

CONSUMER SOVEREIGNTY AND COMPETITION LAW: FROM PERSONALIZATION TO DIVERSITY

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Abstract

Data-driven technologies provide businesses with ever stronger abilities to engage in behavioural manipulation, steer consumer preferences, and exploit individual vulnerabilities. The article argues that competition law needs to give more prominence to consumer sovereignty and consumers' freedom of choice in response to the rise in personalized forms of consumer exploitation by dominant firms, whose harm goes beyond the scope of the remedies offered by data protection and consumer law. Analysing the scope to establish exploitative abuses under Article 102 TFEU, the article discusses how personalization challenges current competition concepts, and submits that competition analysis needs to be adapted at the stage of assessing abuse to address competitive harm from personalization. The article proposes recognizing "personalized exploitation" as abuse of dominance by incorporating dynamic consumer vulnerabilities into the competition analysis and by assessing anticompetitive effects against a "personalized welfare standard" of those exploited instead of against the overall consumer welfare.

1. Introduction

Personalization is changing the functioning of markets. On the supply side, firms can closely monitor consumers' behaviour by using online tracking methods to detect individual preferences.¹ This reduces market uncertainty, which has always been regarded as a main driver of competition. On the demand side, it is well established that consumers suffer from behavioural biases that can now be exploited more effectively than ever.² Technological

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1. Ezrachi and Stucke, *Virtual Competition. The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016), pp. 35–81.

2. Tversky and Kahneman, "Judgment under uncertainty: Heuristics and biases", 185 *Science* (1974), 1124–1131; Kahneman and Tversky, "Prospect theory: An analysis of decision under risk", 47 *Econometrica* (1979), 263–292; Kahneman, "New challenges to the rationality assumption", 150 *Journal of Institutional and Theoretical Economics* (1994), 18–36.

developments such as data analytics allow firms to personalize services to our benefit, but also to take advantage of our 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.³ By relying on data analytics, businesses can profile individual consumers and manipulate their preferences based on five personality traits that can be predicted from seemingly few pieces of information.⁴ Another example is the way businesses can take advantage of information about typing patterns on a computer keyboard which indicate a person's confidence, nervousness, sadness, or tiredness.⁵ "Hypernudging" occurs when a choice architecture is shaped in an effort to channel a consumer's attention and decision-making in directions beneficial to a business.⁶

This article focuses on situations of personal vulnerability that take place when consumers lose control over their choices and enter into transactions they would not have accepted otherwise or not under the conditions offered at that moment. Although such forms of consumer persuasion have always existed, the pervasiveness and accuracy of current targeting methods bring the issues they raise to a new level. How market players can exploit the cognitive limitations of consumers has been analysed before and was dubbed "market manipulation"⁷ or "digital market manipulation"⁸ in the context of a marketplace mediated by technology where consumers can be targeted at the individual level. For this reason, the present article does not study the phenomenon of market manipulation or personalization as such, but starts from the premise that these practices will continue to become more prominent due to the ever-expanding possibilities new technologies offer to exploit behavioural biases, as the above-mentioned examples indicate. While influential policy reports have discussed how competition law should evolve

3. Vedantam, "This is your brain on Uber", *National Public Radio*, 17 May 2016 <www.npr.org/2016/05/17/478266839/this-is-your-brain-on-uber?t=1542276288533> (all websites last visited 17 Jan. 2021).

4. Referred to as the OCEAN, Big Five or five-factor model, including openness, conscientiousness, extroversion, agreeableness, and neuroticism. See European Data Protection Supervisor, "Opinion 3/2018 on online manipulation and personal data", 19 March 2018, at 8 and footnote 34.

5. *Ibid.*, at 8.

6. Yeung, "'Hypernudge': Big data as a mode of regulation by design", 20 *Information, Communication & Society* (2017), 118–136.

7. Hanson and Kysar, "Taking behavioralism seriously: The problem of market manipulation", 74 *New York University Law Review* (1999), 630–749.

8. Calo, "Digital market manipulation", 82 *George Washington Law Review* (2014), 995–1051.

for the digital era,⁹ the fundamental changes personalization brings to the competitive process and the consequences this has for the application of competition law have so far been rather underexplored.

The article analyses personalization from the perspective of exploitative abuses under Article 102 TFEU, and focuses on personalized pricing, where prices are based on individual consumers' profiles and willingness to pay, and behavioural manipulation in the form of undue influence and steering of consumer preferences.¹⁰ The objective of the analysis is to explore when these forms of "personalized exploitation" would require a competition intervention. Although literature has explored how competition law can be applied to exploitative abuses in the data economy, the focus has mainly been on the excessive extraction of data and the imposition of unfair contract terms.¹¹ In addition, issues of personalized pricing¹² and, to a more limited extent, behavioural manipulation¹³ have been discussed, but not from the perspective of the role of consumer sovereignty in competition law and the exploitation of consumer vulnerabilities that this article analyses.¹⁴

9. See UK Digital Competition Expert Panel, "Unlocking digital competition", March 2019, <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>; Cr mer, De Montjoye and Schweitzer, "Competition policy for the digital era", April 2019, <ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; Stigler Committee on Digital Platforms, Sept. 2019, <research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E>.

10. As described 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), at 1456: "Personalized ads could be used to exploit people's weaknesses or to charge people higher prices".

11. For a detailed analysis of these two practices, see Robertson, "Excessive data collection: Privacy considerations and abuse of dominance in the era of big data", 57 CML Rev. (2020), 161–190.

12. See e.g. Botta and Wiedemann, "To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance", (2019) *European Journal of Law and Economics*; Economides and Lianos, "Restrictions on privacy and exploitation in the digital economy: A market failure perspective", NET Institute Working Paper No. #20-05, 42–46 (forthcoming in *Journal of Competition Law and Economics*), <papers.ssrn.com/sol3/papers.cfm?abstract_id=3686785>; Graef, "Algorithms and fairness: What role for competition law in targeting price discrimination towards end consumers?", 24 CJEL (2018), 541–559; Townley, Morrison and Yeung, "Big data and personalized price discrimination in EU competition law", 36 YEL (2017), 683–748.

13. See in particular Economides and Lianos, op. cit. previous footnote, 59–63.

14. An exception analysing nudging from a competition law perspective is Zingales, "Antitrust intent in an age of algorithmic nudging", 7 *Journal of Antitrust Enforcement* (2019), 386–418. However, the focus of his analysis is on practices of self-preferencing, whereby a dominant firm displays its own services more prominently to consumers than those of competitors. This qualifies as exclusionary abuse, whereas the market manipulation discussed in this article concerns direct exploitation of consumers. In addition, Fish and Gal consider

The key message of the article 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, whose harm goes beyond the scope of the remedies that data protection and consumer law offer. Even though the mechanisms of personalization through which consumers can be exploited are new, the harm is arguably the same as in the more traditional scenarios where the consumer surplus shifts to the dominant firm due to the exploitation of consumers who are locked-in. For this reason, enforcement actions against personalized exploitation under competition law would not be out of place.

The article contributes to the state of the art in academic and policy debates by exploring how to assess personalized exploitation under competition law. Although data protection and consumer law also offer protection against personalized exploitation, the article 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 article 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. In other words, subsidization with non-affected consumers at the level of the overall market cannot remove the concerns competition intervention against personalized exploitation aims to address. 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.

whether and how competition law can be applied to promote diversity of exposure and state that "diversity of exposure remains a blind spot as far as competition law is concerned". The present article, however, does not analyse competition law's role in proactively creating diversity of exposure but focuses on how manipulation can restrict consumer choice and extent to which this should lead to competition liability. See Fish and Gal, "Echo chambers and competition law: Should algorithmic choices be respected?", in Charbit and Ahmad (Eds.), *Frederic Jenny Liber Amicorum: Standing Up for Convergence and Relevance in Antitrust*, Vol. II (Concurrences, forthcoming, 2020), p. 6, <papers.ssrn.com/sol3/papers.cfm?abstract_id=3555124>.

The article is structured as follows. Section 2 traces the origins of the notion of consumer sovereignty and discusses its potential as a more prominent objective of competition law, as a starting point for effective protection against the rise of individualized forms of consumer exploitation by dominant firms. Section 3 applies insights from the case law on excessive pricing and unfair contract terms to the issue of personalized exploitation and draws insights from earlier reflections in literature on personalized pricing to develop a legal test for assessing under what conditions behavioural manipulation would violate Article 102 TFEU. Section 4 explores from a conceptual perspective how to recognize and remedy personalized exploitation as abuse of dominance. Section 5 concludes.

2. Towards an increased role for consumer sovereignty in competition law

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 consumer”.¹⁵ In line with Adam Smith’s beliefs, it is in a free market economy that consumer sovereignty is strongest and consumers have the freedom as well as the ability to choose the products that best match their demand. This section traces the origins of the notion of consumer sovereignty and reflects on its role in the current context where take-it-or-leave-it offers often dominate the market.

2.1. Origins of consumer sovereignty

While Adam Smith regarded the notion of consumer sovereignty as an ideal, Austrian economists such as Schumpeter, Von Mises, and Von Hayek, translated the concept into a vision where consumers in “free” markets were seen as the actual sovereigns. They believed that by allowing free choice, markets were perfect democracies and consumers were the sovereigns as long as the State supported the primacy of the consumer.¹⁶ William Harold Hutt is the member of the Austrian School of Economics who is argued to have been the first to coin the term “consumer sovereignty” in his 1936 book *Economists and the Public: A Study of Competition and Opinion*. He stated that: “The consumer is sovereign when, in his role of citizen, he has not delegated to

15. Smith, *The Wealth of Nations* (1776).

16. Schwarzkopf, “The political theology of consumer sovereignty: Towards an ontology of consumer society”, 28 *Theory, Culture & Society* (2011), at 115.

political institutions for authoritarian use the power which he can exercise socially through his power to demand or (refrain from demanding).”¹⁷ The main objective behind consumer sovereignty for Hutt was to promote political and social stability. While freedom of choice for consumers may lead to stability as well as efficiency, his argument was not so much concerned with maximizing consumer welfare or market efficiency.¹⁸

Ludwig von Mises, who also formed part of the Austrian School, took up this notion of consumer sovereignty in his 1951 work *Profit and Loss* and stressed the primacy of consumer preferences in the production of goods and services: “In the capitalist system of society’s economic organization the entrepreneurs determine the course of production. In the performance of this function they are unconditionally and totally subject to the sovereignty of the buying public, the consumers.”¹⁹ By buying and abstaining from buying, consumers “elect the entrepreneurs in a daily repeated plebiscite, as it were. They determine who shall own and who shall not, and how much each owner should own”.²⁰ Compared to Von Mises’ ideas about consumer sovereignty, one can argue that Hutt’s interpretation goes further through its insistence on ensuring equality. Von Mises, but also other members of the Austrian School, including Von Hayek, put more emphasis on the freedom of the entrepreneur than on the need for a democratic political economy.²¹

Despite it thus having originated from political considerations about democratic values, the concept of consumer sovereignty through the work of the Austrian School has become instrumental in economic thinking about the means to maximize consumer welfare and market efficiency.²² The notion of consumer sovereignty has also entered competition policy debates. Averitt and Lande have 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

17. Hutt, *Economists and the Public: A Study of Competition and Opinion*, (J. Cape, 1936), p. 257.

18. Persky, “Retrospectives: Consumer sovereignty”, 7 *The Journal of Economic Perspectives* (1993), at 185 and 188.

19. Von Mises, *Profit and Loss* (1951).

20. *Ibid.*

21. Persky, “Consumer sovereignty and the discipline of the market”, 31 *Revue européenne des sciences sociales* (1993), 25–27.

22. See e.g. Waldfogel, “Does consumer irrationality trump consumer sovereignty?”, 87 *Review of Economics and Statistics* (2005), at 691.

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”.²³ Interestingly, this distinction becomes blurred for the practices of personalized exploitation analysed in this article, because it is the concentrated nature of markets that strengthens the ability of dominant firms to manipulate consumers’ internal decision-making process.

2.2. *Consumer choice and consumer sovereignty in competition law*

Averitt and Lande describe consumer sovereignty 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”.²⁴ In this regard, the exercise of choice lies at the heart of consumer sovereignty. As formulated by Averitt and Lande, “consumers satisfy their own wants and send their signals to the economy” by choosing some goods over others.²⁵ From an EU perspective, Nihoul has also pointed to the central role choice plays in competition enforcement by exploring its prominence in decisions of the European Commission and judgments of the EU courts. Nihoul defines the concept of choice as “the possibility, and the right, for customers, to choose freely the products/services best corresponding to their needs, and the economic partners they want to deal with”.²⁶

When considering how to protect non-price competition through the notion of choice, a number of observations must be made. While competition law can be argued to protect the availability of choice in the market, it does not require the number of options to be maximized or new options to be proactively created. Instead, competition law is concerned with business conduct that artificially *reduces* the range of options that would otherwise have been available in the market. At the same time, not every reduction in choice necessarily raises competition concerns. In the words of Averitt and Lande, competition law aims “to preserve a sufficient, although not a perfect, array of choice for consumers”²⁷ and prohibits “business conduct that harmfully and significantly limits the range of choices that the free market” would have

23. Averitt and Lande, “Consumer sovereignty: A unified theory of antitrust and consumer protection law”, 65 *Antitrust Law Journal* (1997), 713–714.

24. *Ibid.*, at 716.

25. *Ibid.*

26. Nihoul, “Freedom of Choice: The emergence of a powerful concept in European competition law”, 3 *Concurrences* (2012), at 55.

27. Averitt and Lande, *op. cit. supra* note 23, at 716.

otherwise provided.²⁸ This is also connected to the distinction made in competition law discussions between protecting competitors and protecting competition. As the Court of Justice stated in *Post Danmark I*, “not every exclusionary effect is necessarily detrimental to competition”.²⁹ And “[c]ompetition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation”.³⁰ As a result, the competition rules protect against consumer harm. This implies that it is not the availability of choice as such that competition law promotes, but rather the ability or freedom of consumers by exercising their choice to ensure that markets deliver the products and services that meet their preferences.

2.3. *Consumer empowerment and its lack of effectiveness*

Averitt and Lande refer 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.³¹ 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,³² 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.

Personalization of offers raises issues at the interface of competition, consumer, and data protection law.³³ If a consumer is nudged towards one

28. Averitt and Lande, “Using the ‘consumer choice’ approach to antitrust law”, 74 *Antitrust Law Journal* (2007), at 184.

29. Case C-209/10, *Post Danmark I*, EU:C:2012:172, para 22.

30. *Ibid.*, loc. cit.

31. Averitt and Lande, *op. cit. supra* note 23, at 715.

32. Colangelo and Maggiolino, “Fragile or smart consumers? Suggestions for the US from the EU”, TTLF Working Papers No. 36, Aug. 2018, 13–17, <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.

33. The debate on the interaction between these fields was initiated by the European Data Protection Supervisor in 2014 with the publication of the preliminary opinion on “Privacy and competitiveness in the age of big data”, <edps.europa.eu/sites/edp/files/publication/14-03-26_

option by restricting their ability to choose freely, the effect may be the same as having only one option.³⁴ While there is overlap in the substantive protections offered by the three regimes,³⁵ 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,³⁶ 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 article 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

competition_law_big_data_en.pdf>, followed by its 2016 opinion on coherent enforcement of fundamental rights in the age of big data, <edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf>. Recent contributions to the debate include Monti, “Attention intermediaries: Regulatory options and their institutional implications”, TILEC Discussion Paper No. DP2020-018, July 2020, <papers.ssrn.com/sol3/papers.cfm?abstract_id=3646264>; and Reyna, “Optimizing public enforcement in the digital single market through cross-institutional collaboration”, SSRN Working Paper, Jan. 2020, <papers.ssrn.com/sol3/papers.cfm?abstract_id=3529198>.

34. Averitt and Lande, op. cit. *supra* note 23, at 734.

35. Such overlaps in substantive protections may inspire a regulatory authority to borrow concepts from another area of law to interpret and advance the area of law under its own enforcement competence. This phenomenon has been called “kaleidoscopic enforcement” and requires proper coordination mechanisms between competition, data protection and consumer authorities. See Yakovleva, Geursen and Arnbak, “Kaleidoscopic data-related enforcement in the digital age”, 57 CML Rev. (2020), 1461–1494.

36. 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, op. cit. *supra* note 10, at 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”.

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.

By giving more prominence to consumer sovereignty as an objective, competition law can intervene against harmful practices of personalized exploitation. To operationalize the abstract notion of consumer sovereignty in the context of personalized exploitation, the article suggests incorporating 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.³⁷ Before exploring how to design such competition interventions, the next section considers the theory of harm behind qualifying practices of personalized pricing and behavioural manipulation as personalized exploitation under competition law.

3. When personalization leads to an exploitative abuse

EU competition law distinguishes between exclusionary and exploitative conduct. Exclusionary conduct indirectly harms consumers by foreclosing competitors from the market and attacking the competitive market structure. Enforcement actions by competition authorities have so far mainly focused on tackling anticompetitive exclusionary behaviour as a way to keep markets competitive. As a result, the potential of competition law to remedy exploitative practices that directly harm consumers, such as excessive pricing or unfair contract terms, is underdeveloped.³⁸

However, recent years have witnessed a number of influential cases concerning exploitative abuses, for instance as regards excessive pricing in the

37. For another approach to promote consumer sovereignty in concentrated marketplaces, namely through integrating direct consumer influence at the intersection of data protection, consumer rights, and competition law, see Kuenzler, “Direct consumer influence – The missing strategy to integrate data privacy preferences into the market”, YEL (forthcoming), <doi.org/10.1093/yel/yeaa002>.

38. The Commission’s Guidance Paper on Article 102 TFEU prioritizes exclusionary forms of abuse and states that exploitative abuses may require intervention “in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured”. Commission Communication, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Guidance Paper), O.J. 2009, C 45/7, para 7.

pharmaceutical sector³⁹ and by collective management organizations.⁴⁰ And the German *Facebook* case has put the imposition of unfair contract terms back on the map.⁴¹ Increasing levels of market concentration and stronger abilities offered by data-driven technologies to influence consumer behaviour and manipulate consumer preferences will continue to increase the scope for dominant firms to engage in consumer exploitation by personalizing their offerings. Because personalization can also bring benefits to consumers through more relevant services, the main challenge of exploring how competition law can become more proactive towards harmful practices of personalized exploitation is to determine when personalization is anticompetitive.

3.1. *Behavioural manipulation as competitive harm*

For the purposes of this article, “personalized exploitation” is considered to include practices of both personalized pricing and behavioural manipulation. While issues of personalized pricing have already been discussed from a competition law perspective in literature,⁴² the room to hold behavioural manipulation abusive under Article 102 TFEU has only been explored to a limited extent.⁴³ To conceptualize behaviour manipulation, reference can be made to the notion of undue influence as defined under the Unfair Commercial Practices Directive as the exploitation of “a position of power in

39. At the EU level, see European Commission Press Release, “Antitrust: Commission seeks feedback on commitments offered by Aspen to reduce prices for six off-patent cancer medicines by 73% to address Commission’s concerns over excessive pricing”, 14 July 2020, <ec.europa.eu/commission/presscorner/detail/en/ip_20_1347>. For relevant enforcement activities at the national level in Italy, UK, Spain, and Denmark, see press release of the Italian Autorità Garante della Concorrenza e del Mercato, “A480 – Price increases for cancer drugs up to 1500%: the ICA imposes a 5 million Euro fine on the multinational Aspen”, 14 Oct. 2016, <en.agcm.it/en/media/detail?id=1c53b769-446d-4e36-bfed-49e2f7454e03>; decision of the UK Competition and Markets Authority, Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK, Case CE/9742-13, 7 Dec. 2016, <assets.publishing.service.gov.uk/media/594240cfe5274a5e4e00024e/phenytoin-full-non-confidential-decision.pdf>; decision of the Spanish Comisión Nacional de los Mercados y la Competencia to close its investigation opened in Jan. 2017 into allegations of excessive pricing by Aspen after the Commission started an investigation, 20 July 2017, <www.cnmc.es/en/node/357734>; and press release of the Danish Competition and Consumer Authority, “CD Pharma has abused its dominant position by increasing their price by 2,000 percent”, 31 Jan. 2018, <www.en.kfst.dk/nyheder/kfst/english/decisions/2018-cd-pharma-has-abused-its-dominant-position-by-increasing-their-price-by-2-000-percent/>.

40. See Case C-177/16, *AKKA/LAA*, EU:C:2017:689 and the Opinion of A.G. Pitruzzella in Case C-372/19, *SABAM*, EU:C:2020:598.

41. Case B6-22/16, *Facebook – exploitative business terms*, 6 Feb. 2019.

42. See the references cited *supra* note 12.

43. See in particular Economides and Lianos, *op. cit. supra* note 12, 59–63.

relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision".⁴⁴ The steering of consumer preferences is an example of this, where the way offers are framed or presented can trigger us into purchases that we may not want or need. Such forms of behavioural manipulation can cause an overall increase in consumption when sellers use personal data and exploit cognitive biases to tempt us into buying more or other products or services than we would otherwise have purchased. Firms can, for instance, use decoys that trick consumers into buying a more expensive version of a product than the one that had their initial interest. By adding a more expensive but inferior choice, consumers can be nudged into appreciating a more expensive option with some additional features that do not reflect their initial preferences.⁴⁵ The key concern is that consumers lose control over their choices, thereby inducing them to enter into transactions they would not have accepted otherwise. Where dominant firms engage in these practices, this article submits that such a loss of consumer sovereignty is also relevant under competition law because of the harm it causes to the competitive process.

Concerns relating to consumer persuasion have always existed, but the pervasiveness and accuracy of current targeting methods brings these issues to a new level. To address harm from behavioural manipulation, a trade-off has to be made, because it is not desirable to ban all forms of consumer persuasion altogether that are to some extent inherent in the very existence of advertising and consumer targeting.⁴⁶ The difficulty then lies in determining at what point personalization becomes anticompetitive. This also applies to personalized services like the provision of news or results in rankings of search engines and e-commerce platforms. Personalization can increase the relevance of such services for users, but it can also cause concerns when the extent of personalization goes as far as to steer choices of consumers thereby reducing their autonomy.⁴⁷ To establish a legal test for determining when behavioural

44. Art. 2(j) 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.

45. As argued by Ezrachi and Stucke, "The rise of behavioural discrimination", 37 ECLR (2016), 486–489: "behavioural discrimination causes the demand curve to shift to the right".

46. See however, Woodcock, "The obsolescence of advertising in the information age", 127 *Yale Law Journal* (2018), 2270–2341 who advises the US Federal Trade Commission to ban persuasive advertising altogether as anticompetitive under Section 2 of the US Sherman Act, the equivalent of Art. 102 TFEU.

47. See Fish and Gal, op. cit. *supra* note 14, pp. 7–8, and Podszun, "Digital ecosystems, decision-making, competition and consumers – On the value of autonomy for competition", SSRN Working Paper March 2019, at 25, <papers.ssrn.com/sol3/papers.cfm?abstract_id=3420692>, who argues that the requirement of autonomous decision-making between

manipulation results in abuse of dominance, insights can be drawn from the extent to which personalized pricing can violate Article 102 TFEU based on case law in the areas of price discrimination and excessive pricing as well as reflections in literature.

3.2. *Insights from personalized pricing*

From an economic perspective, it is well known that price discrimination has ambiguous effects.⁴⁸ When price discrimination results in lower prices for customers that otherwise could not afford the product, it can promote welfare by expanding the market and increasing output. However, price discrimination can also be employed to raise prices for consumers with a higher willingness to pay, who buy less than they would otherwise, so that the overall output decreases. Furthermore, even if a higher output will enhance overall welfare, it may not result in greater consumer welfare. This is because price discrimination may shift part of the welfare from consumers to the firm instead of redistributing it among groups of consumers.⁴⁹ Such concerns are even more likely in the case of personalized pricing, where a firm is able to charge each consumer their maximum willingness to pay. The consumer surplus, which is the benefit consumers derive from being willing to pay more than the actual price charged, will completely shift to the firm if it engages in personalized pricing. While such a form of perfect price discrimination seemed a mere theoretical possibility, data analytics is increasing the possibilities for firms to adopt such practices. Perfect price discrimination can also occur through indirect methods, such as by steering consumers through differentiated search results or by offering personalized discounts.⁵⁰ Harm to consumer welfare is most likely in a monopoly situation where consumers are not able to switch to another supplier. Consumers can decide to hide their identity by relying on anonymizing technologies, but this will typically have limited effects. In particular, such hiding strategies are only likely to be successful for the more affluent consumers who are at risk of paying higher prices.⁵¹ In a competitive setting, personalized pricing can also stimulate

horizontal competitors stemming from Art. 101 TFEU can be expanded to cover the protection of consumer autonomy under Art. 102 TFEU as well.

48. Motta, *Competition Policy: Theory and Practice*, (Cambridge University Press, 2004), p. 496.

49. Graef, *op. cit. supra* note 12, 544–545.

50. Bourreau, De Streel and Graef, “Big data and competition policy: Market power, personalised pricing and advertising”, CERRE project report, 16 Feb. 2017, 40–41, <cerre.eu/wp-content/uploads/2020/06/170216_CERRE_CompData_FinalReport.pdf>; Botta and Wiedemann, *op. cit. supra* note 12, section 2.

51. Botta and Wiedemann, *op. cit. supra* note 12, section 3.1.

competition when market players do not have access to the same information about the preferences of consumers and compete to attract new customers through price cuts.⁵²

All in all, it is not desirable to ban personalized pricing altogether because of the ambiguous effects of price discrimination. A more nuanced approach is necessary, which would allow the beneficial forms of personalized pricing to still materialize. Although the European Commission has pursued a few cases of consumer price discrimination under Article 102 TFEU,⁵³ their legal reasoning seems tied to the specific circumstances at stake where internal market considerations beyond mere competition concerns played a key role, namely nationality-based discrimination in *Football World Cup*⁵⁴ and the viability of cross-border postal services in *Deutsche Post*.⁵⁵ Beyond claims of price discrimination, prices can also be held unfair in reference to their excessive character.

The excessiveness of prices has so far mostly been established by calculating the difference between the costs of the dominant firm and the price it charges to customers. The price can then be qualified as unfair in itself or compared to similar products.⁵⁶ For instance, the UK Competition and Markets Authority (CMA) relied on a cost-plus approach when holding the prices for certain medicines charged by Pfizer and Flynn abusive in 2016.⁵⁷

52. Ibid.

53. Despite the fact that the wording of Art. 102(c) TFEU refers to situations where a dominant firm discriminates against downstream customers that are in competition with each other, which seems to overlook consumer price discrimination: “applying dissimilar conditions to equivalent transactions with other *trading parties*, thereby placing them at a competitive disadvantage” (emphasis added). See Graef, op. cit. *supra* note 12, 546–549.

54. Commission Decision of 20 July 1999 relating to a proceeding under Art. 82 of the EC Treaty and Art. 54 of the EEA Agreement (Case IV/36.888 – 1998 Football World Cup), O.J. 2000, L 5/55.

55. Commission Decision of 25 July 2001 relating to a proceeding under Art. 82 of the EC Treaty (COMP/C-1/36.915 — Deutsche Post AG — Interception of cross-border mail), O.J. 2001, L 331/40.

56. Case 27/76, *United Brands*, EU:C:1978:22, paras. 251–252.

57. Decision of the UK Competition and Markets Authority, Case CE/9742-13 Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK, 7 Dec. 2016, <assets.publishing.service.gov.uk/media/594240cfe5274a5e4e00024e/phenytoin-full-non-confidential-decision.pdf>. In June 2018, the UK Competition Appeal Tribunal (CAT) overturned the decision of the CMA because of alleged errors in the methodology used to establish the excessiveness of the prices. See UK Competition Appeal Tribunal, 1275/1/12/17 *Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd v. Competition and Markets Authority*, 1276/1/12/17 *Pfizer Inc. and Pfizer Limited v. Competition and Markets Authority* (hereafter: *Pfizer and Flynn*), [2018] CAT 11, 7 June 2018, <www.catribunal.org.uk/judgments/127511217-127611217-flynn-pharma-ltd-and-flynn-pharma-holdings-pfizer-inc-and-pfizer-0>. In its March 2020 judgment, the UK Court of Appeal confirmed this part of the reasoning of the CAT. See UK Court of Appeal, *Competition and Markets Authority v. Flynn Pharma Ltd and*

However, it is argued here that to establish the exploitative nature of personalized pricing one should not merely focus on the supply side by using the difference between the price set by the dominant firm and its costs as the only benchmark. Whether a personalized price is exploitative will namely also depend on the willingness to pay of the customers of the dominant firm.⁵⁸ According to the definition provided by the ECJ in *United Brands*, a price is excessive when “it has no reasonable relation to the economic value of the product supplied”.⁵⁹ Since the economic value of a product is not only determined by the costs of its production but also by the value consumers derive from it, it seems inaccurate to look at the supply side only and ignore the demand side.

As it will be difficult to gauge the willingness to pay and the size of the consumer surplus in practice, the question is how these insights can be reflected in a legal test. Because of the relevance of the willingness to pay, a key question is to what extent subsidization among consumer groups should be taken into account for determining whether personalized pricing is anticompetitive. While personalization harms individual consumers who have to pay a higher price than under uniform pricing, at the level of the market as a whole the average consumer may still benefit if higher prices to some are used to subsidize lower prices for others based on their willingness to pay. In the context of Article 102 TFEU, the ECJ seems open to considering unfairness from the perspective of specific consumers or groups of consumers instead of at the level of the market as a whole.

In *Merci*, the ECJ indeed seems to hint that price increases granted by a dominant firm to certain consumers to offset price reductions to other consumers can be unfair.⁶⁰ The reference of the ECJ in *Asnef-Equifax* to “the beneficial nature of the effect on all consumers in the relevant markets . . . , not the effect on each member of that category of consumers”⁶¹ as the relevant benchmark in the context of Article 101(3) TFEU may be explained by the distinct context.⁶² Assessing whether efficiencies outweigh a restriction of competition under Article 101(3) TFEU arguably requires a different approach compared with establishing whether price discrimination is abusive

Flynn Pharma (Holdings) Ltd, 10 March 2020 [2020] EWCA Civ 339, <[www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/339.html&query=\(pharma\)+AND+\(competition\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/339.html&query=(pharma)+AND+(competition))>.

58. See Van Damme, Graef and Sauter, “Big data, prijsdiscriminatie en mededinging”, (2018) *Markt & Mededinging*, 118–119.

59. Case 27/76, *United Brands*, para 250.

60. Case C-179/90, *Merci*, EU:C:1991:464, para 19, as discussed by Townley, Morrison and Yeung, op. cit. *supra* note 12, at 729.

61. Case C-238/05, *Asnef Equifax*, EU:C:2006:734, para 70.

62. See also Economides and Lianos, op. cit. *supra* note 12, at 44.

under Article 102 TFEU. There is some inconsistency as to the relevant benchmark in the case law under Article 102 TFEU as well, which Townley, Morrison and Yeung explain by noting that EU Courts have shown willing to look at harm at an individual level when the abuse involves discrimination.⁶³ They also demonstrate that the case law is contradictory with regard to the question of whether Article 102(c) TFEU stands in the way of letting dominant firms set prices based on the willingness to pay of individual customers. Some cases hint that this would be acceptable, while others seem to imply that this can amount to abuse.⁶⁴

It is submitted here that due to the increasing likelihood for perfect price discrimination to occur, it is no longer feasible to pinpoint when personalized pricing becomes anticompetitive under either standard. Because prices will constantly change over time and will be adjusted to the characteristics and preferences of individual consumers, the extent of excessiveness or unfairness of prices will also fluctuate. Calculations of what part of the consumer surplus is being exploited are difficult to conduct, both for dominant firms themselves as well as for competition authorities. It is therefore proposed here to take a more normative approach where competition law would set some limits to the extent of personalization in which dominant firms can engage without being held liable for abuse of dominance. This can be tied to notions of fairness and distributional justice in line with the promotion of consumer sovereignty and the protection against exploitation of consumer vulnerabilities, instead of a mere economic assessment of the consumer surplus.⁶⁵

Townley, Morrison and Yeung argue that personalized pricing should not constitute an abuse where it enhances aggregate consumer welfare, irrespective of its implications for fairness.⁶⁶ The point made here is that the consumer surplus (and thus consumer welfare) changes all the time under dynamic pricing, so that reliance on this notion is too uncertain as a benchmark for competition intervention. As a way to address this problem, one option is to ban certain forms of personalized pricing that also have a high likelihood of reducing consumer welfare. Personalized pricing disproportionately harms consumers who are vulnerable and have less ability to switch to another supplier, for instance, because they have poor credit ratings or are less skilled in communicating their preferences to suppliers. Other options may still be available in a dominated market, but they risk remaining hidden unless consumers actively search for them. Even if another

63. Townley, Morrison and Yeung, *op. cit. supra* note 12, 729–730.

64. *Ibid.*, 728–729.

65. For a discussion of the attention for the notion of fairness in recent competition enforcement, see Dunne, “Fairness and the challenge of making markets work better”, (2020) *Modern Law Review*, 1–35.

66. Townley, Morrison and Yeung, *op. cit. supra* note 12, 741–742.

group of consumers is in a less fragile position and is better informed about other options, they cannot discipline the price for the vulnerable consumers if prices are personalized for all consumers.⁶⁷ Beyond harm to those in a vulnerable position, the consumer surplus as a whole can be affected because the burden is put on consumers to compare offers and to switch to prevent them from being exploited.⁶⁸ It is submitted here that there is a need to partly shift that burden from consumers back to businesses. The current reality is that the level of protection for consumers mainly depends on the extent to which they are able to compare and switch between options. Considering the room businesses have through data-driven technologies to take advantage of consumer vulnerabilities, this article aims to tilt the balance back in favour of consumers by imposing limits on the extent of personalization by dominant firms.

3.3. *Room for behavioural manipulation to constitute exploitative abuse*

Subsidization among consumer groups can also play a role in cases of behavioural manipulation, when a firm obtains a higher surplus (for instance by selling higher quantities or more expensive versions of goods, or by steering consumer choices to the firm's benefit) from less affluent and economically sophisticated consumers to compensate its provision of better offers (for instance through better price-quality ratios) to other groups of consumers. Even though behavioural manipulation may not affect the overall consumer surplus due to such a form of subsidization, it creates a more far-reaching invasion into consumer sovereignty as compared to subsidization through personalized pricing. Practices of personalized pricing and behavioural manipulation are related as they both involve personalization, but can be distinguished from each other by looking at the underlying indicators for personalization. Any personalization based on indicators other than a consumer's willingness to pay can be regarded as behavioural manipulation for our purposes here. That behavioural manipulation causes a more far-reaching invasion into consumer sovereignty can be explained because it directly interferes with the way consumer choices are formed and the very

67. See also Armstrong and Vickers, "Consumer protection and contingent charges", 50 *Journal of Economic Literature* (2012), 477–493 contrasting situations where naïve consumers benefit from the presence of sophisticated consumers in the context of contingent charges in financial services, with situations where competition results in subsidization of the sophisticated to the detriment of the naïve consumers.

68. See Townley, Morrison and Yeung, *op. cit. supra* note 12, 701–702 who refer to the likelihood of mistakes on the side of consumers and the higher costs of shopping caused by the more complex decision-making in which consumers have to engage due to personalized pricing.

development of consumer preferences, whereas personalized pricing “merely” relates to the element of price as one of the contract terms. This indicates a need to be even more wary about behavioural manipulation from the perspective of the protection of consumers.

As to the theory of harm behind competition intervention against behavioural manipulation, insights can be drawn from the case law on unfair contract terms. Relevant precedent under Article 102(a) TFEU can be found in cases such as *SABAM*, *GEMA statutes* and *DSD*.⁶⁹ In *SABAM*, the ECJ found the trading conditions of the collective management organization to be unfair because they exceeded what was necessary to attain the objective of protecting the organization’s rights and interests.⁷⁰ In *GEMA statutes*, a decision about another collective management organization, the Commission derived an approach for assessing unfairness in statutes of collecting societies from the *SABAM* judgment. This approach requires that a balance is struck between the freedom of copyright holders to dispose of their works and the operational interest of the collecting society to effectively manage their rights. In particular, the Commission inferred two decisive factors from the *SABAM* judgment for such an assessment of the statutes, namely: “whether they exceed the limits absolutely necessary for effective protection (indispensability test) and whether they limit the individual copyright holder’s freedom to dispose of his work no more than need be (equity)”.⁷¹

In *DSD*, the Commission held that a dominant firm must comply with the principle of proportionality to prevent its commercial terms from being regarded as unfair. The principle of proportionality was interpreted as requiring a balancing of the various interests at stake. The case involved a system by which DSD charged its customers a fee for all packaging carrying its “Green Dot” trademark, even if customers could show they had not used DSD’s system for take-back and recovery of sales packaging. The Commission found that DSD was imposing unfair commercial terms by giving undertakings a choice between introducing separate packaging and distribution channels or paying an unreasonable license fee. According to the Commission, when balancing the various interests in the case, DSD did “not appear to have any reasonable interest in linking the fee payable by its contractual partners ... to the extent to which the mark is used”.⁷²

69. 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, *op. cit. supra* note 11, 179–181.

70. Case 127/73, *SABAM*, EU:C:1974:25, paras. 6–15.

71. Commission Decision in Case IV/29.971 – *GEMA statutes*, 4 Dec. 1981, para 36.

72. Commission Decision in Case COMP D3/34493 – *DSD*, 20 April 2001, para 112. Upheld on appeal: Case T-151/01, *DSD*, EU:T:2007:154, and Case C-385/07 P, *DSD*, EU:C:2009:456.

SABAM, *GEMA statutes* and *DSD* 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 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.⁷³

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. The benefits of a personalized user experience were also discussed in the *Facebook* decision of the German *Bundeskartellamt*. As a precondition to use its social network, Facebook required users to accept its terms, enabling it to combine user data collected outside the Facebook website, including through Facebook-owned services such as WhatsApp and Instagram and on third-party websites, and assign it to a user's Facebook account. In its February 2019 decision, the *Bundeskartellamt* found that Facebook's terms violated data protection law and thereby also constituted an exploitative abuse under German competition law.⁷⁴ With regard to the extent of personalization, Facebook argued that a

73. 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, op. cit. *supra* note 11, 179–183.

74. *Bundeskartellamt*, Case B6-22/16, *Facebook – exploitative business terms*, 6 Feb. 2019, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5>. The use of provisions from data protection law as a standard for determining the existence of exploitative abuse under competition law has also been discussed in scholarship, see in particular Costa-Cabral and Lynskey, “Family ties: The intersection between data protection and competition in EU law”, 54 *CML Rev.* (2017), 33–37; Graef, Clifford and Valcke, “Fairness and enforcement: Bridging competition, data protection, and consumer law”, 8 *International Data Privacy Law* (2018), 211–212; Colangelo and Maggolino, “Data accumulation and the privacy–antitrust interface: Insights from

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”.⁷⁵ 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.⁷⁶ 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”.⁷⁷ 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 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.⁷⁸

In its interim judgment suspending the decision of the *Bundeskartellamt*, the Higher Regional Court of Düsseldorf concluded that there was no evidence of Facebook obtaining the consent of users through coercion, exploitation, or other unfair means. It also found that the advantages resulting from the use of an advertising-financed and thus free of monetary charge social network need to be balanced against the consequences of the use of additional personal data by Facebook. The Düsseldorf Court argued that it was not clear which dangers for the social network users were directly caused by the collection of the additional data by Facebook, and that the *Bundeskartellamt* was exclusively discussing a data protection and not a competition problem.⁷⁹ However, it is submitted here that it should be possible to hold exploitation abusive under competition law and that more normative considerations need to be integrated into competition analysis, going beyond a mere economic balancing of costs and benefits of data collection. While data protection and consumer authorities carry the main responsibility to protect the individuals’ right to self-determination and to address non-economic harm relating to information and power asymmetries, these concerns are

the Facebook case”, 8 *International Data Privacy Law* (2018), 229–231; and Robertson, op. cit. *supra* note 11, 182–183.

75. Case B6-22/16, *Facebook – exploitative business terms*, 6 Feb. 2019, para 691.

76. *Ibid.*, para 692.

77. *Ibid.*, para 693.

78. *Ibid.*, paras. 760 and 785.

79. Oberlandesgericht Düsseldorf, VI-Kart 1/19 (V) *Facebook v. Bundeskartellamt*, 26 Aug. 2019, DE:OLGD:2019:0826.KART1.19V.00, paras. 71–72.

increasingly mixed with harm to the competitive process that cannot be solely addressed on the basis of data protection and consumer law. As a result, competition authorities need to be prepared to look into these issues as well.

This has now been acknowledged on appeal by the German Federal Court of Justice in interim proceedings, which confirmed the *Bundeskartellamt's* decision and explicitly pointed at the relevance of protecting consumer sovereignty under competition law.⁸⁰ According to the Federal Court of Justice, the decisive issue is not that Facebook violated the data protection rules, but that its behaviour violated German competition law by restricting its users' freedom of choice and right to self-determination as protected by the German Constitution. In particular, Facebook's terms did not give users any choice as to the extent of personalization offered by Facebook: namely a limited personalized experience based on data shared by a user on the social network or a more personalized experience linking the user's social network profile with data relating to the user's off-Facebook use of the internet.⁸¹ Although it remains to be seen how the case will be judged on the merits, the German *Facebook* case illustrates the relevance of concerns of consumer sovereignty and freedom of choice to the protection offered by competition law.

Having established that there is room to regard personalized pricing and behavioural manipulation as exploitative abuse under Article 102 TFEU based on earlier case law relating to price discrimination, excessive pricing, and unfair contract terms, the subsequent question is what the threshold for competition intervention should be. The next section submits that a focus on dynamic consumer vulnerabilities in competition analysis can help determine when personalization by dominant firms is no longer proportionate considering the balancing with the interests of consumers.

4. Recognizing personalized exploitation as abuse of dominance under Article 102 TFEU

Personalization changes the market dynamics and thereby challenges assumptions at the basis of our current competition tools. This section discusses how personalization impacts on the definition of relevant markets, the finding of market power, and the assessment of abusive conduct. Because personalization challenges well-established competition concepts, the competition analysis needs to be adapted in order to capture competitive harm resulting from personalized exploitation. This section explains that it is most

80. Bundesgerichtshof, KVR 69/19 *Facebook*, DE:BGH:2020:230620BKVR69.19.0 (23 June 2020), paras. 104–105. See the discussion at the end of section 3.2. *supra*.

81. Bundesgerichtshof, KVR 69/19 *Facebook*, cited previous footnote.

suitable to do so at the stage of establishing whether personalized exploitation by a dominant firm qualifies as abuse by incorporating dynamic consumer vulnerabilities into the competition analysis.

4.1. *Towards personalized markets and market power over individuals?*

Current approaches towards market definition and market power are based on the idea that every market has one uniform price and one representative consumer. In its 1997 Notice on Market Definition, the Commission defines a relevant product market as “all those products and/or services which are regarded as interchangeable or substitutable *by the consumer*”.⁸² However, a representative consumer no longer exists in markets where firms offer personalized services. In its Guidance Paper on Article 102 TFEU, the Commission defines a dominant firm as “an undertaking which is capable of profitably increasing prices *above the competitive level*”.⁸³ Yet, in the case of personalized pricing, there is no longer a uniform competitive price. Markets in which firms respond to differences in consumer preferences and characteristics by differentiating their prices or other aspects of their offerings operate differently from markets in which all consumers are treated similarly. If firms indeed distinguish between individual consumers in a market, this affects the dynamics of the market. Due to the increasing personalization of offers, the basic tenets of one market, one consumer, and one price start to falter.⁸⁴ As a result, there is a need to explore how such developments can be reflected within the existing concepts of market definition and market power in competition analysis.

The 1997 Commission Notice on Market Definition acknowledges that “a narrower, distinct market” may be defined when a distinct group of customers “could be subject to price discrimination”.⁸⁵ Taking this reasoning to its extreme would mean that if consumers can indeed be targeted individually, every consumer constitutes a relevant market of their own. A firm then holds market power over individual consumers. Such market power may exist only at the specific moment at which the personalized offer is made due to the inability of the consumer to switch or due to her loss of control to choose freely. A marketer could for instance target ads at moments when an

82. Commission Notice on the definition of relevant market for the purposes of Community competition law, O.J. 1997, C 372/5, para 7 (emphasis added).

83. Commission Communication, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/02, para 11 (emphasis added).

84. See Van Damme, Graef and Sauter, op. cit. *supra* note 58, 120–121.

85. Commission Notice on the definition of relevant market for the purposes of Community competition law, O.J. 1997, C 372/5, para 43.

individual consumer is tired, less attentive, or otherwise easy to persuade.⁸⁶ It would be very unconventional for competition law to go as far as to define “personalized markets” for each consumer. Nevertheless, some precedent is available where relevant markets have already been defined in a narrow way.

A good example of the definition of a very narrow relevant market can be found in a 2007 UK market investigation, where the former Competition Commission (now replaced by the Competition and Markets Authority) concluded that all banks providing personal current account banking services possessed “unilateral market power” due to user inertia and the lack of switching by customers. This included banks holding a market share of less than 5 percent.⁸⁷ Temporal markets are also well-recognized within competition law, for instance in the electricity sector where temporal markets need to be defined because electricity as a product cannot be stored. The temporal dimension of product markets is also relevant when competitive conditions vary from season to season,⁸⁸ for example because the demand for certain products is lower in a specific part of the year due to the wider availability of alternatives. This was the case in *United Brands* as regards the demand for bananas.⁸⁹

The relevant question is how far the temporal dimension of relevant markets can be stretched. The concept of situational monopoly as developed outside competition law is also of interest in this regard. A situational monopoly exists when a firm happens to be dominant in a market at a particular moment in time.⁹⁰ The monopoly does not stem from a superior product or quality a firm is offering, but is created by a situation where the firm provides the right product in the right place at the right time. If no other market player is able to offer a product for which consumers are willing to pay at a certain point in time, a situational monopoly can occur.⁹¹ An extreme

86. See the examples given by Helberger, Zuiderveen Borgesius and Reyna, *op. cit. supra* note 10, 1456–1457.

87. UK Competition Commission, “Personal current account banking services in Northern Ireland market investigation”, 15 May 2007, paras. 44–45 and 4.262–4.263, as discussed in Oxera, “Behavioural economics and its impact on competition policy. A practical assessment with illustrative examples from financial services”, May 2013, at 38, <www.acm.nl/sites/default/files/old_publication/bijlagen/11586_oxera-behavioural-economics-competition-policy.pdf>.

88. Whish and Bailey, *Competition Law*, 9th ed. (OUP, 2018), pp. 40–41.

89. Case 27/76, *United Brands*, paras. 14–17.

90. See also Posner, *Economic Analysis of Law* (1973), arguing that duress “is a transactional advantage created by the possession of a monopoly, whether of the type that engages the interests of antitrust enforcers, or bilateral, temporal, or situational”.

91. From a management literature perspective, see Lele, *Monopoly Rules How to Find, Capture, and Control the Most Lucrative Markets in Any Business* (Kogan Page, 2005), p. 93 and p. 104, arguing that Starbucks possesses a situational monopoly by having capitalized on a situation in which no other firm met the need for a consistent, good-tasting cup of coffee.

example is the sale of drinks and snacks in a movie theatre where consumers have no ready alternatives available.

The intention of this article is not to claim that all firms in such situations should be seen as potentially dominant for the purposes of competition law. Nor should this be the case for every company that is able to engage in personalization, even though the notion of temporal markets and situational monopolies would offer some support for taking such an approach in competition law. However, this would risk unnecessarily stretching the scope of competition law to address harm that is no longer tied to sustainable forms of market power. The article therefore submits that the steps of market definition and dominance in the competition analysis should still be conducted in the traditional sense by determining the substitutability of the products or services offered in the overall market. This means that only those firms that would normally already be considered dominant face restrictions regarding the personalization of their offerings under competition law. Personalization can instead be incorporated into the assessment of abuse.

While it is proposed to use personalization techniques to tailor default rules and disclosures in private law to the characteristics of specific individuals to counter harmful effects of personalized commercial offerings,⁹² this article claims that personalizing protection in a similar way for the purposes of compliance with competition law would not form an effective solution. Even if disclosures are tailored to the needs of individuals, it is still for an individual consumer to act upon the information received in order to protect themselves against exploitation. Although personalizing protection may form a reasonable solution to ensure compliance with private law,⁹³ transposing such an approach to competition law would imply that the extent to which competitive harm occurs from exploitative practices by dominant firms is made dependent on the behaviour of individual consumers. This is not a responsibility that consumers can carry; nor does it offer proper protection of the competitive process, which weakens as dominant firms continue steering consumer preferences to their own benefit.

For this reason, it is submitted here that consumer exploitation in the form of a loss of control over consumer choices needs to be recognized as

92. Sunstein, “Deciding by default”, 162 *Univ. Pennsylvania L.R.* (2013), at 48; Porat and Strahilevitz, “Personalizing default rules and disclosure with big data”, 112 *Michigan Law Review* (2014), at 1418; Hacker, “Personalizing EU private law: From disclosures to nudges and mandates”, 25 *E.R.P.L.* (2017), at 659; Busch, “Implementing personalized law: Personalized disclosures in consumer law and data privacy law”, 86 *Univ. Chicago L.R.* (2019), at 312.

93. See however Elkin-Koren and Gal, “The chilling effect of governance-by-data on data markets”, 86 *Univ. Chicago L.R.* (2019), 403–431 who argue that personalized law may have chilling effects due to concerns and uncertainty regarding possible negative consequences of the use of data to tailor legal rights and duties.

independent competitive harm. More prominence for consumer sovereignty as an objective of competition law would enable competition authorities and courts to intervene in order to address harm from practices limiting consumers' freedom of choice and distorting the overall competitive process. Instead of the approach in private law to personalize legal protection, compliance with Article 102 TFEU would require dominant firms to restrict the degree of abusive personalization of offerings. The benchmark for assessing abuse would not be consumer welfare as a whole but the welfare of those suffering from personalized exploitation, hence the term "personalized welfare standard". It is proposed here to incorporate such an approach into competition analysis by relying on a dynamic notion of consumer vulnerabilities.

4.2. *Towards a dynamic notion of consumer vulnerabilities*

Consumer and data protection law already recognize a notion of vulnerability. Consumer law has most experience in conceptualizing vulnerabilities, which are established in reference to the average consumer. The ECJ has consistently defined the average consumer as the "reasonably well-informed and reasonably observant and circumspect" consumer.⁹⁴ Social, cultural and linguistic factors need to be taken into account for establishing what the benchmark of the average consumer is.⁹⁵ While this definition has been criticized for putting too high expectations on consumers,⁹⁶ consumer law explicitly acknowledges the need to protect vulnerable consumers.⁹⁷ 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

94. Case C-210/96, *Gut Springenheide*, EU:C:1998:369, para 31; Case C-220/98, *Estée Lauder Cosmetics*, EU:C:2000:8, paras. 27 and 30; Case C-44/01, *Pippig Augenoptik*, EU:C:2003:205, para 55; Case C-99/02, *Criminal proceedings against Linhart and Biffi*, EU:C:2002:618, para 32.

95. Recital 18 of the Unfair Commercial Practices Directive.

96. See e.g. the discussion in Siciliani, Riefa and Gamper, *op. cit. supra* note 36, pp. 24–37.

97. For an analysis of the notion of vulnerable consumers in EU law more generally, see Reich, "Vulnerable consumers in EU law" in Leczykiewicz and Weatherill (Eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing, 2018), pp. 139–158.

not from the perspective of the overall average consumer.⁹⁸ 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".⁹⁹

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 one of the situations causing risk to the rights and freedoms of natural persons, potentially leading to "physical, material or non-material damage".¹⁰⁰ Although the notion of vulnerable data subjects is not as developed and widely used as its equivalent in consumer law, the approach described by the Article 29 Working Party for performing the balancing test required to process personal data on the basis of the data controller's legitimate interests (Art. 6(1)(f) GDPR) has clear similarities with the relationship between the average and vulnerable consumer. In its 2014 opinion on the notion of legitimate interests of the data controller, the Article 29 Working Party states that the balancing test should in principle be made for an average individual, but that a more case-by-case approach may be needed, for instance when the data subject is a child¹⁰¹ or "otherwise belongs to a more vulnerable segment of the population requiring special protection, such as, for example, the mentally ill, asylum seekers, or the elderly".¹⁰² In addition, "the question whether the data subject is an employee, a student, a patient, or whether there is otherwise an imbalance in the relationship between the position of the data subject and the controller" is also relevant in the view of the Article 29 Working Party.¹⁰³ Similar to the approach adopted in consumer law, the average data subject could thus be used as a benchmark to identify individuals in vulnerable positions who require special attention under the GDPR.

Despite the fact that the recognition of vulnerable consumers and data subjects is useful to tailor protection mechanisms, the way these concepts

98. 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.

99. Ibid. For a discussion of the difficulty of applying the notion of vulnerable consumers, see Siciliani, Riefa and Gamper, op. cit. *supra* note 36, p. 38.

100. 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.

101. Children are referred to as an example of a group of vulnerable natural persons in Recital 75 of the GDPR.

102. Art. 29 Working Party, "Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC", WP 217, 9 April 2014, 40–41.

103. Ibid., at 41.

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 article, 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.¹⁰⁴ Within consumer law, a more dynamic understanding of vulnerability is already being discussed.¹⁰⁵ A 2016 report commissioned by the European Commission defined the vulnerability of consumers in reference to “socio-demographic characteristics, behavioural characteristics, personal situation or market environment”,¹⁰⁶ thereby acknowledging the existence of vulnerabilities beyond the fixed groups as applied in consumer law so far. Interestingly, the Commission distinguished between very vulnerable consumers and vulnerable consumers in its 2019 guidelines implementing part of the General Product Safety Directive, so as to recognize different degrees of vulnerability.¹⁰⁷ The Netherlands Authority for Consumers and Markets (ACM) went a step further in its 2020 guidelines on the protection of the online consumer, by explaining 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, thereby confirming the findings in the previous section about the possible rise of personalized markets. For the purposes of

104. See the discussion in Malgieri and Niklas, “Vulnerable data subjects”, 37 *Computer Law & Security Review* (2020), at 3.

105. See also Helberger, Zuiderveen Borgesius and Reyna, op. cit. *supra* note 10, 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.

106. Report “Consumer vulnerability across key markets in the European Union”, Jan, 2016, <ec.europa.eu/info/sites/info/files/consumers-approved-report_en.pdf>, as discussed in Commission Staff Working Document “Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices”, 25 May 2016, SWD(2016)163 final, 45–46.

107. The category of very vulnerable consumers includes children up to 36 months and individuals with extensive and complex disabilities. The category of vulnerable consumers consists of children older than 36 months and up to 14 years and individuals “with reduced physical, sensory or mental capabilities (e.g. partially disabled, elderly, including those over 65, with some reduction in their physical and mental capabilities), or lack of experience and knowledge”. See Table 1 of Commission Implementing Decision (EU) 2019/417 of 8 Nov. 2018, O.J. 2019, L 73/121.

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.¹⁰⁸

A more dynamic notion of consumer vulnerabilities would recognize that everyone has weaknesses that can be exploited, although care should be taken to avoid eroding the protection for specific consumer groups that are in a vulnerable position because of more fixed labels like age or disability.¹⁰⁹ To this end, in a 2019 report on consumer vulnerability the UK CMA made a distinction between “market-specific vulnerability”, which can affect a wide range of consumers due to the specific context of particular markets, and “vulnerability associated with personal characteristics” including physical disability, poor mental health, or low incomes, which relates to certain individuals who are having persistent problems across markets.¹¹⁰ The recognition of market-specific vulnerability 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. The scope of such a dynamic notion of consumer vulnerabilities is thus extremely broad, which 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 a degree of harm that it should be regarded as breaching the relevant legal framework. The next section argues that competitive harm from personalized exploitation can be best assessed under competition law against a “personalized welfare standard” of those exploited, instead of relying on the overall consumer welfare as a benchmark.

A dynamic notion of consumer vulnerabilities can be used across the three fields of consumer, data protection, and competition law. As argued by the ACM, the exploitation of consumer vulnerabilities can constitute an unfair commercial practice in breach of the consumer rules depending on the extent of harm inflicted on the specific group of consumers affected. Within data protection law, there are also possibilities to regard processing of personal data

108. Netherlands Authority for Consumers and Markets, “Guidelines: Protection of the online consumer: Boundaries of online persuasion”, Feb. 2020, at 25.

109. Malgieri and Niklas, op. cit. *supra* note 104, at 11 who refer to the criticism expressed that “if everyone is vulnerable, the notion will lose its usefulness in protecting weaker individuals”.

110. UK Competition & Markets Authority, “Consumer vulnerability: Challenges and potential solutions”, Feb. 2019, at 4, <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782542/CMA-Vulnerable_People_Accessible.pdf>.

that exploits vulnerable data subjects as a violation of the GDPR. Stricter requirements apply to the processing of sensitive personal data,¹¹¹ which for instance includes data related to someone's health and thereby limits the use of such data for behavioural targeting.¹¹² Beyond these more fixed labels of vulnerability, there is room to argue that exploitation of temporary vulnerabilities of data subjects by data controllers should be regarded as unfair data processing under Article 5(1) GDPR due to the particular power imbalances at moments when data subjects are vulnerable.¹¹³

One may argue that there is no need for competition law to step in when the harm from personalized exploitation can be addressed on the basis of consumer or data protection law. However, where dominant firms engage in practices of personalized exploitation, limits of consumer sovereignty also qualify as competitive harm because the manipulation of consumer decision-making can further weaken the competitive process in concentrated markets. As such, the nature of the harm affects overall competition and goes beyond how consumer and data protection law protect the interests of individuals in their relationship *vis-à-vis* businesses.

4.3. *Integrating consumer vulnerabilities into competition analysis*

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, as discussed in the previous section, 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.¹¹⁴

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 times of the day it knows that person is most

111. Art. 9 GDPR.

112. Helberger, Zuiderveen Borgesius and Reyna, *op. cit. supra* note 10, at 1460.

113. Malgieri and Niklas, *op. cit. supra* note 104, at 14.

114. ACM Guidelines cited *supra* note 108, at 25.

exhausted and more prone to make purchases they would not otherwise have made, the analysis of the effects of such behaviour should be confined to the consumers targeted by the dominant firm in that way.¹¹⁵ 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.¹¹⁶ 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 in 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 leads to substantial harm for the affected 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 in a ban on dominant firms using such information in deciding at what moments to target individuals with ads.

Although critics will argue that the proposed recognition of personalized exploitation as abuse of dominance would impose disproportionate burdens on dominant firms, there are a few limiting principles in place. A first limiting principle is that the dominance of the undertaking is still assessed in the traditional way by looking at the substitutability of the products or services offered in the overall market. The narrow definition of the relevant market

115. 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.

116. For an opposite view, see Townley, Morrison and Yeung, *op. cit. supra* note 12, 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 competition law becoming “unwieldy and unpredictable” due to the inclusion of redistributive goals that may be better protected through consumer law and tax legislation.

around the particular consumer vulnerability at stake only forms the frame for assessing the anticompetitive effects, not for assessing the dominance of the firm under investigation.¹¹⁷ Qualifying every firm that personalizes offerings as potentially dominant would stretch the scope of competition law so far that it risks becoming unworkable. Whether a firm can be considered dominant could then change over time depending on whether the extent of personalization results in the firm controlling the choices of individual consumers at particular moments. It is therefore argued here that competition law should focus on addressing harm resulting from sustainable forms of market power.

As a concrete illustration, this means that the use by Uber of information about the battery power left on its users' phones in order to raise its prices at particular moments and for particular users, would only violate the competition rules if Uber can be considered dominant in an overall market for taxi services (or the like). The motivation for this is that even though one firm may be able to exploit a vulnerability at some point, this is not a competition problem as long as the competitive forces of the market can present consumers with alternative providers over time. In other words, it is not a temporary or situational but a persistent form of user lock-in that the recognition of personalized exploitation as abuse of dominance targets. Other regimes like consumer and data protection law can, however, offer protection to individuals against more incidental forms of personalized exploitation resulting from practices of firms irrespective of their market power, for instance by imposing limits on profiling and intervening against unfair commercial practices.¹¹⁸

A second limiting principle is that even once the abuse of dominance is established in the way explained here, there is still a possibility for the dominant firm to objectively justify the personalized exploitation. Although there is typically limited room for an objective justification once an abuse has been established, a dominant firm could invoke the defence here that, on aggregate, consumers clearly benefit from the personalization.¹¹⁹ Based on the evidence put forward by the dominant firm carrying the burden of proof,¹²⁰ it is for the competition authority or court to determine whether the

117. Others have instead proposed to define a separate market for the vulnerable consumers and "then apply Article 102 in the normal way". See Townley, Morrison and Yeung, *op. cit. supra* note 12, at 721 and 745.

118. See Art. 22 GDPR and Arts. 5, 6, and 8 of the Unfair Commercial Practices Directive.

119. By analogy, see Townley, Morrison and Yeung, *op. cit. supra* note 12, 742–743 who instead discuss how a dominant firm can objectively justify personalized price discrimination that reduces aggregate consumer welfare but is fairness-enhancing, for instance because it eliminates discrimination based on gender.

120. For a more far-reaching proposal to expand the special responsibility of dominant firms by imposing a duty of care to prevent online exploitation of consumers for which they

benefits on consumer welfare as a whole can indeed outweigh the negative effects on the specific group of consumers that is targeted by the dominant firm. The aim is to avoid the existence of limited harm for a small group of consumers preventing a dominant firm from engaging in personalization where this has clear benefits for consumers overall. Not only the extent but also the nature of the harm for the affected consumers should be key in such an assessment, including harm that goes beyond higher monetary prices, such as reduction of quality or the exploitation of sensitive personal insights. Considering the urgency for protection against substantial distortions of freedom of choice, one should be careful about accepting the existence of “mere” monetary benefits of personalization for consumers overall as justification to offset the harm for the targeted consumers. Both limitations, namely that only persistent forms of exploitation matter for the purposes of Article 102 TFEU and the possibility for the dominant firm to invoke objective justifications, act as filters to ensure that competition interventions are limited to situations where there is substantial competitive harm.

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. Such interventions can be regarded as paternalistic, since they reduce consumer choice in a narrow sense, by banning a dominant firm from offering certain options in an effort to increase the control of consumers over the available choices in a wider sense, by helping to protect them against harmful options.¹²¹ The paradox here is that one intervenes in how consumers make choices, which in fact reduces their ability to choose freely, in order to promote consumer sovereignty and help them make better or more active choices.

To some extent, the recognition of personalized exploitation as abuse of dominance results in competition law being relied on 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

would carry the burden of proof, see Sauter, “A duty of care to prevent online exploitation of consumers? Digital dominance and special responsibility in EU competition law”, 8 *Journal of Antitrust Enforcement* (2020), at 425.

121. Oxera, *op. cit. supra* note 87, at 55.

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.¹²² 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.¹²³ For this reason, competition intervention against personalized exploitation can be seen as a form of “libertarian paternalism”, because it intervenes to stop nudging by dominant firms and thereby helps consumers to make better decisions while preserving their freedom of choice.¹²⁴ 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.¹²⁵

5. Conclusion

This article 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. 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. Concerns relating to exploitation no longer only relate to the simple consumption of goods and services, but also impact our autonomy in the news we read and the beliefs on which we base our political voting behaviour. With the advent of personal assistants and the Internet of Things,

122. Fish and Gal, op. cit. *supra* note 14, pp. 12–15.

123. *Ibid.*, pp. 8–9.

124. Thaler and Sunstein, “Libertarian paternalism”, 93 *American Economic Review* (2003), 175–179; Sunstein and Thaler, “Libertarian paternalism is not an oxymoron”, 70 *Univ. Chicago L.R.* (2003), 1159–1202.

125. See also Fish and Gal, op. cit. *supra* note 14, 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.

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.

To address these concerns, the article proposes recognizing 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. The competitive harm of personalized exploitation can be made cognizable under competition law by incorporating dynamic consumer vulnerabilities into the competition analysis at the stage of establishing abuse. Instead of relying on the overall consumer welfare as a benchmark, anticompetitive effects of personalized exploitation should be assessed against a “personalized welfare standard” of those exploited. Such a form of protection against the exploitation of consumer vulnerabilities would allow for competition law to promote a specific aspect of consumer sovereignty.

Competition interventions against personalized exploitation are vital to continue providing room for innovative and diverse offerings. Setting the exact threshold for intervention remains a key challenge and requires further consideration, but 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.