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Preserving Consumers' Choice Online: Competition Law to the Rescue!

1. The importance of (consumer) choice

During the first classes of contract law, regardless whether in civil or common law jurisdictions, we draw the students' attention to the fundamental concepts of private autonomy, freedom of contract and will theory. Scholars, practitioners, policymakers may disagree on the scope of limitations that could be imposed on these principles, but their importance for contractual relationships is rarely contested.[1] Moreover, most of the European consumer protection framework has been introduced to preserve the consumers' right to make a choice, an informed choice as to what contract to conclude, if not on what conditions they would enter it.

Consumers are protected against unfair commercial practices, when these would lead them to make a transactional decision, a choice, which they would not have otherwise taken. Traders may not impose unfair terms on consumers, as this can mitigate the harsh reality of standardised, pre-drafted terms and conditions disposing consumers of a choice to shape their contractual rights and obligations. Mandatory information obligations aim to ensure that when consumers make a choice about a transaction, they do so in an informed manner. The right of withdrawal provides consumers with an additional choice whether to continue to be bound by a transaction. Consequently, consumer protection intends to guarantee that when consumers are making a transactional choice, they will do this under optimised conditions, being supported in the process. However, for consumers to even be able to make a transactional choice, the market has to present them with various options to select from. This is where competition law comes forth. By guarding against collusive conduct and the abuse of a dominant position, competition law measures ensure that there is a range of options available to consumers to choose from. Only then consumer law promotes the freedom of choice between these options.[2]

Consumer and competition law could, therefore, be seen as complementary to one another, at least when trying to protect the consumers' choice.[3] Interestingly, national authorities rely either on the consumer or competition law framework in enforcing this protection. For example, Germany does not have a central consumer protection authority, and may sooner rely on the competition law framework to solve consumer problems.[4] Only recently, the competences of the German Federal Cartel Office (*Bundeskartellamt*) have been extended to the area of consumer protection as well.[5] As below paragraphs will show, this may have led German authorities to protect consumers' choice online more explicitly through competition law measures. In the Netherlands, traditionally both consumer and competition law had their own protection framework. As of 2013, the consumer and competition authorities joined forces as the Authority for Consumers & Markets (*Autoriteit Consument & Markt, ACM*), but the consumer and competition departments remained separate within it. The protection of the consumers' freedom of choice online in the Netherlands may then be more naturally pursued through the use of consumer law measures, as the consumer departments of the ACM would look beyond the deficiencies of the market as a reason for the limitations of that choice.[6]

This editorial draws attention to the fact that the joint forces of the competition and consumer law framework may be necessary to protect consumers' choice online, which is threatened by the increased popularity of online transactions and by the use of algorithms online. The competition law framework could help protect consumers' choice, especially when consumer protection measures are missing or incomplete. This might, however, be easier to achieve in the Member States, where national authorities have the confidence and experience in merging these two protection systems.

2. (Lack of) choice online

Consumer choice may be more limited online due to two factors: the structure of the online market and the type of transactions concluded online. As mentioned above, competition law should ensure that the structure of the online marketplace leaves space for consumer choice and consumer law should protect that choice in the transac-

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1. For anyone willing to read more about these principles and their limitations see, eg Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"' (2000) Columbia Law Review 94–175.
2. See also Neil W Averitt and Robert H Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' (1997) 10 Loyola Consumer Law Review 44–63.
3. Ensuring consumer choice falls within the scope of protection of consumer welfare, which is an object of both competition and consumer law frameworks, although the understanding of consumer welfare may differ between them, see eg Kati Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3(2) The Competition Law Review 171–173.
4. This is especially the case when the trader holds a dominant position on the market, as the German Federal Cartel Office (*Bundeskartellamt*) may place special obligations on such traders also when they hold only a 'relative' or a 'superior' market power. Compare Article 102 TFEU and § 20 GWB (Gesetz gegen Wettbewerbsbeschränkungen). See further on the competences of the *Bundeskartellamt*, eg Hans-W Micklitz, 'Behördliche Rechtsdurchsetzung in Deutschland – Potenziale und Perspektiven für den Verbraucherschutz' in Hans Schulte-Nölke (ed), *Neue Wege zur Durchsetzung des Verbraucherrechts* (Springer 2017) 7–29.
5. See <https://www.bundeskartellamt.de/EN/Consumer_Protection/Consumer_Protection_node.html> accessed 11 November 2020.
6. See eg Annemieke Tuinstra, 'Consumenteninertie, mededinging en markttoezicht' (2018) I(6) Markt & Mededinging 241; Martien Schaub, 'Verwaltungsrechtliche Durchsetzung von Verbraucherrechten in den Niederlanden' in Hans Schulte-Nölke (ed), *Neue Wege zur Durchsetzung des Verbraucherrechts* (Springer 2017) 85–92.

tions concluded online. Reality may, however, be different.

First, on the market of digital consumer goods and services there is a clear dominance of the Big Tech companies, irrespective whether we think of Big Four (GAFA)[7] or Big Five (with the addition of Microsoft).[8] Consumers may still avoid acquiring any goods or services from these information technology giants, but that requires a lot of conscious and careful decision-making from consumers. And let us be honest, consumers are not best known for careful and conscious decision-making, regardless of what the average consumer benchmark would have us believe. Furthermore, rejecting digital goods and services from Big Tech companies may lead to consumers' exclusion either from the digital marketplace or specific social spheres. Imagine giving up on all social media interactions. Whilst there are some benefits of such a decision, there are also downsides. For example, unless your family and friends share your discontent with such services or are exceptionally diligent at sharing their events and other news via old-fashioned means, as well as social networks, you may miss out on specific social happenings. Research showed you may also be less aware of political news.[9] Can we then really talk about consumer choice online if there is a clear market and societal preference for users of specific digital goods and services? It seems implausible that consumer protection framework could address this issue as fair commercial practices might also evoke such pressures on consumer choice.[10] Competition law rules are more suited to tackle the dominance of the Big Five companies,[11] which will be further discussed in the following paragraph.

Second, online transactions as a type of contracts concluded at a distance have particular traits that put consumers at a disadvantage, such as the lack of an opportunity to assess the quality of the purchased goods or confirm the identity of an online trader. The Consumer Rights Directive[12] addresses these issues by awarding consumers with the right of withdrawal and information rights. However, this protection framework has gaps regarding consumers' signing up for digital services or digital content, where they relinquish their right of withdrawal to receive an immediate access to such digital services or content.[13] The new Modernisation Directive introduces new rules pursuant to which consumers will retain a cooling-off period in a contract for the supply of digital services, but not for the supply of digital content, if they explicitly consented to lose the right of withdrawal and if they paid a price for such digital content.[14] These new provisions should widen the consumers' choice in online transactions, as they recognise the applicability of the right of withdrawal in more situations. However, as it is not always easy to differentiate between contracts for the supply of digital services and digital content, they may also contribute to further uncertainty by introducing such an important consequence to the distinction between them. To give an example, when a consumer has a subscription to an online gaming server, joining an online gaming session, which would require streaming of the video and audio content, would likely be perceived as a provision of a digital service, even if the consumer did this only once and logged out within a few minutes. The consumer could then use the right of withdrawal. However, if the same online gaming server allowed a direct download of a game to the consumer's computer, this would likely be seen as a supply of digital content, even if the consumer downloads many games over a period of time.[15] Consumers could then explicitly consent to lose their right of withdrawal.

Despite these consumer protection safeguards, however, research indicates that due to online traders and service providers applying various technologies to influence consumer behaviour online, they may influence or even take away consumer choices.[16] The online environment has proven particularly susceptible to the application of various persuasion techniques, which consumers are often not even aware of. European stakeholders recognise this issue, but have yet to address it, perhaps through the forthcoming Digital Markets Act.[17] The attempt of the Modernisation Directive to require online search engines revealing how they rank the search results, is just the first

7. Google, Amazon, Facebook and Apple.
8. See eg Conor Sen, 'The "Big Five" Could Destroy the Tech Ecosystem' (*Bloomberg* 15 November 2017) <https://www.bloomberg.com/opinion/articles/2017-11-15/the-big-five-could-destroy-the-tech-ecosystem>; Rana Foroohar, 'Big Tech collaborates to conquer' *Financial Times* (London, 25 October 2020) <https://www.ft.com/content/eacb3e89-59fa-4251-bc5c-8137774022c2> accessed 11 November 2020.
9. See eg Benedict Carey, 'This Is Your Brain Off Facebook' *The New York Times* (New York, 30 January 2019) <https://www.nytimes.com/2019/01/30/health/facebook-psychology-health.html> accessed 11 November 2020.
10. Unless we re-define what we consider as 'fair' in the online environment.
11. On the application of Article 102 TFUE prohibiting the abuse of a dominant position on the market with the consumer welfare in mind see eg Pinar Akman, 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29(2) Oxford Journal of Legal Studies 267–303.
12. Directive 2011/83/EU of the European Parliament and of the Council on consumer rights [2011] OJ L304/64.
13. Pursuant to Article 16(a) and (m) Consumer Rights Directive.
14. Recitals 30 and 38 Directive (EU) 2019/2161 of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7 (Modernisation Directive).
15. See as to the difference between single and continuous acts of supply in Recital 30 Modernisation Directive.
16. See eg Eliza Mik, 'The erosion of autonomy in online consumer transactions' (2016) 8 Law, Innovation and Technology 1-38; Agnieszka Jabłonowska et al, 'Consumer law and artificial intelligence. Challenges to the EU consumer law and policy stemming from the business' use of artificial intelligence' (EUI Working Papers LAW 2018/11) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228051> accessed 11 November 2020.
17. See eg European Parliament, 'The EU must set the standards for regulating online platforms, say MEPs' (Press release 20 October 2020) <https://www.europarl.europa.eu/news/en/press-room/20201016IPR89543/digital-eu-must-set-the-standards-for-regulating-online-platforms-say-meps> accessed 11 November 2020. See also Article 5(a) of the proposal for a Digital Markets Act, COM(2020) 842 final <https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf> accessed 5 January 2021. This newly proposed provision could address some of the issues outlined in the following part of this editorial.

step here.[18] In the meantime European consumer law seems to lack proper instruments to protect consumer choice online. Could anything else be done?

3. Competition law to the rescue!

On June 23 2020 the German Federal Supreme Court (*Bundesgerichtshof*, *BGH*) issued a decision in interim proceedings started by the *Bundeskartellamt* against Facebook.[19] After a three-year investigation against Facebook the *Bundeskartellamt* decided that the social network giant exploited consumers by collecting and processing their data, without obtaining the explicit consent from users for these practices.[20] Their decision was overturned by the Higher Regional Court (*Oberlandesgericht*) in Düsseldorf,[21] and the decision was then reviewed by the BGH. Importantly for the purposes of this editorial, in its review, the BGH commented on the choice that consumers should be offered online.[22]

What the BGH took into account was the fact that major online service providers, and in this case specifically Facebook, use big data to personalise the online experience of internet users. In order to do so, they ask for the users' consent to collect and process their data, including personal data, following also the rules of the GDPR.[23] However, the users' consent could be framed in different ways. A narrow consent would enable an online service provider to collect and process the users' data as shared directly with that service provider whilst its services are being used. A broader consent would also facilitate the collection of the data shared elsewhere online, which obviously may be more worrying to users interested in protecting their privacy.

As Facebook claims in their terms and conditions, they collect the users' data not only from the data directly shared on their social network, but also from elsewhere online (off-Facebook data), in order to facilitate a personalised experience to their users.[24] Such a practice could, pursuant to the BGH, qualify as an abuse of the dominant position on the market.[25] The abuse of the dominant position would come from the lack of a real and free choice offered to the users of Facebook to decide to what extent they would want their data to be collected and processed. Interestingly, OLG Düsseldorf previously argued that Facebook users retained control over their data, as they could balance the benefits of joining free of charge a social network such as Facebook with the detriments of having to sponsor its business by sharing their data with advertisers of Facebook. Internet users could make this choice, pursuant to OLG Düsseldorf, 'uninfluenced' and 'completely autonomous', according to their personal preferences and values.[26]

BGH indirectly contests such an assessment. Namely, in its decision the BGH focuses on the 'take-it-or-leave-it' approach of Facebook. Facebook's commercial model does not offer its users the option to keep using this big social network and try to protect their data, or at least such data that is not required to operate and finance the social network. This follows from the fact that the personalised experience on Facebook is not optional for its users.[27] BGH considers, therefore, that Facebook provides to its users its services in a way resembling tying of services, which practice may often result in unfair competition on the market. Facebook couples a standard social network experience with the additional personalised service. Consequently, Facebook does not give its users the choice to allow Facebook to only process their data shared on Facebook and receive the standard service, or to collect all their data Facebook could access elsewhere online and personalise their experience.[28] What also needs to be kept in mind is that services such as offered by Facebook, i.e. social networks, create a lock-in effect for their users.[29]

BGH decides then that the fact that Facebook users consented to the sharing of data in order to access the social network is meaningless if there is no 'real or free' choice given to them in receiving the service without also sharing all their data.[30] That real and free choice could be more easily found if Facebook users could determine to what extent they wanted to share their personal data with Facebook, as long as the limitations would not lock them out of Facebook's services, but rather just lead to them being offered a different type of experiences on the social network.

18. This will be regulated by the new Article 6a Consumer Rights Directive, but also by Article 7(4a) Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market.
19. Decision of 23 June 2020, KVR 69/19.
20. See further on the decision of the *Bundeskartellamt* eg: Rupprecht Podszun, 'Die Facebook-Entscheidung: Erste Gedanken von Podszun' (8 February 2019) <https://www.d-kart.de/blog/2019/02/08/die-facebook-entscheidung-erste-gedanken-von-podszun/>; Justus Haucap, 'The Facebook Decision: First Thoughts by Haucap' (7 February 2019) <https://www.d-kart.de/blog/2019/02/07/the-facebook-decision-first-thoughts-by-haucap/> accessed 11 November 2020; Inge Graef, 'Naar een meer samenhangend mededingings- en gegevensbeschermings-toezicht in datagedreven markten' (2018) 2(3) Tijdschrift voor Toezicht 38-39; Anouk Focquet and Julie van Pée, 'Gegevensbescherming en mededinging: een artificieel of intelligent huwelijk?' (2019) 3 Tijdschrift Privacy & Persoonsgegevens 17–23.
21. OLG Düsseldorf 26 August 2019, Kart 1/19 (V) <https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2019/Kart_1_19_V_Beschluss_20190826.html> accessed 11 November 2020.
22. As to the comments on the decision as a whole see eg Rupprecht Podszun, 'Facebook Case: The Reasoning' (28 August 2020) <https://www.d-kart.de/en/blog/2020/08/28/facebook-case-the-reasoning/> accessed 11 November 2020.
23. Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to processing of personal data and on the free movement of such data [2016] OJ L119/1 (General Data Protection Regulation, GDPR).
24. Eg from data shared on WhatsApp, Oculus, Masquerade, or Instagram apps, see decision of 23 June 2020, KVR 69/19, para 6.
25. ibid, paras 4-5, 53.
26. ibid, para 57.
27. ibid, para 58.
28. ibid, paras 58 and 86.
29. ibid, para 123.
30. ibid, paras 120–21, 131.

Competition law may, therefore, help protect consumer choice online.[31] There is a limitation to the scope of this protection, though. First, it may be easier to invoke in countries like Germany, where it is a common practice to apply the competition law framework in the enforcement of consumer protection. However, if the consumer protection framework continues to underestimate the risks that the online environment brings about, both European and national enforcement authorities may more frequently look to the neighbouring area of competition law.[32] Second, the outlined protection will only apply when an online service provider holds a dominant position on the market. Only then could we expect them to adjust their business models, as dominance brings with it special obligations for undertakings. As such dominant online service providers will be more likely to significantly impact the choice consumers have on the online marketplace, the role that competition law tribunals and courts play in consumer protection in the coming years is worth paying attention to.

The last thing to mention is that the recent Digital Content and Digital Services Directive[33] in its Article 19(1) stipulates that digital service providers who provide digital services over a period of time, such as Facebook, can only modify their services if certain conditions are fulfilled. One of these conditions is that the modification does not bring an additional cost to consumers. In the given case, when during the performance of the contract Facebook decided to start collecting off-Facebook data of their users, to which data collection users have not consented at the moment of the contract's conclusion, we could question whether such a modification brings with it an additional cost to consumers. If yes, then the new provisions of European consumer law may also provide here an obligation for Facebook to conclude a new contract with their users for the provision of a personalised experience. Consequently, European consumer law may soon explicitly regulate the issue that the German courts chose to resolve through the application of competition law at the moment. This again seems to indicate a complementary character of these two areas of law.

31. This editorial illustrates only one scenario where this could be the case.
32. Eg in the past years the European Commission has issued many decisions on the infringements of antitrust law by the Big Five, most recently against Amazon, see 'Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' (Press release 10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 11 November 2020.
33. Directive (EU) 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.