TARGETED ADVERTISING AND THE (CHILDREN'S) RIGHT TO PRIVACY - REMEDIES OF EX-ANTE AND EX-POST REGULATION

ROK DACAR
University of Maribor, Faculty of Law, Maribor, Slovenia
rok.dacar@um.si

This paper analyses how instruments of economic regulation can be used to protect the right to the protection of personal data, especially in relation to vulnerable societal groups, such as children. In this regard, it analyses the Bundeskartellamt's Facebook decision that established an unprecedented connection between competition law and data protection law, as well as the Digital Markets Act, which imposes several positive and negative obligations on companies branded as "gatekeepers," which could also increase the level of personal data protection. It is concluded that instruments of economic regulation can have a profound impact on data protection issues, although addressing them is not their primary goal.

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CILJNO USMERJENO OGLAŠEVANJE IN (OTROKOVA) PRAVICA DO ZASEBNOSTI – *EX-ANTE* IN *EX-POST* SREDSTVA PREDHODNEGA IN POPREJŠNJEGA UREJANJA

ROK DACAR
Univerza v Mariboru, Pravna fakulteta, Maribor, Slovenija
rok.dacar@um.si

Ključne besede:
zloraba tržnega položaja,
pravica do varstva osebnih podatkov,
Facebook,
Bundeskartellamt,
Digital Markets Act

V prispevku je analizirano, kako lahko instrumenti ekonomske regulacije prispevajo k zaščiti pravice do varstva osebnih podatkov, še posebej glede na ranljive družbene skupine, kot so otroci. V tem kontekstu je analizirana odločitev Bundeskartellamta v zvezi s Facebookom, ki je vzpostavila brezprimerno povezavo med konkurenčnim pravom in pravom varstva podatkov, ter 'Digital Markets Act', ki podjetjem, označenim kot »varuhi vrat«, nalaga več pozitivnih in negativnih obveznosti, ki bi lahko tudi povečale raven varstva osebnih podatkov. Ugotavljamo, da lahko instrumenti ekonomske regulacije močno vplivajo na vprašanja varstva podatkov, čeprav to ni njihov primarni cilj.

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1 Introduction

In today's digital society, the right to privacy is a particularly important fundamental right, all the more so when vulnerable segments of the population, such as children, are affected. The rapid developments in companies' business models and the opening up of completely new markets pose an as-yet unprecedented threat to the right to privacy.

This paper attempts to analyse how the right to privacy (of children) can be protected with instruments of *ex ante* economic regulation in the context of targeted advertising.

The first chapter thus defines several concepts necessary for understanding the paper, namely targeted advertising, the right to privacy and the protection of personal information, and economic regulation. The second chapter looks at some examples where instruments of economic *ex ante* and *ex post* regulation have been used in innovative ways to protect the right to privacy and analyses their scope and importance. Finally, the last chapter provides an overview of the main findings of the study.

2 Setting the scene

2.1 Targeted advertising

Targeted advertising is a particularly efficient form of advertising that is directed only at people who have shown some affinity for a particular product or service in the past. It is most often associated with multi-sided web platforms, i.e., intermediary services that operate on two different markets (sides). In one market, they offer a product for free, but in exchange, they collect the user's personal data. They then use this information to create accurate profiles of each user's preferences (e.g., through information about the websites they visit, search queries, connections with other users of the platform, etc.). These profiles are ultimately used as a key input for operating in the secondary market, where they offer targeted advertising services

to companies on a "pay-per-click" basis.[1] One of the best-known examples of targeted advertising are the ads displayed to users of the social network Facebook. In the controversial decision B6-22/16, the German competition authority ruled that the Facebook company had abused its dominant position in the social networking market in Germany by forcing its users to comply with abusive general terms of service that allowed the company to collect a disproportionate amount of personal data (Lypalo, 2021, pp. 169–198).

2.2 The right to privacy and the right to the protection of personal information

Although it is a relatively new fundamental right, the right to privacy has become one of the most important cornerstones of the European Union's legal system. There are several different definitions of privacy, with Warren and Brandeis viewing it as the "right to be let alone" (Warren & Brandeis, 1890, p. 195). Westin, on the other hand, defined the right to privacy as the right of individuals, groups, or institutions to freely decide when, how, and to what extent their personal information is disclosed to third parties (Westin, 1967, p. 7), while Miller claims that the right to privacy is the ability of an individual to control the dissemination of information about them (Miller, 1973, p. 25). The above theories all indicate that a violation of the right to privacy does not occur as long as the individual to whom the data relates consents to disseminating their personal information. However, particularly in the context of the digital economy, situations can arise where an individual has consented to disseminating their personal data for a specific purpose, but the data ends up being used for an entirely different purpose. This usually happens when the data is combined with other (personal) data, with the new contexts revealing information that the individual does not want to share with the public. Such positions are addressed by various contextual privacy theories, all of which suggest that the collection and/or processing of personal data does not violate the right to privacy as long as it remains within the context in which the data subject has given consent. Closely related to the right to privacy is the right to the protection of personal data. The European Court of Human Rights first established the latter as the informational dimension of the right to privacy and was later incorporated

[1] The company using the services of targeted advertising pays the intermediary platform a certain remuneration for each click of the user on the displayed advertisement, regardless of whether the user buys (or does not buy) the product in question.

into the Charter of Fundamental Rights of the European Union[2] as an independent fundamental right (article 8). In general, it can be stated that a violation of the right to the protection of personal data is almost always also a violation of the right to privacy, but not vice versa.

2.3 Economic regulation

Regulation theory attempts to define the meaning of the term regulation, its different types, its effects, the role of each actor in the regulatory process, and so on. This paper, however, is limited to the distinction between *ex ante* and *ex post* and economic and social regulation.

Ex ante regulation refers to regulatory acts that address abstract and general positions that have not yet occurred, in other words, the attempt to influence the behavior of regulated parties before the relevant acts have occurred. *Ex post* regulation, on the other hand, addresses actions that have already occurred. A typical example of *ex post* regulation is the prohibition of abuse of a dominant market position.

In terms of its primary goals, regulation can be classified as either economic or social regulation, although the line between the two types of regulation is often blurred and unclear (Graef, Husovec & Purtova, 2018, p. 1359). In general, however, it can be stated that economic regulation consists of rules that are intended to regulate the behavior of companies concerning various aspects of market competition and are especially justified in cases of market failure(s).[3]

On the other hand, social regulation consists primarily of rules aimed at protecting values that are per se outside the bounds of pure market competition. Thus, social regulation serves primarily to ensure, among other things, the right to a clean

[2] Charter of Fundamental Rights of the European Union, OJ C 326, 26. October 2012.

[3] Market failure is a fundamental consideration in the analysis of economic and regulatory issues. This failure, characterized by situations in which the unregulated market does not allocate resources efficiently, has significant legal implications. Legal frameworks and regulations often play a central role in addressing problems such as externalities, monopolies, asymmetric information, and the provision of public goods. Law serves as a tool to correct these market inefficiencies and protect the interests of consumers and society as a whole. Whether through antitrust and competition laws to prevent monopolistic behavior, environmental regulations to address negative externalities, or consumer protection laws to mitigate information asymmetries, the legal system plays an important role in shaping the rules and boundaries of market activity to ensure fairness, equity, and the general welfare of society.

environment, the right to the protection of personal data, standards for occupational safety and working hours, etc. However, the fact that social regulation primarily targets values that are not in themselves directly related to market competition does not mean that it has no impact on market competition. On the contrary, it can have a significant impact on competition. However, this impact is always a byproduct of the protection of a socially important value. Thus, because economic goals play only a secondary role in social regulation, the letter may even have a negative impact on market competition.[4]

3 Examples of economic regulation protecting the (children's) right to privacy

The following part of this paper examines in more detail two instruments of economic regulation that have been used, among other things, to counter threats to the individual's right to privacy.

3.1 The Bundeskartellamt's Facebook decision

In 2019, the Bundeskartellamt, Germany's competition protection authority,[5] published its controversial decision B6-22/16 (hereinafter: Facebook decision).[6] The Bundeskartellamt concluded that Facebook (now Meta) was abusing its dominant position in the German social networking market.[7]

[4] For example, a high level of protection of personal data may have a negative impact on market competition by creating new regulatory and compliance hurdles that companies must overcome in order to operate in a given market. In particular, smaller companies may not be able to make the necessary changes to their business models and will therefore be forced out of the market, affecting competition in the market.

[5] The Bundeskartellamt is responsible for enforcing competition and antitrust law in Germany. It plays a crucial role in regulating and monitoring markets to ensure fair competition, prevent monopolies and protect consumers from anti-competitive behaviour. The Bundeskartellamt investigates mergers, monopolistic practices and violations of antitrust law and imposes fines and sanctions where appropriate. It also promotes competition and provides advice to companies and policymakers to maintain a competitive market in Germany.

[6] Bundeskartellamt, decision B6-22/16, Facebook, 7 February 2019.

[7] Abuse of a dominant position in EU law refers to anticompetitive conduct by a dominant company that holds a substantial share of a given market, which is expressly prohibited by article 102 of the Treaty on the Functioning of the European Union. Such conduct may take various forms, such as unfair pricing, exclusionary practices or the transfer of dominance from one market to another. These actions hinder competition, stifle innovation and harm consumers, which is contrary to the fundamental principles of EU competition law. The competition authorities of the EU Member States and the European Commission actively monitor and intervene to prevent or eliminate such abuses in order to ensure a level playing field for companies and the preservation of an open and competitive market.

It should be noted that abuse of a dominant position is traditionally "measured" in monetary terms – in both exclusionary and exploitative abuse of a dominant position cases, the end result is an unjustified price increase of the product.[8] The existence of a dominant position does not in itself constitute an infringement of article 102 of the Treaty on the Functioning of the European Union,[9] but is merely a precondition for the abuse of a dominant position. For there to be an infringement of article 102, the dominant company must abuse its pre-existing dominant position in some way.

The conduct which, in the view of the Bundeskartellamt, constituted an abuse of a dominant position was as follows: The company Facebook required new users of the Facebook social network to agree to its general terms and conditions if they wanted to use the said social network. In other words, using the Facebook social network was impossible if the new users disagreed with the general terms and conditions. By agreeing to the terms and conditions, the users also agreed that the company Facebook would collect the personal data they generated by using websites that were not connected to the Facebook social network, as well as by using other platforms and applications controlled by the company Facebook (such as WhatsApp and Instagram) and the Facebook social network itself. This allowed the company Facebook to create very accurate profiles of individual users, which it then used to offer services of targeted advertisement on the market for targeted advertisement. According to the Bundeskartellamt, this behavior violated users' right to the protection of personal data and the right to informational self-determination.[10] This was the case as the actions of the company were not based on any of the legal basis

[8] Exclusionary abuses of dominance include anticompetitive practices aimed at excluding or hindering competitors from the market, such as predatory pricing, exclusive dealing, tying, and refusal to supply. Exploitative abuses, on the other hand, refer to excessive or unfair pricing strategies, including excessive pricing, discriminatory pricing, and price suppression, in which the dominant firm exploits its market power to the detriment of consumers. Both types of abuse are central to competition law because they undermine fair competition, harm consumer welfare, and impede innovation in the marketplace. Moreover, it should be noted that the distinction between exclusionary and exploitative abuses of dominance is not necessarily clear-cut, as ultimately all forms of abuse of dominance result in some form of loss of consumer welfare. Moreover, the same actions by a dominant company may constitute both exclusionary and exploitative abuses of market dominance (Grilc, 2009, p. 259).

[9] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

[10] The German "right to informational self-determination" is a legal concept that emphasizes the right of individuals to control their personal data and information. It grants individuals the power to decide how their data is collected, processed, and used, and aims to protect privacy and data autonomy. This right is a fundamental aspect of data protection and privacy laws in Germany and has influenced broader European data protection legislation, including the GDPR.

for legal data processing as put forth by the General Data Protection Regulation (henceforth: GDPR)[11].[12]

The above violations were only possible because Facebook had (has) an extremely dominant position in the market for social networks in Germany. Therefore, if German users wanted to use social networks, they had to use Facebook's social network because there were no actual or potential substitutes. In addition, Facebook also concealed the actual amount of personal data it collected from its users.

In its Facebook decision, the Bundeskartellamt made an unprecedented connection between competition law and the right to protection of personal data, a fundamental right in the European Union. Accordingly, a violation of the right to protection of personal data may constitute an abuse of a dominant position (a violation of competition law rules) if it was made possible by the dominant position of the company. This somewhat contradicts the principle established in the *Asnef-Equifax*[13] judgement of the Court of Justice, according to which competition law and data protection law are generally two separate areas. However, the aforementioned judgement still leaves the door open for data protection aspects to be taken into account in competition law proceedings if a company's actions simultaneously constitute a breach of data protection law and competition law. The company Facebook had filed an appeal against the decision of the Bundeskartellamt with the Duesseldorf Higher Regional Court, which overturned it due to significant concerns about its legality.[14] However, following an appeal against the decision of the Higher Court to the Federal Court of Justice, the latter referred the case back to the Higher Court, which made a reference for a preliminary ruling to the European Court of

[11] 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, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016.

[12] Accordingly, the processing of personal data is lawful if:) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

[13] C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc), 23 November 2006.

[14] Düsseldorf Higher Regional Court, FCO, VI-Kart 1/19 (V), *Facebook*, 24 March 2021.

Justice. The latter passed a judgement on July 6th 2023[15] in which it ruled that violations of other legal fields (such as data protection law) may be considered when deciding on whether a company abused its dominant market position. Moreover, the dominant market position of a company is also to be considered when deciding on the validity of the data subjects' agreement to the processing of their personal data. It can thus be concluded that the Court of Justice mitigated its strict position on the separation of competition law and data protection law as put forth in the *Asnef-Equifax* judgement.

Some authors, in particular, Schneider (Schneider, 2018, p. 221), have strongly criticized the Facebook decision of the German Federal Cartel Office, arguing that abuse of market dominance does not automatically constitute a violation of rules of other areas of law, such as data protection law. This does not mean, of course, that Facebook's actions should go unpunished, but that the instruments of data protection law must be used for this purpose – the Duesseldorf Higher Regional Court took the same position in its ruling overturning the Federal Cartel Office's decision.

Incidentally, the German competition authorities were not the only national institution to initiate proceedings against Facebook for its data hoarding practices.[16] The Italian competition authority, the Autorita' Garante della Concorrenza e del Mercato,[17] did likewise. However, the latter has the authority to issue rulings in cases of both competition law violations and consumer protection law violations. Consequently, it found Facebook guilty not of abuse of market dominance but of violating the Italian consumer protection law, the Codice del consume, which transposes the Unfair Commercial Practices Directive[18] into the Italian legal order.

[15] C-252/21, Meta Platforms and others, 6 July 2023.

[16] Data hoarding is the accumulation and retention of large amounts of digital information, often without a clear or immediate purpose. This behaviour can strain storage resources, complicate data management, and pose privacy and security risks. Data hoarding is often driven by the belief that the data may be valuable in the future, but without effective organization or curation, it can become a liability rather than an asset, hindering efficient data use and decision making.

[17] The Italian Competition Authority, Autorità Garante della Concorrenza e del Mercato, is the Italian regulatory body responsible for promoting and enforcing fair competition and consumer protection in the country. It plays an important role in ensuring competitive markets, preventing antitrust practices, and protecting the rights and interests of consumers. It investigates mergers, enforces antitrust laws, and takes action against unfair business practices. The Authority's mission is to create a level playing field for businesses and protect the welfare of Italian consumers through its regulatory and enforcement activities.

[18] 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 and amending Council Directive 84/450/EEC,

Facebook violated consumer protection rules by advertising its services (the use of the Facebook social network) as free, while the real price was the users' personal data. In my opinion, the Autorita' Garante della Concorrenza e del Mercato has chosen to prosecute violations of consumer protection law rather than competition law because in this way it has avoided having to define a relevant market in which the Facebook social network operates. Relevant markets are usually defined using the SSNIP test,[19] which requires that the product in question has a monetary price. If this is not the case, as in the case of the Facebook social network, the SSNIP test cannot be applied and defining the relevant market can be difficult, if not impossible.

3.2 The Digital Markets Act

A particularly important instrument of *ex ante* economic regulation that also addresses (albeit indirectly) privacy concerns is the Digital Markets Act, whose main objective is to ensure competitive and fair markets. For example, the Digital Markets Act primarily aims to limit the power of so-called "big tech" companies (e.g., Alphabet, Meta, Amazon, and Netflix) that operate in several important data and big data-driven markets (such as the social networking market and the targeted advertising market). These latter markets are very different from traditional markets (the so-called "brick-and-mortar" markets), as they are characterized by, *inter alia*, extreme direct and indirect network effects (also called network externalities),[20] extreme economies of scale,[21] the snowball effect[22] and the "winner takes it all"

Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005.

[19] The SSNIP (Small but Significant Non-transitory Increase in Price) test is an important tool in antitrust and competition law used to assess the competitive effects of a hypothetical price increase by a dominant company in a given market. The purpose is to determine whether such a price increase would be sustainable and profitable, and if so, whether it would substantially lessen competition or create a monopoly. The test examines whether a small price increase would cause a hypothetical monopolist to lose a significant number of customers who would switch to other products or suppliers. If the test indicates that the price increase is not profitable or would not result in significant customer churn, this indicates that the market is competitive, whereas a profitable price increase indicates potentially anticompetitive behavior and may trigger regulatory action or antitrust litigation.

[20] Direct network effects occur when the value of a product or service increases as more people use it, such as social media platforms that become more valuable as the number of users increases. Indirect network effects, on the other hand, involve multiple user groups, where the growth of one group increases the value of the product for another group, such as the availability of apps on a smartphone, which benefits both users and developers and creates a positive feedback loop.

[21] Economies of scale refer to the cost benefits a firm experiences when it increases its output or production. When a firm produces more units of a product, it can spread its fixed costs (e.g., equipment and facilities) over a larger quantity, thereby reducing its average unit cost. This efficiency leads to cost savings, so it is more cost-effective to produce on a larger scale, which translates into lower prices for consumers or higher profits for the company.

[22] The snowball effect in economics refers to a self-reinforcing cycle in which a small initial change or event triggers a series of larger and larger interrelated changes. This process can lead to exponential growth or decline. In a positive context, it can describe how initial investment, consumer demand, or innovation can lead to significant economic

principle of functioning.[23] Because of these peculiarities, traditional ex post economic regulation instruments are rather unsuitable for application in these markets, as they were designed for traditional brick-and-mortar markets. This, by its very nature, requires the creation of innovative (*ex ante*) regulatory structures, such as the Digital Markets Act. The Digital Markets Act is an instrument of asymmetric regulation, meaning that its obligations (positive and negative) do not apply to all companies in a given sector or market, but only to those that meet strict criteria – the so-called "gatekeepers." The European Commission classifies companies as "gatekeepers" must meet strict positive and negative obligations that severely limit their economic freedom. Among the most important obligations are the data access obligation and the prohibition of self-referencing and data hoarding.[24] These obligations are rigid in nature, meaning that once a company is designated as a "gatekeeper" with respect to one or more of its key platform services, it is obliged to comply with them, with no room for negotiation with the European Commission. Moreover, the penalties for violations of the Digital Markets Act are severe compared to the penalties for violations of data protection law and even competition law, as the violating gatekeeper company can be fined up to 10 percent of its annual income for individual violations and up to 20 percent of its annual income of systemic breaches. In addition to the high maximum fines, the European Commission may also impose structural remedies (such as unbundling) if it deems this necessary and the measure is proportionate to the infringement in question.

Although the main goal of the Digital Markets Act is to ensure a competitive and fair market and to allow smaller companies to access it, it also has a strong, albeit indirect, impact on the right to personal data protection. First, because it limits the economic power of "big tech" companies and thus their ability to engage in business practices that could constitute a violation of the right to the protection of personal data, and second, because some of its provisions directly prohibit economic practices

expansion. Conversely, in a negative context, it can illustrate how economic downturns or crises can escalate when they affect different sectors of the economy and trigger a cascade of negative consequences.

[23] The "winner takes it all" principle in economics describes a situation in which the most successful or dominant player in a given market or industry collects most of the profits, while competitors receive relatively little. This may be due to network effects, economies of scale, or other factors that give the market leader a self-reinforcing advantage. As a result, the dominant company accumulates a disproportionately large market share, profits and influence, often leaving smaller competitors with limited opportunities to succeed or survive.

[24] For a more detailed list of positive and negative obligations set forth by the Digital Markets Act see: Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, article 5-6.

that in most cases have a negative impact on the right to the protection of personal data – a prime example being the prohibition of data hoarding.

4 Conclusion

New and innovative business models (such as multi-sided platforms) pose as yet unprecedented threats to the right to personal data protection. This is especially true for vulnerable social groups, such as children. These dangers can be addressed with instruments of social or economic regulation. In the latter case, the protection of the right to the protection of personal data is not the primary goal of regulation, but only a "by-product." Be that as it may, economic regulation can be particularly effective in protecting the right to the protection of personal data, as it imposes sanctions that are traditionally much stricter than those imposed by instruments of social regulation.

This paper analyzes two instruments of economic regulation that also consider data protection concerns: the decision of the Bundeskartellamt in the Facebook case and the Digital Markets Act. In the Facebook case, the Bundeskartellamt concluded that Facebook's practices, which collected a huge and disproportionate amount of users' personal data, constituted an abuse of market dominance because they were enabled by Facebook's ultra dominant market position – if users wanted to use social networks in Germany, they had to use the Facebook social network because there were no actual or even potential substitutes for it. The Facebook decision is noteworthy in that it makes an innovative and unprecedented connection between competition law and fundamental rights – according to it, abuse of a dominant position can also constitute a violation of a fundamental right (in this case, the right to protection of personal data) if that violation was made possible by the dominant position of the violating company. The decision has been appealed and is currently being considered by the Court of Justice of the European Union for a preliminary ruling. The Italian Competition Authority also sanctioned the same action by Facebook. However, the latter imposed a fine on Facebook because it violated consumer protection law, not competition law.

In addition, *ex ante* economic regulation tools can also be used to address privacy concerns; an important example is the recently adopted Digital Markets Act. This regulation imposes strict and non-negotiable positive and negative obligations that

companies designated as gatekeepers (with respect to the core platform services they control) must comply with. Although these obligations are primarily economic in nature, they also contribute to increased protection of personal data by limiting the economic power of gatekeepers and thus their ability to violate the right to the protection of personal data, and by prohibiting certain economic practices that traditionally lead to interference with the right to the protection of personal data.

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