Submission to the consultation of the European Commission's preliminary report on the consumer IoT sector inquiry

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With this submission, I would like to take the opportunity to respond to the European Commission's consultation of the preliminary report on the sector inquiry into the consumer Internet of Things (IoT). The main message of this submission is that the potential for exploitative practices deserves more attention in the sector inquiry, in particular in the context of the increasing personalization of services as facilitated by consumer IoT devices. Because the possible competitive harms resulting from practices of 'personalized exploitation' go beyond the harms that data protection and consumer law can address, it is submitted here that EU competition law should be more prepared to protect against the exploitation of consumer vulnerabilities in the IoT context.

To substantiate this message, this submission provides a summary of a journal article published by the author: Inge Graef, 'Consumer sovereignty and competition law: From personalization to diversity', Common Market Law Review 2021, vol. 58 no. 2, p. 471-504, available in full at https://kluwerlawonline.com/journalarticle/Common+Market+Law Review/58.2/COLA202102

Introduction

Data-driven technologies provide businesses with ever-stronger abilities to engage in behavioural manipulation, steer consumer preferences and exploit individual vulnerabilities. As an illustration, it is reported that Uber is aware when a customer's phone runs out of battery, enabling it to increase prices precisely when customers are in extra need of a ride.[1] By relying on data analytics, businesses can profile individual consumers and manipulate their preferences by targeting them at moments when they feel tired, less attentive or otherwise easy to persuade.[2] In such situations of personal vulnerability, a consumer may lose control over her choices and enter into transactions she would not have accepted otherwise or not under the conditions offered at that moment.

Although data protection and consumer law also offer protection against personalized exploitation, this piece submits that the way in which personalization restricts consumer choice in combination with the increasing concentration of markets also affects the nature of competition and thereby raises competition concerns that cannot be solely addressed through the consumer and data protection rules. The key message of this submission is that competition law should give more prominence to the protection of consumer sovereignty and consumers' freedom of choice as a starting point for a more effective protection against the rise of individualized forms of exploitation of consumer vulnerabilities.

The submission proposes to recognize personalized exploitation as abuse of dominance by incorporating dynamic consumer vulnerabilities into competition analysis, based on existing experience with the concept of vulnerability in consumer and data protection law. This would entail that the assessment of anticompetitive effects of personalized exploitation is confined to the consumers whose vulnerabilities have been targeted by the dominant firm in a particular way. Instead of taking overall consumer welfare as a benchmark, a "personalized welfare standard" should be adopted in order to assess the existence of abuse based on the impact of the personalization on those exploited. Such an approach would provide room to qualify personalized exploitation as abuse of dominance and restrict the extent of personalization by dominant firms in order to promote consumer sovereignty and freedom of choice under competition law.

Consumer sovereignty

The notion of consumer sovereignty can be traced back to Adam Smith who famously wrote: "Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the

[1] Vedantam, "This is Your Brain on Uber", *National Public Radio*, 17 May 2016 <https://www.npr.org/2016/05/17/478266839/this-is-your-brain-on-uber?t=1542276288533>.

[2] See the examples given by Helberger, Zuiderveen Borgesius and Reyna, "The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law", 54 CML Rev. (2017), 1456-1457.

consumer".[3] In line with Adam Smith's beliefs, it is in a free market economy where consumer sovereignty is strongest and consumers have the freedom as well as the ability to choose the products that best match their demand.

The notion of consumer sovereignty has attracted attention in competition policy debates in the 1990s. Averitt & Lande have described consumer sovereignty in the context of competition policy as the power of consumers "to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods and services".[4] In this regard, the exercise of choice lies at the heart of consumer sovereignty. Averitt & Lande referred to consumer sovereignty as the state of affairs that should prevail in a modern free market economy so as to ensure that the economy evolves in line with consumer demands, rather than acts in response to government instructions or the interests of individual businesses.[5] This primacy of the consumer is nowadays hard to find in markets that are dominated by big firms that offer consumers take-it-or-leave-it offers. Although some argue that the solution is to be found in giving consumers more and stronger rights that they can invoke themselves against firms,[6] it is submitted here that the onus should not be entirely put on consumers taking proactive action. Firms nowadays know more about consumers than the latter know about themselves. Effective consumer empowerment may therefore be difficult to distinguish from situations where in fact there is only an appearance of consumers being in control.

Averitt & Lande also relied on the concept of consumer sovereignty as a way to delimit the boundaries between antitrust and consumer law from a US perspective. In their view, the two regimes share the common objective of facilitating the exercise of consumer sovereignty, which consists of two elements: (1) the availability of a range of consumer options through competition, and (2) the ability of consumers to choose effectively among these options. While antitrust law intends to ensure that the marketplace remains competitive so that a meaningful range of options is available to consumers, consumer law aims to ensure that consumers can choose effectively among those options. In this sense, antitrust law remedies market failures in the marketplace that are external to consumers, whereas consumer law addresses internal market failures taking place "inside the consumer's head".[7] Interestingly, this distinction becomes blurred for the practices of personalized exploitation analysed here, because it is the

[3] Smith, *The Wealth of Nations*, 1776.
[4] Averitt and Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law", 65 *Antitrust Law Journal* (1997), 716.
[5] Averitt and Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law", 65 *Antitrust Law Journal* (1997), 715.
[6] Colangelo and Maggiolino, "Fragile or Smart Consumers? Suggestions for the US from the EU", *TTLF Working Papers No. 36*, August 2018, 13-17, <https://law.stanford.edu/publications/no-36-fragile-or-smart-consumers-suggestions-for-the-us-from-the-eu/>. For a critical view, see Bietti, "Consent as a Free Pass: Platform Power and the Limits of the Informational Turn", 40 *Pace Law Review* (2020), 310-398.
[7] Averitt and Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law", 65 *Antitrust Law Journal* (1997), 713-714.

concentrated nature of markets that strengthens the ability of dominant firms to manipulate consumers' internal decision-making process.

Data protection and consumer law still rely to a large extent on empowering individuals to take well-informed and rational decisions. However, due to the persistent nature of the power and information asymmetries and the room data-driven technologies provide businesses to exploit individual vulnerabilities,[8] merely promoting consumer empowerment no longer seems sufficient. In particular, data protection and consumer law on their own cannot offer adequate protection against harm from personalized exploitation by dominant firms. This submission proceeds from the insight that practices of personalized exploitation by dominant firms also cause competitive harm, beyond the harm against which data protection and consumer law protect. The manipulation of consumer decision-making does not only erode the freedom of choice of individuals, but can also further weaken the competitive process in concentrated markets. Instead of making active choices reflecting their true preferences, consumers are tricked into choices laid out for them by the dominant firm. This enables the dominant firm to pursue its own commercial interests to the detriment of consumers, who risk being exploited, and to the detriment of overall competition, which is controlled by the dominant firm through its steering of demand. The relevance of competition law in addressing personalized exploitation therefore does not only stem from the higher likelihood and extent of harm inflicted by dominant firms, but also from the nature of the harm that affects the competitive process and goes beyond harm to the interests of individual consumers as protected by data protection and consumer law. The submission argues that competition law can intervene against harmful practices of personalized exploitation by giving more prominence to consumer sovereignty as an objective.

Theory of harm for personalization as an exploitative abuse

While consumers may benefit from some level of personalization, there needs to be a balance between the interests of consumers in getting good quality services and the interests of the dominant firm in making revenues and operating its business. There are reasons to believe that the extent of personalization in which dominant firms nowadays engage goes beyond what is beneficial for consumers. With regard to the theory of harm behind competition intervention against personalized exploitation, insights can be drawn from the case law on unfair contract

[8] For a discussion of consumer law's over-reliance on information provision to create transparency and the definition of the too strictly interpreted notion of average consumer as a reference point for protection, see Siciliani, Riefa and Gamper, *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making*, (Hart Publishing, 2019), pp. 16-55. See also Helberger, Zuiderveen Borgesius and Reyna, "The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law", 54 CML Rev. (2017), 1441 who state that: "It is not suggested here that informing consumers is a panacea. Information requirements have limited potential to empower consumers. Scholars from various disciplines agree that information requirements are not a solution for everything".

terms. Relevant precedent under Article 102(a) TFEU can be found in cases such as *SABAM*, *GEMA statutes* and *DSD*.[9]

These cases refer to the notion of proportionality and a balancing of interests in order to determine the unfairness of contract terms. Behavioural manipulation by dominant firms does not necessarily stem from contract terms, because it can also occur as a commercial practice irrespective of the content of the contract terms imposed on consumers. Nevertheless, a similar thinking can be applied to the assessment of behavioural manipulation whether it originates from contract terms or not. The relevant question to be answered is to what extent it is reasonable or proportionate for a dominant firm to personalize offers based on the preferences of consumers. In *SABAM*, the trading conditions were put in place to protect the rights and interests of the collective management organization. And in *DSD*, the contract terms at stake determined the conditions of access to a system of packaging and distribution channels. When applying the insights from the case law about unfair contract terms in the context of behavioural manipulation, the key consideration would be whether personalization of offers by the dominant firm is proportionate considering the interests of consumers.[10]

The benefits of a personalized user experience were also discussed in the *Facebook* decision of the German Bundeskartellamt.[11] With regard to the extent of personalization, Facebook argued that a comprehensive collection of personal data is necessary to provide a personalized user experience and that "limiting data processing is always unreasonable because it interferes with Facebook's product design".[12] The Bundeskartellamt rejected this interpretation because it would give Facebook unlimited scope to personalize its service and collect any personal data that may be potentially relevant to do so.[13] The balance of interests would then risk completely tilting towards Facebook, considering that the main relevant consideration is the pursuit of Facebook's own commercial interests. In the words of the Bundeskartellamt, this would be "tantamount to relinquishing the fundamental right to data protection or to informational self-determination".[14] Part of the reasoning of the Bundeskartellamt in the context of data processing is arguably also relevant for assessing the exploitative nature of personalization. In

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[9] For an analysis, see also Kalimo and Majcher, "The concept of fairness: linking EU competition and data protection law in the digital marketplace", 42 EL Rev. (2017), 224-225; and Robertson, "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data", 57 CML Rev. (2020), 179-181. Case 127/73, *SABAM*, EU:C:1974:25, paras. 6-15; Case V/29.971 – *GEMA statutes*, 4 December 1981, para 36; Case COMP D3/34493 – *DSD*, 20 April 2001, para 112. Upheld on appeal: T-151/01, *DSD*, EU:T:2007:154 and C-385/07 P, *DSD*, EU:C:2009:456.

[10] For an analysis of the fairness of excessive data extraction under Art. 102 TFEU under the *SABAM* and *DSD* cases and under the principles of data minimization and purpose limitation see, Robertson, "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data", 57 CML Rev. (2020), 179-183.

[11] Case B6-22/16, *Facebook - exploitative business terms*, 6 February 2019, <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5>.

[12] Case B6-22/16, *Facebook - exploitative business terms*, 6 February 2019, para 691.

[13] Case B6-22/16, *Facebook - exploitative business terms*, 6 February 2019, para 692.

[14] Case B6-22/16, *Facebook - exploitative business terms*, 6 February 2019, para 693.

particular, the Bundeskartellamt referred to more abstract goals such as the "information sovereignty" of users, their rights for self-determination and the protection of their autonomy when balancing the data protection rights of Facebook users with the rights of Facebook for entrepreneurial freedom.[15] While the Higher Regional Court of Düsseldorf suspended the decision of the Bundeskartellamt in interim proceedings in August 2019,[16] the German Federal Court of Justice confirmed the Bundeskartellamt's decision on appeal and explicitly pointed at the relevance of protecting consumer sovereignty under competition law.[17] Although it remains to be seen how the case will be judged on the merits,[18] the German *Facebook* case illustrates the relevance of concerns of consumer sovereignty and freedom of choice to the protection offered by competition law.

Recognizing personalized exploitation as abuse of dominance under Article 102 TFEU

To operationalize the abstract notion of consumer sovereignty in the context of personalized exploitation, the submission suggests to incorporate dynamic consumer vulnerabilities into the competition analysis under Article 102 TFEU. Protection against exploitation of consumer vulnerabilities under competition law would promote a specific aspect of consumer sovereignty that is especially relevant in relation to commercial practices of personalization.

Consumer and data protection law already recognize a notion of vulnerability. Consumer law has most experience in conceptualising vulnerabilities, which are established in reference to the average consumer. One illustration of this can be found in the approach laid down in the Unfair Commercial Practices Directive for determining whether a commercial practice is unfair. Commercial practices that "are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product" have to be assessed "from the perspective of the average member of that group" and not from the perspective of the overall average consumer.[19] The notion of vulnerability is defined in reference to the consumers' "mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee".[20] Similarly, the recitals to the General Data Protection Regulation (GDPR) recognize the existence of vulnerable data subjects. The processing of personal data of vulnerable natural persons is mentioned as

[15] Case B6-22/16, *Facebook - exploitative business terms*, 6 February 2019, paras. 760 and 785.
[16] Oberlandesgericht Düsseldorf, VI-Kart 1/19 (V) *Facebook v. Bundeskartellamt*, 26 August 2019, DE:OLGD:2019:0826.KART1.19V.00.
[17] Bundesgerichtshof, KVR 69/19 *Facebook*, DE:BGH:2020:230620BKVR69.19.0 (23 June 2020), paras. 104-105.
[18] The case has now been referred to the Court of Justice for a preliminary ruling.
[19] Art. 5(3) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive), O.J. 2005, L 149/22.
[20] Art. 5(3) of the Unfair Commercial Practices Directive. For a discussion of the difficulty of applying the notion of vulnerable consumers, see Siciliani, Riefa and Gamper, *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making*, (Hart Publishing, 2019), p. 38.

one of the situations causing risk to the rights and freedoms of natural persons, potentially leading to "physical, material or non-material damage".[21]

Despite the fact that the recognition of vulnerable consumers and data subjects is useful to tailor protection mechanisms, the way these concepts have been applied so far is rather static. They identify a fixed group of individuals or refer to a longer period of time in which the vulnerability applies. Such a static notion of vulnerability cannot address the personalized exploitation analysed in this submission, which is defined by firms taking advantage of moments of personal vulnerability. It has already been recognized that vulnerability should be regarded as a universal human condition that can occur in different settings and can vary over time.[22] Within consumer law, a more dynamic understanding of vulnerability is already being discussed.[23] The Netherlands Authority for Consumers and Markets (ACM) explained in its 2020 guidelines on the protection of the online consumer that the standard for what constitutes an unfair commercial practice may differ depending on the specific vulnerabilities in the group targeted by the trader. The group of consumers targeted will become smaller, as the extent of personalization by the trader increases. According to the ACM, this may even result in a situation where a personalized offer targets one individual consumer. For the purposes of applying the consumer rules, the ACM found that the average consumer may be the same as the individual consumer targeted by the offer in such cases.[24]

Insights like these can form the starting point for the development of a concept of temporary and dynamic vulnerabilities in order to address harm from personalized exploitation. Such a concept would include all types of vulnerabilities that regular consumers face from time to time, irrespective of whether they relate to one's physical or mental state, individual preferences or behavioural weaknesses. This implies that the scope of such a dynamic notion of consumer vulnerabilities is extremely broad. This is a welcome development in order to make the personalized exploitation of individual vulnerabilities cognizable. As such, the difficulty does not lie so much in identifying dynamic vulnerabilities but rather in determining when the exploitation of such a vulnerability leads to such an extent of harm that it should be regarded as breaching the relevant legal framework.

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[21] Recital 75 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation, GDPR), O.J. 2016, L 119/1.

[22] See the discussion in Malgieri and Niklas, "Vulnerable data subjects", 37 *Computer Law & Security Review* (2020), at 3.

[23] See also Helberger, Zuiderveen Borgesius and Reyna, "The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law", 54 CML Rev. (2017), 1457-1458 who recognize that profiling and personalized marketing can lead to new forms of consumer vulnerability that need to be further conceptualized in consumer law.

[24] Netherlands Authority for Consumers and Markets, "Guidelines Protection of the online consumer: Boundaries of online persuasion", February 2020, at 25.

To assess personalized exploitation under Article 102 TFEU, it is proposed here to incorporate dynamic consumer vulnerabilities into competition analysis by confining the assessment of anticompetitive effects of the practices of personalization to the consumers whose vulnerabilities have been exploited by the dominant firm in a particular way, instead of looking at consumer welfare as a whole. This transposes the approach of the ACM for consumer law in its 2020 guidelines on the protection of the online consumer into competition law. If a business diversifies its offerings across consumers through personalization techniques, the ACM requires consumer law's benchmark of the average consumer to be determined by reference to the specific group of consumers targeted. As stated by the ACM, this implies that the standard for what constitutes an unfair commercial practice under consumer law may differ depending on the exact vulnerabilities targeted by a business.[25]

A similar approach could be used in competition analysis. For instance, if a dominant firm diversifies the moments at which it targets ads to individual consumers depending on what parts of the day it knows that person is most exhausted and more prone to make purchases she would not have made otherwise, the analysis of the effects of such behaviour should be confined to the consumers targeted by the dominant firm in such a way.[26] This implies that subsidization with non-affected consumers at the level of the overall market cannot remove the competition concerns of personalized exploitation. It is proposed here for competition law to open the door for a more individualized assessment of the anticompetitive effects of personalization against a "personalized welfare standard" of the affected consumers.[27] Considering the rise of personalized exploitation due to the possibilities offered by data-driven technologies and the extent of the expected harm in ever more concentrated markets, there is a need to adapt the competition analysis to the new reality.

The key trigger for personalized exploitation to become anticompetitive under Article 102 TFEU as a reduction of consumer sovereignty is when the exploitation leads consumers to make choices they would not have made otherwise resulting into substantial harm for the affected consumers, either in terms of the extent of the harm (through extra costs that are incurred or lower quality that is experienced) or the nature of the harm (by shaping consumer preferences and interfering with free consumer decision-making). To remedy the competitive harm, the dominant firm would be required to restrict the extent of personalization. In practice, this will mean that certain vulnerabilities whose exploitation lead to substantial harm for the affected

[25] Netherlands Authority for Consumers and Markets, "Guidelines Protection of the online consumer: Boundaries of online persuasion", February 2020, at 25.

[26] For a discussion of how marketing techniques can be used to take advantage of ego depletion, see Daley and Howell, "Draining the Will to Make the Sale: The Impermissibility of Marketing by Ego-Depletion", 11 *Neuroethics* (2018), 1-10.

[27] For an opposite view, see Townley, Morrison and Yeung, "Big Data and Personalized Price Discrimination in EU Competition Law", 36 Yearbook of European Law (2017), at 740 who argue that a narrower focus of the competition rules is beneficial for reasons of easier and cheaper enforcement, legal certainty and to prevent that competition law becomes "unwieldy and unpredictable" due to the inclusion of redistributive goals that may be better protection through consumer law and tax legislation.

consumers can no longer be used by dominant firms to personalize offerings. For instance, if personalized advertising based on insights about the mental vulnerabilities of individuals during the course of the day is shown to lead to serious interferences with the autonomous decision-making of the affected consumers, application of Article 102 TFEU would result into a ban on dominant firms to use such information in deciding at what moments to target individuals with ads.

The outcome of this approach is that the personalization of offerings violates the competition rules when it is based on exploitation of vulnerabilities causing serious harm for the personalized welfare of the group of consumers that is targeted by the dominant firm. The effect of such restrictions on the extent of personalization under the prohibition of abuse of dominance is that substantial distortions of consumer sovereignty and freedom of choice are recognized and remedied as relevant competitive harm.

To some extent, the recognition of personalized exploitation as abuse of dominance results into competition law being relied upon to protect the diversity of offerings to which consumers are exposed. As Article 102 TFEU would restrict the extent of personalization by dominant firms, the result is that consumers are targeted with less personalized and thus more diverse offerings. If consumers want personalized offerings, a competition intervention to impose diversity would be contrary to their preferences and thus go against their sovereignty. However, one can argue that the preferences deserving protection are those that are the result of autonomous choices and not those set by mere passive behaviour.[28] As such, the trigger for a competition intervention as proposed here is a distortion or manipulation of consumer sovereignty. In particular, dominant firms are not required to actively create more diverse offerings but are obliged to restrict the extent of personalization where this interferes with the autonomous decision-making of consumers. In other words, the recognition of personalized exploitation as abuse of dominance aims to ensure that data-driven technologies reflect instead of shape consumer preferences.[29] Although the outcome will often be an increase in the diversity of offerings presented to consumers, the objective and the nature of competition intervention against personalized exploitation is to protect consumer sovereignty and as such falls within the remit of the competition rules.[30]

[28] Fish and Gal, "Echo Chambers and Competition Law: Should Algorithmic Choices be Respected?", in *Frederic Jenny Liber Amicorum: Standing Up for Convergence and Relevance in Antitrust*, vol. II (forthcoming 2020), pp. 12-15.
[29] Fish and Gal, "Echo Chambers and Competition Law: Should Algorithmic Choices be Respected?", in *Frederic Jenny Liber Amicorum: Standing Up for Convergence and Relevance in Antitrust*, vol. II (forthcoming 2020), pp. 8-9.
[30] See also Fish and Gal, "Echo Chambers and Competition Law: Should Algorithmic Choices be Respected?", in *Frederic Jenny Liber Amicorum: Standing Up for Convergence and Relevance in Antitrust*, vol. II (forthcoming 2020), pp. 16-19 who conclude that promoting diversity of exposure can be consistent with competition law's goals and values but is better addressed by specific regulatory tools.

Conclusion

This piece submits that competition law needs to give more prominence to consumer sovereignty and freedom of choice. In an economy where firms can shape consumer preferences and target offerings at an individual level, one can no longer take the ability of the mechanisms of supply and demand in delivering proper market outcomes for granted. With the advent of personal assistants and the Internet of Things, the scope for behavioural manipulation keeps increasing. These technologies often rely on the presentation of default options to consumers without requiring them to make active choices. Without effective protection against personalized exploitation, competition may be further weakened to the detriment of consumers but also to the detriment of the overall economy and society.

To address these concerns, this submission proposes to recognize personalized exploitation in the form of personalized pricing and behavioural manipulation as abuse of dominance under Article 102 TFEU. While consumer and data protection law also offer relevant protections, personalized exploitation by dominant firms causes harm to the competitive process that cannot be remedied under these two regimes. By steering consumer preferences and manipulating consumer decision-making, a dominant firm is not only able to restrict the freedom of choice of individuals but also to damage the competitive process to its own advantage. As such, the recognition of personalized exploitation as abuse of dominance under competition law is a necessary starting point to put consumer sovereignty and freedom of choice back at the heart of the functioning of markets.