



# Interplay between competition, data protection and consumer law





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# Overview

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-  Comparison of the three regimes
-  Exploitative abuse
-  Role of data protection in merger review
-  Data portability



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# Comparison of the three regimes



# Comparing objectives and means

	Competition law	Consumer and data protection law
<b>Objectives</b>	<ul style="list-style-type: none"><li>- Protect competition in order to enhance consumer welfare</li><li>- Contribute to the functioning of the internal market</li></ul>	<ul style="list-style-type: none"><li>- Protect individual consumers or data subjects</li><li>- Contribute to the functioning of the internal market</li></ul>
<b>Means</b>	<ul style="list-style-type: none"><li>- More economic and effects-based analysis</li><li>- Negative integration</li></ul>	<ul style="list-style-type: none"><li>- Human-rights based approach</li><li>- Positive integration</li></ul>



# Relevant secondary legislation

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## Secondary data protection legislation:

- GDPR
- e-Privacy Directive

## Secondary consumer protection legislation:

- Consumer Rights Directive
- Unfair Contract Terms Directive
- Unfair Commercial Practices Directive
- ‘New Deal for Consumers’ announced by the Commission in April 2018



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## Competition law:

- Enforcement by the European Commission and national authorities
- Far-reaching investigation powers, fines, **prospective and structural remedies**...

## Data protection and consumer law:

- Enforcement only by national authorities
- Only **ex post behavioural remedies** and ('small') fines



# Exploitative abuse



# Exploitative abuse

- Rather rare in the enforcement work of competition authorities
- Guidance Paper on enforcement priorities under Article 102 TFEU only focuses on exclusionary abuse
- Idea is that the **market will self-correct**, unless there are high entry barriers
- Complicated to establish **at what point** a certain type of exploitative behaviour becomes anticompetitive





## *United Brands (1978):*

- *'a price which is excessive because it has no reasonable relation to the economic value of the product supplied'* (par. 250)
- excessive character of the price could be determined by comparing the selling price and the production costs which would then disclose the profit margin (par. 251)
- whether a price has been imposed which is either **unfair in itself or when compared to competing products** (par. 252)



# Data as the new price?

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## Speech Competition Commissioner Vestager (Sept. 2016):

*‘Consumers use search engines that produce incredibly accurate results. Social networks let people keep in touch with friends, wherever they are in the world.*

*And they don't pay a single penny for those services. Instead, they **pay with their data**.*

*That doesn't have to be a problem, as long as people are happy that the data they share is a fair price to pay for the services they get in return.’*

## If data is the new price, then the **excessiveness of prices** instead relates to the **data being extracted from users**



# Data as the new price?

- Seems difficult to apply the economic test of *United Brands* to data
- Surveys and experiments may be held to determine the willingness of consumers to reveal certain information
- But willingness may differ from consumer to consumer
- Instead, principles from data protection law may be used as **benchmark** for whether abusive exploitation exists
- Precedent for such an approach in *AstraZeneca*:
  - Misuse of regulatory procedures
  - Misleading representations constitute an abuse if it is established that they are actually liable to lead the public authorities to grant the exclusive right applied for (par. 106)



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- Legitimate ground for processing of personal data:  
consent is most commonly used ground in the context of online services
    - Definition of consent: *‘any freely given, specific, informed and unambiguous indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed’*
  - Purpose limitation principle:
    - Specified purpose
    - Compatible use



# Some relevant consumer protection principles

- Speech EDPS 2015: non-negotiable and misleading privacy policies as constituting a potential form of abuse of dominance
- Article 6(1) of the Unfair Commercial Practices Directive
  - a commercial practice has to *'be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct'*



## Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules

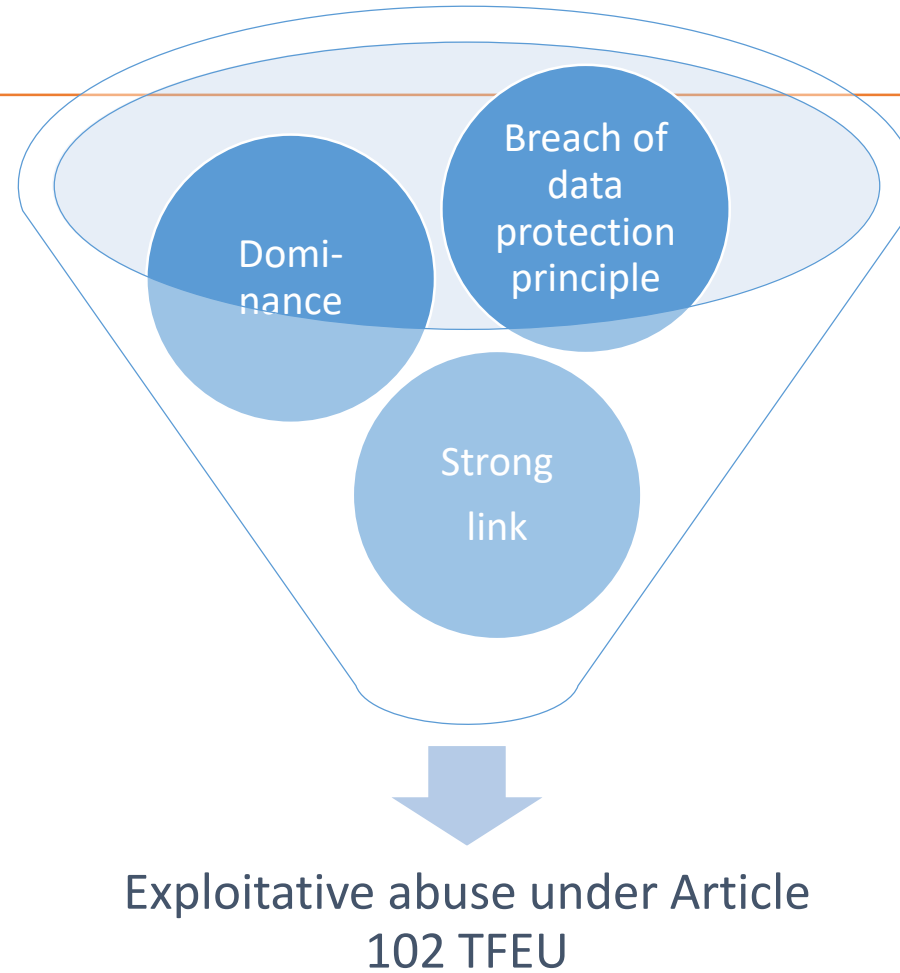
**Date of issue:** 02.03.2016

The Bundeskartellamt has initiated a proceeding against Facebook Inc., USA, the Irish subsidiary of the company and Facebook Germany GmbH, Hamburg. The authority is investigating suspicions that with its specific terms of service on the use of user data, Facebook has abused its possibly dominant position in the market for social networks.

- Abusive imposition of unfair conditions
- Key issue: have consumers been **sufficiently informed** about the type and extent of data collected?
- Seems to refer to the **validity of consent under data protection law**



# Excessive collection of data



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# Role of data protection in merger review





# Data protection as a non-price parameter of competition



- Data protection as dimension of competition, just like price, choice, innovation etc.
- Included as such in 'normal' competition analysis
- Recognized in *Facebook/WhatsApp* but not further analyzed as other parameters of competition took precedence
- *Microsoft/LinkedIn*: privacy as important parameter of competition and driver of customer choice in the market for professional social networks



# Data protection as a non-economic interest

- European Commission persistently expressed the view in *Google/DoubleClick*, *Facebook/WhatsApp* and *Microsoft/LinkedIn* that:
  - ‘Any privacy-related concerns flowing from the increased concentration of data [...] do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules’ (par. 164 *Facebook/WhatsApp* decision)
- Court of Justice in *Asnef-Equifax*:
  - ‘any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection’
- Normative question can be asked whether a **more proactive attitude** is desirable

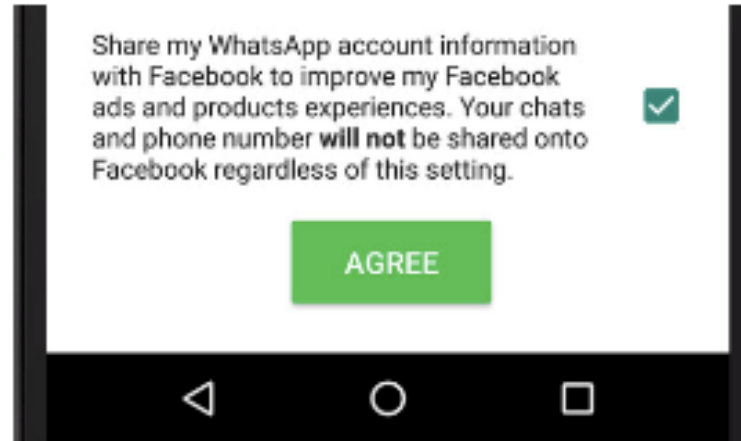


# Data protection as a non-economic interest

- Limited scope for **prospective analysis and structural remedies** under data protection and consumer law
- Room for a more proactive approach when a merger raises competition concerns
- Illustration: suggested **firewall between data sets** in *Google/DoubleClick*



# Update of WhatsApp's privacy policy in Aug. 2016



- Not only data and consumer protection authorities expressed concerns
- 110 million fine imposed on Facebook in May 2017 for providing **misleading information** during the 2014 merger investigation
- Merger did not give rise to competition concerns '*even if the merged entity were to start collecting and using data from WhatsApp users*'
- Too optimistic to approve the merger without exploring possible remedies?
- Now the only option is to monitor ex post whether Facebook is complying with the relevant rules



# Room for better alignment of enforcement during mergers



## ■ Article 21(4) Merger Control Regulation:

- *'Member States may take appropriate measures to protect **legitimate interests other than those taken into consideration by this Regulation** and compatible with the general principles and other provisions of Community law'*

## ■ Does the GDPR give more opportunity for monitoring compliance ex ante?

- Accountability: data controllers have to take responsibility for and to demonstrate compliance with EU data protection rules
- Data protection impact assessments: in case of likelihood of high risk for the rights and freedoms of individuals (Articles 35 and 36 GDPR)



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# Data portability



# New right to data portability

## ■ Article 20 of the General Data Protection Regulation

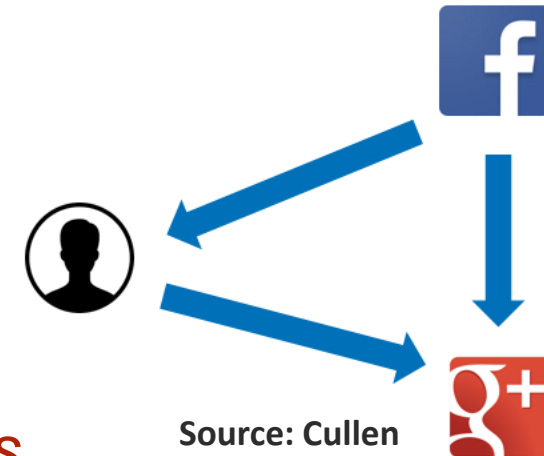
### ■ Scope of the new right:

- Processing carried out by automated means and on the basis of consent or a contract
- Personal data concerning the data subject provided by him or her

### ■ Two elements:

- Right to receive personal data in a **structured, commonly used and machine-readable format** and to transmit the data to another controller
- Where **technically feasible**, right to have the personal data **transmitted directly** from one controller to another

### ■ The right to data portability *‘shall not adversely affect the rights and freedoms of others’*



## Facebook profile data

The screenshot displays Mark Zuckerberg's Facebook profile. Key sections include:

- Profile Header:** Name (Mark Zuckerberg), location (Palo Alto, California), education (Harvard University), and birth date (May 14, 1984).
- Education and Work:** Lists Facebook as an employer (Feb 2004 to present) and Harvard University as a college (Computer Science - Psychology).
- Family:** Lists Karen Zuckerberg (Mother), Edward Zuckerberg (Father), and three sisters: Randi, Donna, and Arielle Zuckerberg.
- Philosophy:** Includes a favorite quote: "All children are artists. The problem is how to remain a child in your heart as you grow up."

- His/Her personal data
- Provided by him/her to a controller





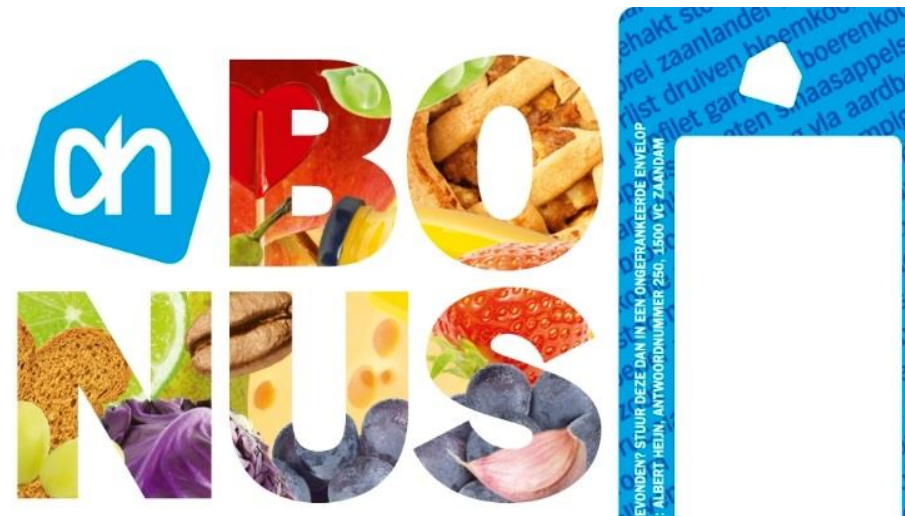
## Energy consumption data



- His/Her **personal data**
- **Provided by** him/her to a controller



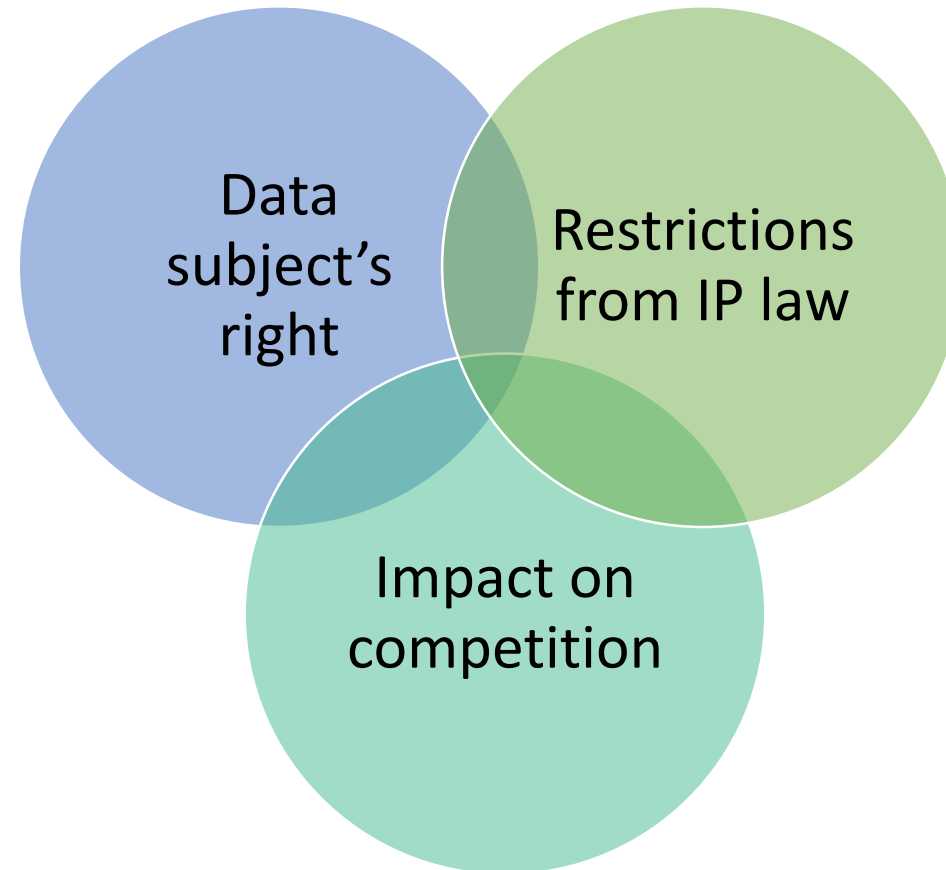
## Loyalty cards



- His/Her **personal data**
- **Provided by** him/her to a controller



# Interaction between different interests



# 2012 speech of previous Competition Commissioner



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Data portability *'goes to the heart of competition policy' [...]*

*'The portability of data is important for those markets where effective competition requires that customers can switch by taking their own data with them.'* [...]

*'Customers should not be locked in to a particular company just because they once trusted them with their content.'*

*Whether this is a matter for regulation or competition policy, only time will tell.'*



## Restrictions on data portability may lead to:

- **Exploitation of consumers:** restrictions on portability of messaging history as potential barrier to consumers' switching in communications apps (*Facebook/WhatsApp*)
- **Exclusion of competitors:** commitments to lift restrictions on portability of advertising campaigns in AdWords (considered in *Google* investigation)



# Comparing the enforcement mechanisms

Data protection law	Competition law
Right of the user	Duty of the provider
Limited to personal data provided by the user	All types of data
All types of automated processing of personal data based on consent or a contract	Limited to individual cases of abuse of dominance
Fine of up to 20 million euro or 4% of worldwide turnover (whichever is higher)	Fine of up to 10% of worldwide turnover



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## ■ Article 13(2)(c):

- *‘the supplier shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the digital content’*
- Consumer protection does not suffer from the inherent limitations of data protection and competition law
- Portability as a means to empower consumers to switch



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