Digital Markets and Data:
Competition, Consumer Protection and Privacy Concerns

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1. Digital Markets, Data, and Privacy Concerns (1)

- Digitalisation, Internet, Big Data is a technological revolution
  + Exponential growth of generated data
  + How are data generated:
    > voluntary (e.g. using „free“ services as search engine / social networks and paying with data)
    > observed (cookies, tracking web surfing, sensor data ...)
    > inferred (from other data ...)
  + Data as valuable resource: data mining / analytics
  + Digitalisation revolutionizes entire economy not only specific sectors (Schumpeterian process of „creative destruction“)
1. Digital Markets, Data, and Privacy Concerns (2)

- Potential huge advantages of using Big Data:
  + Innovation of new products and services / more econ. efficiency
  + Improvement of public policies (health, education, safety, security)

- Privacy concerns about Big Data:
  + transparent, predictable individuals (loss of autonomy)
  + excessive data collection, user profiles
  + harm through discriminatory strategies and behavioral targeting

- Current discussions:
  + e.g., privacy policy of Facebook ⇔ data protection supervisors
  + ECJ decision on EU-US data transfer pact

=> Technological revolution needs an institutional evolution:
What are the proper rules for the digital economy?
2. Economics of Privacy (1)

- Economics of privacy: new field in economics (Acquisti/Taylor/Wagman 2014)

- What is privacy?
  + control over /safeguard of personal data, linked also to autonomy (German Constitutional Court: „informationelle Selbstbestimmung“)

- Privacy from an economic perspective: (information economics)
  + Privacy: non-disclosure of information / control of the disclosure
  + Persons have preferences for privacy:
    > persons want to keep certain information secret for its own sake
    > revealing of information might have negative consequences
  + But: non-disclosed information can lead to economic inefficiency

=> Trade offs: balancing benefits and costs of privacy / disclosure!
2. Economics of Privacy (2)

- Effects of Big Data on privacy and consumers:
  + firms can have much more information about their customers
  + can lead to better products and services but also to strategies that might harm consumers (old insight: information is power)

- Example: Price discrimination strategies
  + Online sale allows for real-time personalized pricing
  + knowledge about willingness-to-pay of individual customers might lead to first-degree price discrimination (consumer rent)
  + theoretical studies: so far no clear general results
    > information might harm consumers but it depends on conditions, sometimes it is better for firms if they have less information
  + empirical studies: so far not much evidence for personalized price discrimination strategies but this might change
2. Economics of Privacy (3)

- How important is privacy to consumers / internet users?
  + in surveys a large majority of users is concerned about privacy
  + in their behavior many users are often not cautious about disclosing information and do not use privacy-enhancing technologies
    => privacy paradox!
  + directly related: how do users value their data / their privacy?
  + results of many empirical studies:
    > privacy behavior is context-specific, i.e. it depends much on the specific circumstances, what kinds of data, disclosing it to whom
    > privacy preferences are very heterogeneous
    > many users are not aware of extent of collecting data and behavioral targeting ( => intransparency and uncertainty)
    > behavioral decision-making biases in regard to privacy

=> very differentiated demand for privacy / protection of personal data!
2. Economics of Privacy (4)

- Question: Market failure in regard to offer sufficient privacy options?
  
  + efficient markets would offer very differentiated privacy options, including options that allow to limit collection or use of these data
  + internet firms should offer much more differentiated privacy options, including:
    > limiting / specifying to what extent firms collect and use data
    > options to use the services with a monthly fee w/o collecting and using the data (or w/o advertising)
  + requires much more clear information about collection/use of data
  + empirical studies: privacy policies might not fulfill requirements of „informed consent“ (too long / incomprehensible privacy policy terms)
  + concerns about excessive data collection

Conclusion: problem of lacking transparency / information and not enough choice in regard to privacy options for users!
3. Relevant Fields of Law

- Competition Law
- Consumer Law
- Big Data and Privacy
- IPR
- Privacy / Data Protection Law
- Media Law
4. Competition Policy Perspective (1)

Can privacy problems be solved by competition policy?

- Google, Facebook etc. seem to be "quasi-monopolies" or have at least considerable market power (Apple? Amazon?)

- Competition problems:
  + platform markets (multi-sided markets): large direct and indirect network effects with tendencies to natural monopolies
  + largest platform / search engine might have best quality due to most collected data (dynamic economies of scale): => entry barrier!
  + but: this structure might be efficient (Google etc. are very innovative!)

=> weak competition between platforms/search engines

=> can lead to non-fulfillment of privacy preferences and to excessive collection of valuable data
4. Competition Policy Perspective (2)

Competition policy options: (see also Monopolkommission 2015)

- Increasing competition between platforms / social networks etc.
  + accumulated data as "essential facility": but access solutions problematic for privacy
  + data portability (social networks) for users: reducing switching costs and consumer lock-in problems

- Abuse of dominance (Art. 102 TFEU):
  + Excessive collection of data as exploitative "price abuse"
  + Remedies: minimum standards for transparency and privacy (extent and use of collected data)
  + Are violation of individual rights of users (privacy) and IP owners itself an abuse? (leading to a competitive advantage)

=> Privacy problems cannot be primarily solved by competition policy!
5. Consumer Policy Perspective (1)

- Consumer policy:
  + protection of consumers against market failure problems through information and rationality problems
  + instruments: information duties, minimum standards for products / services, controlling standard form contracts

- Large information / intransparency problems about collection/use of data: => huge problem from a consumer policy perspective!
  + users are not well-informed
  + (long-term) costs for users are uncertain and unpredictable,
  + might be behavioral biases and „vulnerable“ users/consumers

- Mutual reinforcement of competition and consumer problems?
  + weak competition betw. platforms increases information problems, and information problems tend to reduce competition
Policy options: (European Data Protection Supervisor 2014, Monopolkommission 2015)

- Lacking transparency about data "price" can be a "misleading" and therefore "unfair" commercial practice
- More information requirements about collected data and their use, and options for limiting data collection
- Regulation of standard form contracts in regard to privacy policies:
  + minimum standards for privacy (options) in standard form contracts
  + more privacy-friendly design of default rules
    (more opt-in in regard to data collection instead of opt-out solutions)
- Data portability (e.g., between social networks)

- Combination of competition and consumer policies:
  + Possibility of using consumer policy instruments also in competition cases (Art. 102 TFEU)
6. Data Protection Policy Perspective (1)

Data protection laws in Europe:

- EU General Data Protection Regulation (not enacted yet):
  + overcoming the fragmentation of national data protection laws in EU (Single Digital Market)
  + Basic principle: data sovereignty (consent principle)
  + privacy as a fundamental individual right (ECJ: „right to be forgotten“)

=> will lead to far-reaching regulation of data protection in the EU!

[- International problems and jurisdictional issues
  + Big difference betw. the basic approach to privacy in EU and US
  + ECJ- decision about EU-US data transfer pact]
6. Data Protection Policy Perspective (2)

Data protection / Privacy laws from an economic perspective:

- Consumer policy perspective: (information problems => 5.)

- Property rights perspective:
  + optimally defined bundle of rights in regard to (personal) data?
  + Who shall have what rights about what kind of data, and to what extent transferable with or w/o consent of persons? (including default rules in regard to opt-in or opt-out solutions, right to withdraw / correct data, as well as data portability)
  + Data protection laws define and allocate these bundles of rights
  + Privacy as fundamental right: => individuals should have strong property rights about his/her personal data (=> consent principle!)
  + well-functioning digital economy needs clearly specified property rights in regard to data
6. Data Protection Policy Perspective (3)

- Preliminary results from economics of privacy:
  + broad discussion: self-regulation ⇔ regulation
  + privacy protection not only protects individual rights but can also increase welfare
  + but: advantages / disadvantages of privacy and disclosure of data with a lot of complex trade off problems, which might require different sector-specific solutions (e.g., health, credit, insurance)

- Very interesting: Can there be markets for personal data that respect privacy rights and preferences?
  + „propertization / licensing“ of personal data
  + not giving away personal data for „free“ services in an intransparent way but selling them according to their specific preferences (privacy-enhancing technologies)
  + what kinds of rules are necessary for such markets?
7. Conclusions

- We are at the beginning of a long process of developing the proper set of rules for the digital economy and data.

- Strengthening of privacy rights of users/consumers in the digital economy is necessary, because
  + market failure problems
  + privacy protection necessary for safeguarding private autonomy

- But: difficult trade off problems with benefits of disclosure / data sharing and innovation in digital markets (need for economic analysis)
  + different sectors / markets might need different solutions

- Necessary is an integrated approach of different policies:
  + what is an optimal combination of competition law, consumer law, data protection law (and perhaps also intellectual property)?
  + cooperation between different regulatory agencies