through additional consent
  - + direct prohibition of data combination (w/o option of getting consent) might be a much better solution for competition (and perhaps also for privacy)

## 5. DMA: Towards a broader asymmetric regulation? (2)

- Problems of the DMA regarding intertwinement of competition and data protection / privacy problems
  - + DMA does conceptually not take into account second market failure (info / behav problems) and interaction effects with data protection law
  - + But: info/behav. problems pop up in some obligations / anti-circumvention rules (behavioral manipulation, dark patterns etc.)
- Proposal of alternative DMA concept: (Kerber/Specht-Riemenschneider 2021)
  - + DMA as a vehicle for an integrated policy approach with asymmetric regulation for competition, data protection, and consumer law
  - + data (consumer) protection objectives as part of fairness regarding P2C
  - + to address both market failures and interaction effects (synergies / conflicts)
  - + in future: perhaps also more data protection-oriented obligations
  - + e.g.: new obligation that allows users to choose between monetary payment for platform services (w/o data) and paying with personal data