

Data Governance, Innovation and Competition Policy

Prof. Dr. Wolfgang Kerber

(University of Marburg)

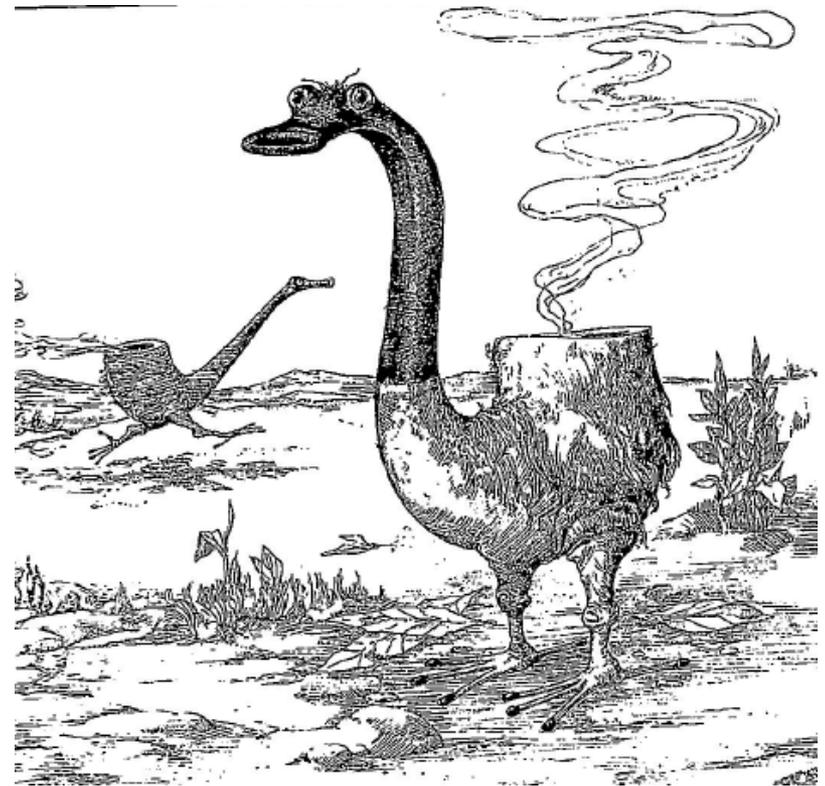
Intellectual Property for the European Union
in a World of Challenges

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1. Introduction

- Data is a key resource in digital economy
- but data is also a strange animal ...
 - + ... for the law
 - + ... and for economics
- How to deal with data?
 - + data ownership / data sharing / data access / open data
 - + what data governance do we need? (set of legal rules / rights on data)
- different perspectives on data:
 - + innovation and IP perspective
 - + competition policy perspective
 - + privacy / data protection / consumer policy



(Kurt Halbritter: Halbritters Tier- und Pflanzenwelt, Hanser: München 1975, p. 21: "Kurzfüßiger Pfeifenraucher")

2. Data from an innovation and IP perspective (1)

- Why do we not have property rights on data?
 - + personal data (GDPR): data subjects have bundle of rights (also for excluding others, but only in a limited way)
 - + non-personal data: no exclusive rights (perhaps trade secret protected)
 - + Do we need an IP-like exclusive right on data?
- economic characteristics of data:
 - + non-rivalrous in use
 - + but: excludability (can be kept secret; no general copying problem)
 - => broad consensus that no "protection" of data through an exclusive right
- but non-rivalry of data: => data should be used as much as possible
 - => discussion on more data sharing/data access/open data, esp. for innovation (Communication "Building a European data economy")

2. Data from an innovation and IP perspective (2)

- however: problem of incentives for collecting/investing into (high quality of) data remains (but: costs might be very small or large)
- incentive problem is solved by (exclusive) **"de facto control of data"**
 - + i.e. mandatory sharing of / access to data can endanger these incentives
 - + "de facto control" of data has a similar role that usually IP rights have
- but positions of exclusive "de facto control" of data can lead to problems:
 - + "underuse" of data (data silos etc.) => less efficiency and innovation
 - + access to certain data sets might be important for market entry and competition, i.e. refusal to grant access can be used for foreclosing competitors and leveraging market power to other markets
 - + in complex IoT-ecosystems with many stakeholders who contribute to the production of data and/or need these data for creating/offering valuable services, the exclusive "de facto control" of the data by one (!) stakeholder might not be an efficient solution for the governance of these data
- necessary: more sophisticated data governance solutions that solve the complex trade off problems

2. Data from an innovation and IP perspective (3)

Data from an innovation policy perspective:

- discussion much more about data sharing than "protecting" data
- Open data
- Opening of publicly held data (PSI: public sector information)
- Opening of privately held data
 - + Facilitating voluntary sharing / trading / pooling of privately held data
 - > (e.g., facilitating data-sharing agreements / data pools in competition law with regard to Art. 101 TFEU)
 - + mandatory data-sharing / data access
 - > (e.g., anonymised data sets for AI applications)
- but important: data production incentives, compliance with GDPR
- Example: PSD2: opening of bank account data for innovative payment service providers (Fintech, Open Banking) => innovation policy

3. Data from a competition policy perspective (1)

Recent discussion on challenges of digital economy for competition law

- Reports:
 - > Schweitzer/Haucap/Kerber/Welker (2018):
Modernising the law on abuse of market power (German report)
 - > Crémer/de Montjoye/Schweitzer (2019):
Competition policy for the digital era (EU report)
 - > Furman et al (2019): Unlocking digital competition (UK report)
- broad consensus: large digital platforms have "entrenched" positions of market power that cannot be challenged and threaten competition and innovation
- important: huge amount of accumulated data / control of data as competitive advantage of large digital platforms and entry barrier
- Current policy question:
 - + What to do about the market power of large digital platforms?
 - + Is current competition law (with its ex-post control of abusive behavior) capable of dealing with it or is it necessary to introduce also ex-ante regulation of large digital platforms? (see also Comm, A European strategy for data, p.14)

3. Data from a competition policy perspective (2)

Separate discussion about data access problems in digital IoT ecosystems

- "Internet of Things" (IoT): connected smart devices collecting/producing data
 - + examples: connected cars, smart home applications, smart agriculture etc.
- Manufacturer of a connected device often has exclusive control of the
 - (1) data produced with the device and
 - (2) technical access to the device (closed system / no interoperability)
- Problem: this can lead to
 - + a monopolistic gatekeeper position to an IoT ecosystem
 - + data access / interoperability problems for users/firms in the ecosystem,
 - + danger of leveraging market power to all (secondary)markets for aftermarket and complementary services that need access to data and/or device,
 - + and therefore to less competition, innovation, and consumer choice
- German and EU report have seen this as an important separate case group, in which competition law might help to solve these problems for competition and innovation through granting data access to independent service providers

3. Data from a competition policy perspective (3)

Example: Access to in-vehicle data and resources in connected cars (Kerber 2018)

- ecosystem of connected driving with many new services and firms
- "extended vehicle" concept: all in-vehicle data are directly transmitted to proprietary servers of vehicle manufacturers leading to their exclusive de facto control of all data and technical access to the vehicle (gatekeeper position in ecosystem)
- enables foreclosure of independent service providers and leveraging of market power to all secondary markets within the ecosystem that need access to in-vehicle data and/or the vehicle
- question of access of indep. service providers to the data (also in real-time) and the vehicle for enabling competition and innovation (!) both on aftermarkets and the many new markets for complementary services in the connected car
- since 2016 policy proposals for either a "shared server" solution or "open interoperable telematic systems" that would eliminate gatekeeper position (TRL 2017)
- this is an open unsolved policy problem that the Commission has acknowledged but not so far no serious attempt to solving it

3. Data from a competition policy perspective (4)

General discussion how to solve data access problems in competition law

- entrenched market power of digital platforms due to accumulated data:
 - + (radical) proposals of mandating data-sharing with direct competitors
- EU/German report: refusal to grant access to data as abusive behavior (Art. 102)
 - + application of essential facility doctrine to data (more flexibly applicable)
 - + based upon foreclosing competitors and leveraging market power
 - + German report: recommends additionally facilitation of data access also for firms that are bilaterally dependent on a firm that exclusively controls data (relative market power) (dependency: a firm has not sufficient and reasonable possibilities of switching to other firms / "unequal bargaining power" problem)
 - + but always: balancing of effects according to number of criteria
- Furman report (UK): skeptical about ex-post control of abusive behavior
 - + proposal of a "digital market unit" with ex-ante regulatory powers for more data mobility, opening data, and more interoperability, esp. also for digital firms with "strategic market status" (in addition to traditional competition law)

3. Data from a competition policy perspective (5)

Draft proposal for 10th amendment of German competition law (24 Jan 2020)

- one important objective: facilitating access to data
- refusal to grant access to data as abusive behavior of a
 - + dominant firm (§ 19 GWB)
 - > § 19 (2) No.4 GWB/RefE: essential facility doctrine extended also to data
 - + firm with relative market power (§ 20 (1) GWB)
 - > abolishment of limitation to SMEs in § 20 (1) GWB
 - > new § 20 (1a) GWB/RefE: "data dependency"
 - “(1a) A dependency ... can also exist if an undertaking for its own business activities needs access to data, which are controlled by another undertaking ... ”
- § 19a GWB/RefE: new additional type of control of abusive behavior for firms with a paramount significance for competition across markets ("überragende marktübergreifende Bedeutung für den Wettbewerb") (inspired by Furman report)
 - + e.g., German competition authority could prohibit measures of these firms that would impede competition by making interoperability and data portability more difficult (§ 19 (2) No. 4 GWB/RefE)

3. Data from a competition policy perspective (6)

To what extent might competition law be capable of solving the data access / data sharing problems?

- so far nearly no case practice but consensus that much more is possible
- both on EU and MS level good chances that at least some of the data access problems can be solved by competition law
- much is unclear, development of case groups difficult, and depending on activities of legislators and/or competition authorities

But: there is already a basic consensus about criteria for balancing the interests of data-holding firms and data claimants that can be used:

- benefits of data access for competition and innovation
- incentives for investing in (high quality of) data
- compensation for data access
- participation of other stakeholders in the production of data
- taking into account data protection law and business secrets
- important: differentiation between different kinds of data

3. Data from a competition policy perspective (7)

But broad consensus in data sharing/access discussion that competition law is only one policy instrument for solving data governance problems:

- **competition law**
- **contract law / unfair trading law** (unequal bargaining power)
- **data portability right** (Art. 20 GDPR)
 - + much discussed as potential solution but so far not effective due to unclear scope, no real-time data, large transaction costs etc.
 - > (problem acknowledged in Comm. A European strategy for data, p.10)
 - + many ideas about extending data portability right, e.g. through combining it with competition law (e.g. draft proposal German competition law; Kommission Wettbewerbsrecht 4.0: ex-ante regulation of dominant platforms regarding real-time data portability and interoperability)
- **direct data access rights** (MPI 2017, Drexl 2018)
- **sector-specific regulatory solutions**

3. Data from a competition policy perspective (8)

Sector-specific data governance regimes I:

- sector-specific regulatory regime allows for much better tailored solutions who should control data, have access to what kinds of data, under what conditions
 - regulatory approach allows for setting ex-ante rules (instead of ex-post control)
 - integrated solution with common data formats, technological access to/ portability of data (e.g., APIs), minimum standards for (cyber)security, but also model contracts for data access, rules about fair fees etc.
 - Example PSD2 (second payment services directive):
 - + regulation of access to bank account data
 - + technological regulation about access to the account
 - + security regulation (authentication plus certification solution for service prov.)
 - + regulation of access fees (here: no fees)
- => well-functioning data access regime might need a broad regulatory approach

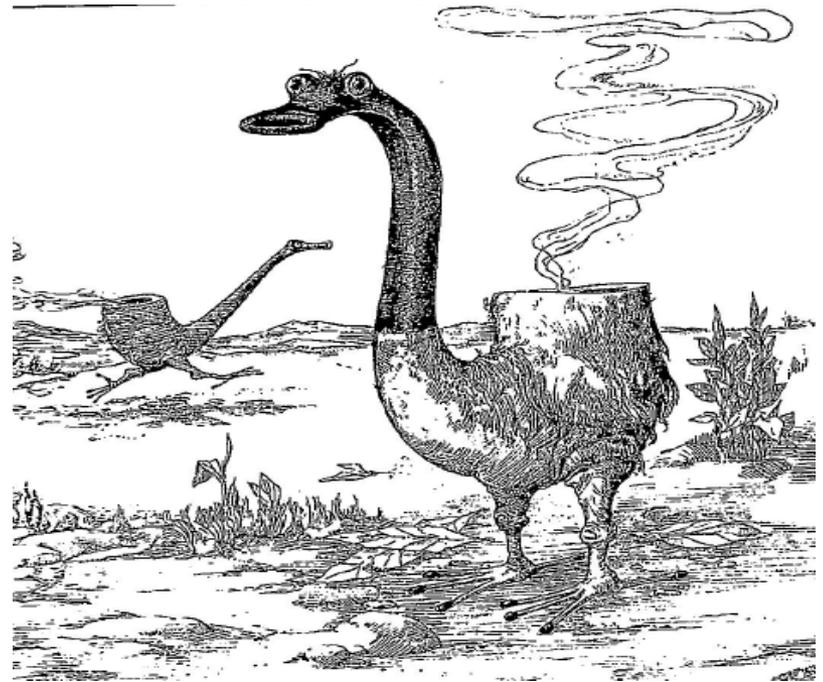
3. Data from a competition policy perspective (9)

Sector-specific data governance regimes II: Data in connected cars

- Old regime for access to essential technical information for repair/maintenance services (RMI): Type approval Reg. 715/2007 (updated in 2018: Reg. 2018/858)
- Design of this sector-specific access regulation:
 - + FRAND-like: non-discriminatory, reasonable fees, standardized format etc.
 - + also technological regulation: OBD-Adapter w. certain sets of diagnostic data
 - + solutions for security-relevant parts of the car: certification of indep. repairers
- Problem: also the new Reg. 2018/858 is not capable of solving access and interoperability problems for indep. service providers after transition to connected cars (problem of remote access) (Kerber/Gill 2019)
- Solution requires a far-reaching sector-specific regulatory solution that eliminates the gatekeeper position of vehicle manufacturers
- planned new reform of type approval regulation is an opportunity for solving this problem (see Comm. A European strategy for data, p.28)
- Option: Extending this sector-specific access regime for RMI to all data that are necessary for ind. service prov. and standardization of interfaces in ecosystem

4. Towards a better framework for data governance

- optimal data governance solutions are difficult due to different types of data and different conditions
=> many different strange animals!
- but we have a framework of criteria that can be used for developing proper data governance solutions, esp. in digital ecosystems, ...
- and we have a set of legal instruments that we can develop ...



Not analyzed here: data from a privacy / data protection / consumer law perspective

- many open questions: data protection through GDPR might not be good enough
- new discussion how to strengthen the data sovereignty of individual persons
 - + Personal information management services / privacy management tools / new data trustee solutions (German Datenethikkommission, Kommission Wettbewerbsrecht 4.0; also in Communication, A European strategy for data, p.10)