



UiO : **Department of Private Law**
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Competition Law in the Age of Big Data

Market Power in Data-Driven Markets

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Three Dimensions on the Commercial Use of (Personal) Data

- **Personal data as**
 - Output – as any other product
 - Input
 - Currency
- **Input - value for businesses**
 - Source of innovation
 - Improve the profitability of services
 - Targeted advertisement
 - Google - 95.4 bill USD (2017)
 - Facebook - 39.94 bill USD
- **Currency - value for consumers**
 - “Free(mium) services”
 - Price reductions
 - Source of revenue

Data Dimension

Privacy Dimension



Data Dimension: Personal Data & Market Power

- **Key issue**
 - How does control over data affect the balance of economic power?
 - Can control over (personal) data constitute an entry barrier?
- **Downplaying arguments**
 - Data as a source of market power not entirely new
 - E.g. Magill (1995), IMS Health (2004)
 - Higher standard of proof
 - Consumer data is
 - Ubiquitous
 - Non-rivalrous
 - ‘Competition is just a click away’



Data-Driven Network Effects & Beyond

- **Barriers to entry due to**

- Scale – volume
- Scope – variety
- Speed – velocity

- **Other factors**

- Traditional network effects
- Legal barriers
 - Data protection law
- Economies of scope
 - Large fixed costs & insignificant incremental costs
- Behavioral
 - Difficulty in detecting quality ('click away' argument)

The more data you can collect, the more you know, the better product you can provide, but also the more powerful will you be towards others



Margrethe Vestager

Related Developments

- **EC Google Shopping Decision (2017)**
 - Recognizes data-driven barriers
- **A US Court in Bazaarvoice/Power-Reviews (2014)**
 - '[d]ata and network effect' give Bazaarvoice 'significant & durable competitive advantage'.
 - Ordered divestiture of consumer-generated data to third party
- **EC Com on 'EU Data Economy' & proposal for 'Free Flow of Data'**
 - Access based on FRAND terms
- **German amendment**
 - Threshold for merger notification - transaction value
 - Access to relevant data in assessing market power

Data and Abuse of Dominance (Article 102)

- **Denial of access to personal data**
 - French Competition Law Authority (2014) - energy and gas supplier GDF Suez
 - Order to grant its competitors access to parts of its database relating to consumers b/c
 - Data was not obtained based on ‘competition on the merits’
 - Database gives GDF unjustified advantage over its competitors + financially unreasonable to replicate
- **Cross-usage of data**
 - Belgium: €1.9 million fine for the Belgian National Lottery
 - For repurposing PD acquired as a legal monopoly to open markets
 - Data not acquired ‘following competition on the merits’
- **Digital markets?**
 - **Commission (2018) preliminary inquiry into Amazon’s**
 - Collection and use of data from third party sellers
 - Whether the data could give Amazon an edge over competitors by providing insight into consumer behavior?
 - **Bundskartellamt abuse of dominance proceeding against Amazon**
 - Unfair T&C vis-a-vis sellers including rights to use information the sellers provide

Privacy Dimension: Role of Privacy in Competition Law

- **Data as a currency**
 - Privacy is the price
- **Key issue**
 - Is it an antitrust concern on how much privacy users pay?
- **Two approaches**
 - Fundamental rights approach
 - Privacy as a non-price competition parameter



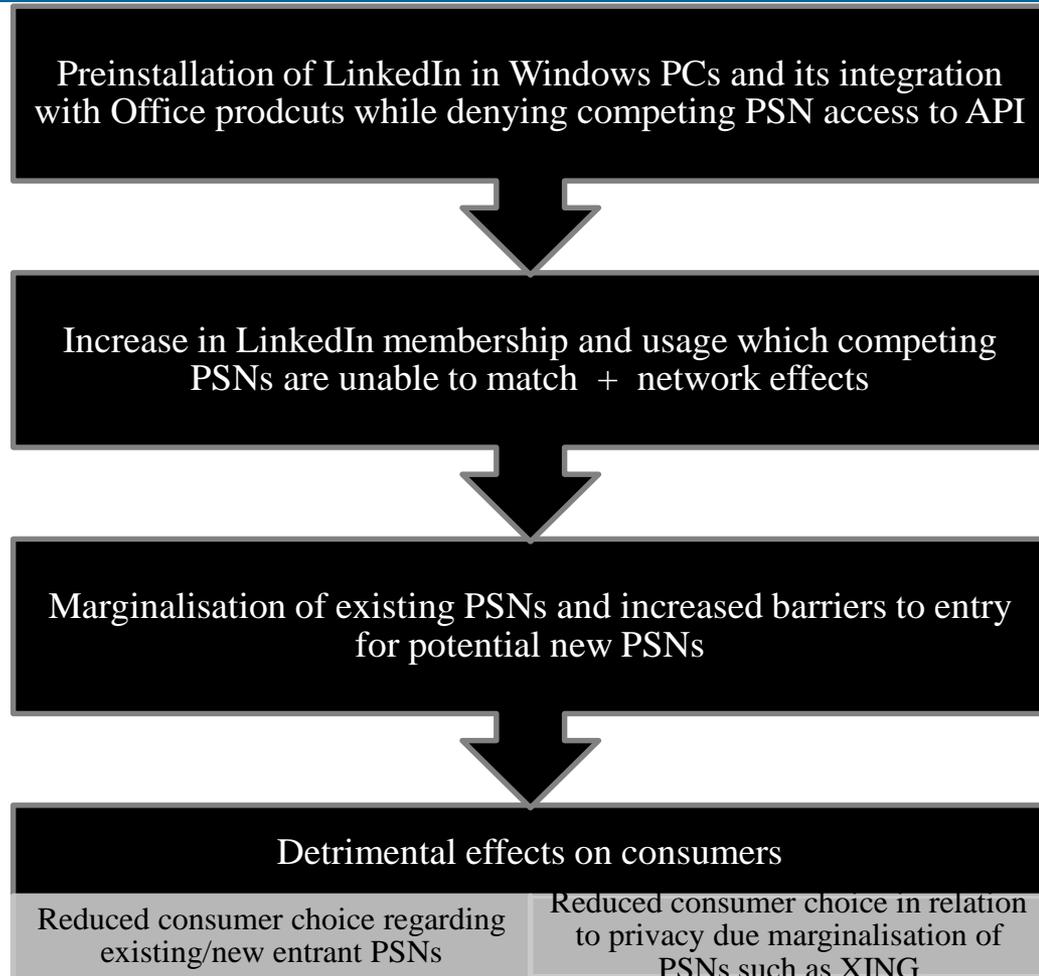
Privacy as a Non-Price Competition Parameter

- **Privacy be a non-price parameter**
 - Facebook/WhatsApp (2014)
 - Data privacy a key non-price competition parameter
 - Microsoft/LinkedIn (2016)
 - Data privacy as 'a significant factor of quality'
- **Open question**
 - When does a merger lead to reduction in privacy as a non-price parameter?



Con.

- **Facebook/WhatsApp (2014)**
 - No clear theory of harm
 - Change in business model of WhatsApp?
- **Microsoft/LinkedIn (2016)**
 - Integration & promotion of LinkedIn through Microsoft Windows and Office products
 - Reduced consumer choice in relation to privacy



Microsoft/LinkedIn

- **XING offers ‘greater degree of privacy protection than LinkedIn’ b/c**
 - During registration, users have to actively accept XING's privacy policy by ticking a box;
 - When introducing new features, XING explicitly seeks active consent from the members;
 - Ability to continue without losing any of the functions to which they previously had access.
- **Theory of harm informed by DP rules i.e. qualities of consent**
 - Consent must be unambiguous
 - Consent must be freely given
- **Thus, foreclosure of XING → deprives users a better quality of privacy**
- **Microsoft agreed to implement measures**

Single Firm Conduct: Abuse of Dominance

- **Conducts**

- Excessive data collection as an exploitative conduct?
- Lack of transparency on data collection & use?

- **The German Facebook Case (2017)**

- Collecting + merging data from third party websites
- Unfair and constitute abuse of dominance

- **Consumer harms**

- Users' loss of control on how 'their personal data are used'
- Lack of choice to avoid merging of their data
- 'a violation of users constitutionally protected right to informational self-determination'

- **Benchmark for adequate/optimal terms of service?**

- Data protection rules
 - Cf 2013 case KZR 58-11 – VBL-Gegenwert
 - 'use of illegal general terms & conditions by a dominant company can constitute an abuse'
- EU and other MS?



Cont.

• Abuse of dominance – Art 102

- Blocking privacy-enhancing app/technology
 - Disconnect complaint (2015)
 - Blocks invisible tracking and ads that spread malware
- Google removed the app from Play Store
- Abuse of dominance for ‘discontinuance of supply’ and ‘the related exclusion of competing privacy and security technology’?

• Is Google Play essential facility?

- May be not
 - Users can install it as browser extension
 - Download it from developer’s website
- May be if combined?



