

CPI EU News Presents:

Facebook's Hunger For Your Data: Network Effects in the FCO Decision

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March 2019

Introduction

On February 6, 2019, the Bundeskartellamt (Federal Cartel Office - “FCO”) ruled that Facebook abused its dominant position as a social network in Germany by imposing exploitative business terms on its counterparties, Facebook users. The terms highlighted by the FCO allow Facebook to collect and combine data from non-Facebook services such as Facebook’s subsidiaries WhatsApp and Instagram, and from non-owned third-party sites.

The case is ground-breaking because it is the first to establish an infringement of competition law rules because practices were in conflict with data protection principles. We review this finding, and consider the potential for the approach to gain traction outside Germany.

However, the case also raises more traditionally economic issues in the ongoing debate about “Big Data” and antitrust, i.e. the value of data for competition and the application of antitrust to the digital industry. Those important aspects, less noticed in the early reactions to the decision, are the principal focus of this comment.²

Facts of the Case

Facebook operates a social network which users can join for free. Facebook monetizes its service substantially through targeted advertising.³ This means that Facebook collects data about users to develop user profiles which will allow identification of the type of advertising most likely of interest to a particular user.⁴ The FCO accepts that it is an essential component of Facebook’s business model to aggregate data per user based on the user’s interactions with the Facebook platform. Users, the FCO says, know that the data they make available through their Facebook account will be collected and used to a certain extent. However, many users are unaware, according to the FCO, that Facebook also collects data about them *outside* of the Facebook platform: Facebook collects data about users not only through two of its other companies, WhatsApp and Instagram, but also through third-party websites which have embedded so-called “Facebook Business Tools” - such as “Like,” “Share,” or “Facebook Login” buttons, or which use analytical services such as “Facebook Analytics.” This data flows to Facebook, which combines it with data users provide directly on the Facebook platform and uses it for numerous data processing purposes.⁵

The Federal Cartel Office’s Decision

The FCO found that Facebook is active on the private social network market where Facebook’s counterparties are the private users.⁶ The market is limited to Germany and within that geography the FCO concluded that Facebook holds a dominant position because Facebook’s remaining rivals are limited to some smaller German providers of social networks.⁷

Due to this dominant position, the FCO found that Facebook has a much stronger position than its counterparties, Facebook users. Users who create a Facebook account therefore have no choice but to accept Facebook’s data collection practices when signing-up to the Facebook social network service. This includes “ticking a box” allowing Facebook to collect personal data about the user from other apps and sites. The FCO concluded that any idea that the user has a choice is illusory, since there are only two binary options: (1) accept Facebook’s terms and conditions, including the data collection from non-Facebook platforms and sites, which the FCO labels as excessive; or (2) not have a Facebook account.⁸ Based on

the FCO's assessment - in discussion with data protection authorities - this approval of Facebook's terms and conditions does not meet the criterion of "voluntary consent" under the European General Data Protection Regulation ("GDPR") and were therefore in conflict with the data protection principles protected by the GDPR.⁹

The FCO then relies on the German Federal Court of Justice's case law to find that Facebook's GDPR infringement also constitutes an infringement of the German Competition Act's abuse of dominance prohibition (Section 19(1)). Specifically the German Federal Court of Justice has ruled that violations of the German Civil code¹⁰ or constitutional rights¹¹ can be abusive under Section 19(1) "in particular if the fact that such terms and conditions are applied is a manifestation of market power or superior power of the party using the terms"¹² or "where one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is abolished."¹³ The FCO concludes that, in this case, Facebook is the more powerful party and the law must therefore intervene to balance the interests of Facebook and its users: "It is the authority's view that the European data protection regulations, which are based on constitutional rights, can or, considering the case-law of the highest German court ..., must be considered when assessing whether data processing terms are appropriate under competition law."¹⁴

This exploitative abuse of Facebook's users is, however, not only a GDPR issue but relevant also for the dynamics of the market, because "the conduct of online businesses is highly relevant from a competition law perspective."¹⁵ Social networks are, the FCO notes, data-driven products, and access to personal data of users is thus essential for a social network's market position. On that basis, the question of how a company handles personal data is not only a data protection concern but also an economic issue, and thus one relevant for competition authorities. We return to this below.

The FCO concluded that Facebook's processing of data from third-party sources is not required to operate the social network or to monetize the social network because, as a personal network, this could largely be based on the data obtained through the user's interaction with the Facebook platform itself.¹⁶ The FCO therefore required Facebook to either seek effective voluntary consent from its users for the extensive data collection; or allow users to have a Facebook account without consenting to that wider collection.¹⁷ Facebook has appealed the FCO decision.

Opinion

While the FCO's decision is groundbreaking in as far as it combines antitrust and data protection, it is entirely in line with the newly conventional wisdom among antitrust authorities that data is an important asset with economic value. The FCO's finding that "Facebook's comprehensive data sources are highly relevant for competition as a social network is driven by such personal data"¹⁸ is in line with precedents from e.g. the European Commission ("Commission"). The importance of datasets as an "asset" relevant to a market analysis under antitrust has been well-established in e.g. the Commission's merger decisions such as *Google/DoubleClick*,¹⁹ *Microsoft/LinkedIn*,²⁰ and *Facebook/WhatsApp*.²¹ Data also drove the Commission's *Google Android* case²² and the Commission's pending examination of Amazon's practices focuses on Amazon's use for its own benefit of third-party retailer data.²³

Indeed the DOJ's head of antitrust has recently given a ringing endorsement of the principle, contrasting with an earlier absence of U.S. enthusiasm.²⁴ As mentioned by the FCO,²⁵ the

Facebook decision also responds to recent reforms to the German Competition Act which made it explicit that access to data is a relevant factor to assess market dominance: “In particular in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of ... 4. the undertaking’s access to data relevant for competition.”²⁶ This statutory amendment puts to rest any German debate on the issue,²⁷ but the point is in any event beyond doubt in other jurisdictions.

From this starting point, the FCO analyzes the creation and maintenance of Facebook’s dominant position through the large datasets Facebook assembles,²⁸ applying customary principles. In this context the FCO concludes that Facebook’s economies of scale and the significance of direct network effects have marginalized Facebook’s competitors²⁹ because Google+ and the smaller German players cannot offer users the possibility to connect with similar numbers of other users. Users are therefore unlikely to switch³⁰ and there was no evidence of users multi-homing and using different social networks in parallel.³¹ Facebook, on the other hand, the FCO found, can use the vast amount of data to optimize its own service and tie more users to its network, to the detriment of alternative social network providers.³²

The FCO’s analysis also focuses on one aspect particularly important in relation to user data: personalized advertising.³³ The FCO finds that “the attractiveness and value of the advertising spaces increase with the amount and detail of user data.”³⁴ It is challenging for alternative ad-funded social networks to enter the market because they need a large private user base to succeed. Without a critical mass of users, the social network will not be sufficiently attractive for advertisers.³⁵

But, as mentioned above, users are unlikely to switch to an alternative which does not yet have a significant number of people on the platform. Facebook is therefore becoming more and more indispensable for advertising customers which are faced with a dominant player for advertising space on social networks.³⁶ The value of data in the online advertising space is already the subject of a French and German sector inquiry.³⁷ The Commission has also examined online advertising markets, e.g. in *Microsoft/LinkedIn* the Commission examined the effect of the parties’ concentrated datasets on online advertising services,³⁸ in *Telefonica UK/Vodafone UK/Everything Everywhere/JV* the Commission analyzed whether competing providers of advertising services would be foreclosed,³⁹ in *Google/DoubleClick* the Commission assessed whether the acquisition of DoubleClick’s display and ad serving technology by Google could lead to foreclosure based on the combination of databases on customer online behavior.⁴⁰ Most recently, the *Google Android* case examined how Google’s contractual terms ensured continuous data flows for Google’s own advertising service.⁴¹

Based on the available materials, the FCO has conducted an analysis of direct and indirect network effects based on the concentration of data and foreclosure of rivals. It is obvious that data collection and processing are in that respect economic activities which are relevant under competition law. The detail of that analysis will be of interest, once the full decision is available for the demonstration of market power and foreclosure effects, going beyond the loss of choice for private users resulting from Facebook’s exploitative business terms. While the headlines greeting the case have focused on the GDPR nexus, this part of the decision, based on more familiar economics, is also of great significance.

Finally: will we see an export to other jurisdictions of the FCO’s joining of data protection and antitrust law principles? The reasoning is grounded in German constitutional rights but the protection of personal data is also recognized as a specific right in the European Charter

of Fundamental Rights:⁴² this is a horizontal right which protects not only against interference by the state, but against any processing that does not meet minimum safeguards.⁴³ The European Commission - and other national authorities - can be inspired directly from the overriding Charter principle of minimum safeguards,⁴⁴ many of which are specified in Article 8(2) of the Charter itself. Dominant firms can afford to be “more casual about users’ privacy than others. There is no reason for antitrust regulators to treat this beyond their reach ... the fairness of ‘trading conditions’ - here the provision of the online service in return for extensive (and often unwitting) waiver of privacy rights - is explicitly a criterion within Article 102.”⁴⁵ There is therefore no reason that a similar result which takes into account that users have *de facto* no choice but to sign up to Facebook’s terms and conditions while direct and indirect network effects strengthen Facebook’s position and keep users locked-into its ecosystem, cannot be reached under EU competition rules applying the “unfair trading conditions” abuse foreseen in Article 102 TFEU. The Austrian, Dutch, Italian, and Spanish competition authorities have already voiced interest in the findings of the FCO and the potential parallels in their jurisdictions.⁴⁶

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- ¹ Dechert LLP.
- ² Our discussion is based on the materials published by the FCO to date, i.e. the FCO's press release, background paper and summary decision: Bundeskartellamt's press release: Bundeskartellamt prohibits Facebook from combining user data from different sources (February 7, 2019), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2; Facebook FAQ, Background information on the Bundeskartellamt's Facebook proceeding (February 7, 2019), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FA_Qs.pdf?__blob=publicationFile&v=6; B6-22/16 – Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (February 15, 2019), available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3.
- ³ B6-22/16 – Facebook, p. 2.
- ⁴ *Ibid.*
- ⁵ *Id.* p. 3.
- ⁶ *Ibid.*
- ⁷ *Id.* p.5-6. See also Facebook FAQ Background information, p. 3.
- ⁸ Bundeskartellamt's press release: Bundeskartellamt prohibits Facebook from combining user data from different sources (February 7, 2019), p.2, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2.
- ⁹ B6-22/16 – Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (February 15, 2019), p. 9-11, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3.
- ¹⁰ KZR 58/11, *VBL-Gegenwert I*, 2013; KZR 47/14, *VBL-Gegenwert II*, 2017 and B6-22/16 – Facebook, p. 8.
- ¹¹ KZR 6/15, *Pechstein v. International Skating Union*, 2016 and B6-22/16 – Facebook, p. 8.
- ¹² B6-22/16 – Facebook, p. 9.
- ¹³ *Ibid.*
- ¹⁴ *Id.* p.8.
- ¹⁵ *Ibid.*
- ¹⁶ *Id.* p.10.
- ¹⁷ *Id.* p.12.
- ¹⁸ *Id.* p.7.
- ¹⁹ M.4731, *Google/DoubleClick*, http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf.
- ²⁰ M.8124, *Microsoft/LinkedIn*, http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.
- ²¹ M.7217, *Facebook/WhatsApp*, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.
- ²² AT.40099, *Android*, unpublished. The Commission's *Google Android* decision considered how Google's different abuses contributed to a continuous flow of data for its advertising service. See, e.g. Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm.
- ²³ Margrethe Vestager, European Commissioner for Competition, Speech at the Youth and Leaders Summit in Paris: New technology as a disruptive global force (January 21, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/new-technology-disruptive-global-force_en.
- ²⁴ Makan Delrahim, Assistant Attorney-General, Speech at the Silicon Flatirons Annual Technology Policy Conference at The University of Colorado Law School: "I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy (February 11, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons>. See also Barry Nigro, Deputy Assistant Attorney General, Speech at the Capitol Forum and CQ's Fourth Annual Tech, Media & Telecom Competition Conference (December 13, 2017), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-capitol-forum-and-cqs>.
- ²⁵ Facebook FAQ, Background information on the Bundeskartellamt's Facebook proceeding (February 7, 2019), p. 7, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FA_Qs.pdf?__blob=publicationFile&v=6.
- ²⁶ Act against Restraints of Competition (Competition Act – GWB), section 18(3a), <http://www.gesetze-im->

internet.de/englisch_gwb/.

- ²⁷ The reform improved the application of the German Act against Restraints of Competition to the digital industry and confirmed the importance of data in that sector. Deutscher Bundestag, Gesetzentwurf der Bundesregierung: Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, Drucksache 18/10207 (December 7, 2016), p. 48-51, available at <http://dipbt.bundestag.de/doc/btd/18/102/1810207.pdf>.
- ²⁸ Facebook FAQ, p. 4-5 and B6-22/16 – Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (February 15, 2019), p. 7, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3
- ²⁹ Facebook FAQ, p. 3-4.
- ³⁰ *Id.* p. 4.
- ³¹ *Id.* p. 5.
- ³² *Ibid.*
- ³³ *Id.* p. 7.
- ³⁴ Bundeskartellamt prohibits Facebook from combining user data from different sources (Feb. 7, 2019), p. 3, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2.
- ³⁵ Facebook FAQ, p. 4-5.
- ³⁶ *Id.* p. 5.
- ³⁷ Autorité de la concurrence : Avis n° 18-A-03 du 6 mars 2018 portant sur l'exploitation des données dans le secteur de la publicité sur internet, (March 6, 2018), <http://www.autoritedelaconcurrence.fr/pdf/avis/18a03.pdf> and Bundeskartellamt, *Bundeskartellamt launches sector inquiry into market conditions in online advertising sector*, (February 1, 2018), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html.
- ³⁸ M.8124, *Microsoft/LinkedIn*, http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.
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- ⁴⁰ M.4731, *Google/DoubleClick*, http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf.
- ⁴¹ AT.40099, *Android*, unpublished.
- ⁴² Charter of Fundamental Rights of the European Union, 2000 OJ C 364/10, art. 8.
- ⁴³ Preliminary Opinion of the European Data Protection Supervisor, *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy*, (March 2014), https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf.
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- ⁴⁵ *Ibid.*
- ⁴⁶ Khushita Vasant, *German Facebook decision reverberates through European antitrust agencies*, PaRR, February 8, 2019, <https://app.parr-global.com/intelligence/view/prime-2782635>.