CPI EU News Presents:

The FCO's *Facebook* Decision: Putting Privacy Before Competition

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On February 6, 2019, the German Bundeskartellamt ("FCO") concluded that Facebook had infringed German competition law by violating the European General Data Protection Regulation ("GDPR").[2] The decision, a Russian doll of sorts, uneasily straddles the line between competition policy and data protection (which lies outside of the FCO's competence). It ultimately pushes competition law far beyond its natural confines and takes an unduly restrictive view of various provisions contained in the GDPR.

The FCO's Convoluted Theory of Harm

The FCO's decision rests on three necessary findings (in addition to the usual requirements of market definition, market power, etc.):

First, Facebook combines personal data from third-party websites with user profiles generated on the Facebook platform. This interweaving notably occurs when users visit a website that has embedded Facebook's "Like" or "Share" buttons, and when users register or login to these sites using their Facebook credentials.[3] Doing so allowed Facebook to track users' behavior to and from these sites, though the extent of this monitoring is not entirely clear.[4]

Second, this practice allegedly violated Europe's GDPR.[5] Article 6 of the GDPR sets out a limited number of grounds upon which companies may lawfully process data. These notably include "user consent" and "necessity for the performance of the underlying contract."[6] According to the FCO, Facebook's behavior did not fall within one of these limited justifications. Of these requirements, Facebook's alleged failure to obtain users' consent is perhaps most surprising. Though Facebook's terms of service did provide for this eventuality, the FCO argued that "take it or leave it" offers could not be equated with consent.[7] In other words, users' consent was only valid if they could opt-out of some terms while maintaining access to the Facebook platform. According to the FCO, this was not the case here.

Third, Facebook's behavior was found to be a "manifestation of market power."[8] This condition is critical. Without it, Facebook's conduct would not be relevant as far as German competition law is concerned.[9] It would thus fall exclusively to data protection authorities. But therein lies one of the case's most problematic aspects. It is relatively uncontroversial that market power is not necessary to enforce the type of contractual terms which Facebook implemented. Sensing this weakness, the FCO argued instead that Facebook's behavior "impedes competitors because Facebook gains access to a large number of further sources by its inappropriate processing of data and their combination with Facebook accounts." This interpretation seems hard to square with German competition law. "Manifestation of" is clearly not synonymous with "impedes competitors."

What Next?

Failure to successfully appeal the decision would have important ramifications for Facebook's business in Germany. In order to comply with the decision, Facebook must either refrain from combining data from third-party websites with user profiles, or obtain users' "consent" to do so (presumably by giving them the option to opt out of this specific processing). The latter option seems far more likely.

One solution would be for Facebook to allow users to opt out of this type of processing via its Privacy Settings page (and allow them to continue using its services when they exercise

that option). This is, for instance, what Twitter has done.[10] Another option would be for Facebook to seek users' consent at the source of these "likes," "shares," and "logins." Using these functions currently causes a Facebook window to pop up on third-party websites. It would not be particularly difficult to ask for users' consent at that point (and only then merge their data). This could potentially alleviate the FCO's concerns. Users' potential refusal would only prevent them from using a specific function of the Facebook platform (which is inherently linked to the collected data), rather than the entire platform. Facebook will have to figure out which of these options (or other alternatives) produces the best results in terms of user consent and data generation.

Given the potential impact of these design choices on Facebook's business model and profitability, it is no surprise that it has decided to appeal the FCO's decision.[11] In that respect, Facebook has a key advantage. Because the FCO's decision rests on both German competition law and the GDPR, Facebook will be able to rely on both sets of provisions to sustain its appeal.

The FCO Overshot the Mark

The late Justice Scalia famously warned that it is wrong to conflate the goals of regulation and those of antitrust enforcement.[12] The FCO's Facebook decision is proof, if any were need, that he was onto something. Not only does the case extend German competition law far beyond its natural limits, it also marks a wholly unnecessary foray into the intricacies of data protection regulation (which should have been left to competent data protection authorities).

For a start, the decision is bad as a matter of competition policy. There is tremendous value in being able to integrate services, such as Facebook's, within third-party websites (notably via "like," "share," and "login" buttons). For instance, functions like Facebook's secure login makes it much faster to register on third-party websites, potentially increasing competition to the benefit of consumers. It is thus eminently desirable that Facebook be allowed to earn something in return for this valuable product (potentially in the form of data).

Critics may retort that users are insufficiently informed to make these decisions, and they may well be right. But assessing whether companies' data policies are clear and transparent is the mission of Europe's data protection authorities, not the FCO.[13] The GDPR notably requires that every member of a national supervisory authority has "the qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform its duties and exercise its powers." This is simply not the case for the FCO. In other words, the FCO is only competent to review data protection issues insofar as they have anticompetitive effects.

Which brings us to the next problem with the FCO's decision. Though exploitative abuses (such as the one in this case) are undeniably a part of the European legal landscape, they are usually confined to behavior that is made possible by a firm's market power. The FCO saw fit to ditch this rule in favor of a much looser requirement that Facebook's alleged infringement of the GDPR "impedes competitors."[14] But that is true of virtually all violations of law. If one believes – as argued by Gary Becker[15] – that firms disobey the law because it increases their profits, then infringements systematically affect their competitive position *vis à vis* rivals who abide by the law. The German FCO's stance would mean that virtually every legal infringement by a dominant company could amount to abusive behavior. This in

turn would threaten the delicate balance that these legal instruments have achieved between over and under-deterrence.[16] Not to mention the fact that competition authorities are obviously not well placed to judge whether firms have violated other legal provisions.

Finally, even if Facebook's behavior was enabled by its market position, the FCO takes an extremely narrow view of "consent." The GDPR provides that consent must be "freely given" and that this is not the case "if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance."[17] In other words, it does not explicitly preclude "take it or leave it" offers, but leaves them to the appreciation of relevant data protection authorities (who must notably determine whether data processing is "necessary" in a given case). Letting competition authorities take point on such matters threatens the coherent application of the GDPR. The FCO's conclusion that users have not freely consented to Facebook's terms of service, because they have no alternatives to the Facebook platform, is equally dubious. Users can share photos on Tumblr, Flickr, Snapchat, or Pinterest. They can read newsfeeds on Twitter and Google News. And they can send instant messages on Snapchat, WeChat, Telegram, Google Hangouts, Signal, and even SMS. This is not to say that these are necessarily in the same relevant market as Facebook. But it does undermine the idea that consumers are somehow coerced into joining the Facebook platform, and that this invalidates their consent to Facebook's terms of service.

To summarize, the FCO is acting as a self-appointed enforcer of data protection rules. In doing so, it seems to have forgotten that its mission is not to monitor firms' data collection policies but to preserve competition. Although it goes to great lengths in order to establish that these are one and the same, its decision is ultimately unconvincing. We may not like Facebook's data processing practices, and they might plausibly infringe the highly restrictive GDPR, but it was not up to the German competition authority to make that call.

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[2] See German Bundeskartellamt, *Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing*, Feb. 6, 2015, case summary available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 (the full decision has yet to be published).

[3] See *Facebook*, case summary, p.2-3. This functionality is sometimes referred to as "Facebook Business Tools." https://www.facebook.com/help/analytics/1474296822878427. Facebook also obtained data from a tool called "Facebook Analaytics," the functioning of this tool is not made clear in the decision.

[4] See *Facebook*, FAQs, p.3 available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf;jsessionid=34DA54FD65BDB5B83BAF8B47F20C9ADF.1_cid362?__blob=publicationFile&v=6.

[5] See *Facebook*, case summary, p.7.

[6] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. L. 119/1 (hereafter "GDPR"), art. 6, 1. (a) and (b).

[7] See *Facebook*, case summary, p.1.

[8] *Id.* p.7.

[9] *Id.*

[10] See Twitter Cookie policy, available at https://help.twitter.com/en/rules-and-policies/twitter-cookies (last viewed Feb. 27, 2019).

[11] See Karin Matussek & Stephanie Bodoni, "Facebook to appeal Germany crackdown," THE INDEPENDENT, Feb. 8, 2019, available at https://www.independent.ie/business/world/facebook-to-appeal-germany-crackdown-37794625.html.

[12] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398 (2003).

[13] See GDPR, art. 51.

[14] See *Facebook*, case summary, p. 11.

[15] See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 JOURNAL OF POLITICAL ECONOMY, 169-217 (1968).

[16] For a discussion of optimal deterrence, see, e.g. William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 UNIVERSITY OF CHICAGO LAW REVIEW, 652 (1983).

[17] See GDPR, recitals 42 & 43.