The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law

Wolfgang Kerber & Karsten K. Zolna
(University of Marburg)

Presentation based upon the following paper:
Kerber / Zolna: The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law
available at: SSRN: https://dx.doi.org/10.2139/ssrn.3719098

1. Introduction

- Facebook case of German Federal Cartel Office (FCO) (February 2019):
  + first competition case which views certain data-collecting behaviour / terms of service as exploitative abuse of dominant firm (and considers privacy effects)
  + German Federal Court of Justice (BGH): supports this decision with a far-reaching new reasoning (June 2020)
  + (this abusive behavior now also in the Digital Market Act: Art. 5(a))
- triggered a very controversial but also stimulating international discussion about the relationship between competition and data protection law
- Our questions from an economic perspective:
  + What is the role of competition law regarding privacy effects, and can the Facebook case be defended as a case for competition law?
  + What is the appropriate relationship betw. competition and data protection law, if we have simultaneously two market failures with manifold interaction effects?
  + Do we need a more integrated approach of different policies for dealing with data-collection behaviour / privacy terms of digital firms?

2. The controversial discussion about the Facebook case

2.1 The Facebook case in a nutshell (1): The problem

- Background: collection of personal data by digital platforms from many different sources, leading to entrenched market power positions of Google, Facebook
- Facebook collects data from own Facebook services but also from tracking, third-party websites etc., and combines them in one Facebook account
  + leads to comprehensive consumer profiles with competitive advantages, e.g. in advertising markets (but also to serious privacy and competition concerns)
- What is the abusive behavior? Facebook requires that users give consent to the use and merging of all collected personal data (from Facebook services and other Off-Facebook sources) in one Facebook account ("bundling of consent")
- Remedy of the FCO:
  + an additional option for consent of users of Facebook, i.e. social media platform can also be used w/o giving consent to merge all these data sets
- Background idea: consumers have no genuine choice due to market dominance

2.1 The Facebook case in a nutshell (2): The legal side

Philipps Universität Marburg

The Facebook case of the FCO from a legal perspective:

- FCO used German competition law (instead of Art. 102 TFEU)
- Facebook is dominant on the social media market in Germany
- main focus on exploitative abuse and only a bit on exclusionary abuse
- benchmark for abusive behavior: infringement of EU data protection law (with deep data protection law assessment); not enough choice (plus information/ transparency problems), i.e. users are "forced" to give consent

Court proceedings (so far only about suspension of remedy)

- OLG Düsseldorf: clear rejection of the decision
- German Federal Court of Justice (BGH): clear rejection of the OLG decision and full support of the FCO decision but with different reasoning (using German constitutionally protected "basic right" instead of EU data protection law)
- further legal proceedings: goes back to OLG (and perhaps to the ECJ due to the question of Art. 102 violation)

2.2 The discussion about the Facebook case (1)

Philipps Universität Marburg

Very intense and broad international discussion about Facebook case:

- decision of German FCO is innovative in several respects
- touched a very important open policy question for digital markets (see, e.g., also OECD roundtable in June 2020)

Main counter position to Facebook case of German FCO:

- approach of a strict separation of competition law and data protection law
  - \+ clear division of labour: competition law should deal with competition problems and data protection law with privacy problems
- position of many scholars, many other competition law regimes, the OLG Düsseldorf, but so far also the EU Commission
- but many of the critics would accept that the privacy terms of Facebook are a problem but this should be only solved by data protection law (or consumer law) and not by competition law

2.2 The discussion about the Facebook case (2)

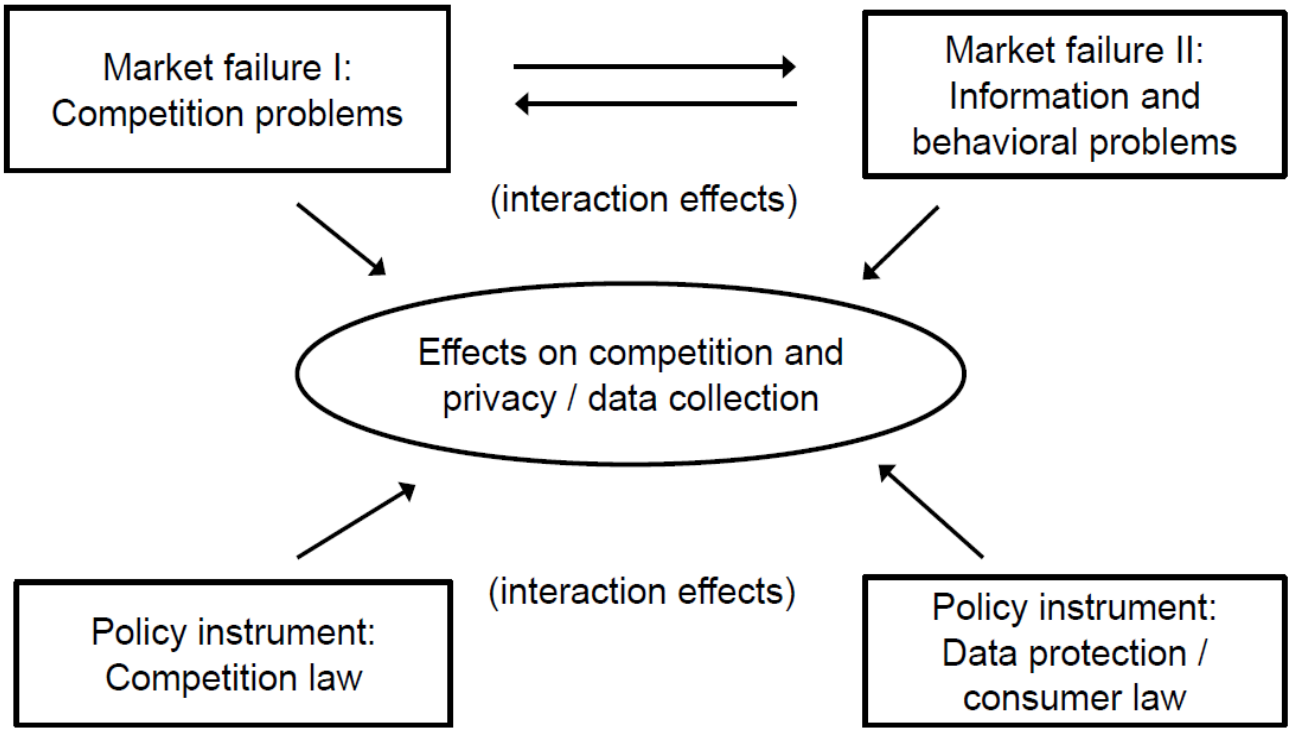
Positions that support / sympathize with FCO decision and support also that competition law should take into account privacy effects:

1) seeing privacy as part of consumer welfare (non-price parameter), and/or using traditional approaches to exploitative abuse: excessive data collection, unfair business terms (also in Art. 102 TFEU)
2) taking directly into account violation of data protection law
   + FCO: data protection law violation as benchmark
   + question: directly or as part of a broader reasoning?
   + critique that CAs might become enforcers of data protection law
3) taking into account privacy as a fundamental value in broader reasoning about abuse (many competition lawyers suggest that this is possible)
   + this is also approach of the German Federal Court of Justice: with German "basic right" of informational self-determination
4) scholars who see necessity to break up the traditional limits of different policies, develop something new, and/or a more integrated policy approach (esp. between competition law, data protection law, and consumer law)

3. Framework for the analysis of the relationship: Two market failures, two policies, and interaction effects (1):

- Facebook case: simultaneous existence ot two market failures:
  + competition problem (market dominance)
  + information and behavioral problems of consumers (unsolved problems of "notice and consent" solutions / privacy self-management)
- Tasks of policies regarding market failures:
  + competition policy: for solving competition problems
  + data protection / consumer law: for solving market failure problems through information / behavioral problems
- Does the traditional standard approach of a separate application of these two policies work if simultaneously both market failures?
  + problem: implicit assumption of only one market failure / no interaction effects
  + but in digital markets manifold interaction effects and jointly caused effects on privacy and competition through both market failures

3. Framework for the analysis of the relationship: Two market failures, two policies, and interaction effects (2):



=> 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

3. Framework for the analysis of the relationship: Two market failures, two policies, and interaction effects (3):

Examples of interaction effects between market failures:

- competition regarding data collection / privacy policies does not work due to info / behavioral problems of consumers
- competition problems can aggravate information problems, lead to less transparent terms and larger data collection

=> negative effects on privacy and competition through combination of both market failures (joint causation)

Examples of interaction effects between policies:

- data protection law can
  - \+ impede competition (e.g., advantage of large platform firms for getting consent)
  - \+ foster competition through data portability right (Art. 20 GDPR)
- competition law can
  - \+ have negative privacy effects through data access / sharing remedies
  - \+ foster privacy through control of mergers, abusive behavior etc.

=> effects on privacy and competition through combination of both policies

4. Can competition law / data protection law deal with negative effects of competition problems on privacy?

Competition law:

- privacy harm as consumer harm: privacy risks, non-fulfillment of privacy preferences

=> competition law can deal with negative effects on privacy (but we need more research about privacy harms)

Data protection law:

- problem 1: is only a minimum protection of privacy, and competition would often lead to higher privacy level (due to privacy preferences)
- problem 2: focusses on solution of information / behav. market failure problems and cannot analyse / remedy competition problems (no differentiation between firms with and w/o market power)

=> data protection law (and also consumer law) cannot deal with negative privacy effects through competition problems (mergers, cartels, dominant firms)

Conclusion: application of competition law to privacy effects can be necessary!

5. How to take into account privacy in the control of abusive behavior of dominant firms? (1)

Exclusionary abuse: this is always possible

- FCO only vague reasonings, but now more studies about advertising markets and market power of Facebook, and link betw. collection of personal data and negative effects on competition on digital advertising markets (CMA 2020 etc.)

Exploitative abuse:

- always difficult but important, difficulty of finding a benchmark
- legal options in Art. 102 TFEU:
  - \+ excessive data collection / unfair business terms => balancing of interests
  - \+ (recent discussion: fairness as new important criterion!)
- decisive: effects of competition problems on privacy => more research
- FCO decision: using direct violation of data protection law as benchmark
  - \+ led to misleading discussion whether any violation of laws can be abusive
  - \+ problem: violation of data protection law is neither a necessary nor a sufficient condition for abusive behaviour (i.e., compliance with GDPR is not sufficient)
  - => violation as benchmark not a good idea but can be part in broader reasoning

5. How to take into account privacy in the control of abusive behavior of dominant firms? (2)

Solution of the German Federal Court of Justice (BGH): (June 2020)

- supported the FCO but w/o using EU data protection law
- uses constitutionally protected "basic right" of informational self-determination
- having no choice violates this right, which grants individuals the right to substantially participate in decisions how their personal data are collected and used
- plus: Facebook social media => quasi unavoidable communication platform (with a "special responsibility" for informational self-determination)
- BGH also emphasizes link betw. exploitative abuse and exclusionary effects on markets for digital advertising

=> our interpretation: it opens up the option to use privacy as fundamental value also at EU level for granting consumers a minimum level of choice with respect to the collection and use of personal data through dominant firms

(this is linked to recent discussion about more empowerment of consumers for getting more control over their data, consumer choice)

5. How to take into account privacy in the control of abusive behavior of dominant firms? (3)

Digital Market Act proposal:

- ex-ante regulation for gatekeepers: have to comply with a set of obligations
- Art.5(a): "refrain from combining personal data sourced from these core platform services with personal data from any other service offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent" (according GDPR)
- Facebook case remedy of an additional choice for combining personal data would be a per-se obligation for all gatekeepers (without any balancing)
- recital 36: for protecting contestability (competition rationale)
- unclear whether obligations also motivated by concerns about privacy or consumer choice (or derived from fairness as second main objective of the DMA)

Conclusion from this legal / policy development:

- Introducing a minimum standard of choice for consumers regarding their personal data for dominant firms / gatekeepers

5. How to take into account privacy in the control of abusive behavior of dominant firms? (4): Remedies and their limits

Can remedy of FCO with additional consent for merging these data sets work? (also relevant for BGH decision and DMA obligation)

- for exclusionary effects:
  - + very unclear whether enough users will reject consent for making a difference with respect to data advantages of Facebook on markets for digital advertising
- for exploitative abuse: additional consent option gives more choice to users
  - + but is this enough choice for informational self-determination, or requirement of much more granular choice options ? (benchmark for sufficient choice?)
- main problem:
  - + remedy of FCO does not solve the second market failure (information / behavioral problems) with regard to data-collection and privacy terms
  - + therefore remedies might not be effective enough

=> competition law (or DMA) might not be enough for solving problems for privacy and competition, i.e., also application of data protection (or consumer) law might be necessary!

6. The need for a broader and more integrated policy approach

Implications for relationship betw. competition and data protection law:

- "strict separation approach" between policies does not work on digital markets
- 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 remedies?
- more collaboration/alignment between both policies / enforcement authorities
  + at level of investigations in cases
  + at level of policy reforms in competition and data protection law
- more integrated policy approach necessary also between more policies, as, additionally, consumer policy, data (governance) policy, standardisation policy …
- How does the DMA fit into such a more integrated policy approach?
  + despite the Art. 5(a) obligation DMA does not seem to be embedded in a more collaborative and integrated policy concept
  + instead CMA proposal (December 2020) in UK is very explicit also about other market failures and collaboration with other policies / enforcement authorities