

CPI EU News Presents:

The Theory of Harm in the Bundeskartellamt's *Facebook* Decision

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Introduction: What We Know About the *Facebook* Decision

On February 6, 2019, the German Bundeskartellamt decided its long-awaited *Facebook* case, kicking off what promises to be years of litigation. Next stop: Higher Regional Court of Düsseldorf.² As the decision is not yet publicly available, what we know so far stems from three documents that the Bundeskartellamt has published so far: a press release, a background paper, and a case summary.³ For competition lawyers, this means that some reading between the lines is necessary in order to understand the essence of the case: the theory of harm it relies on. This is worth the while, as *Facebook* may represent an important step into European competition law's future in digital markets.

The Theory of Harm in *Facebook*

The Bundeskartellamt takes issue with Facebook's practice of third-party tracking, i.e. its collection of personal user data through the tracking of user behavior on other websites or applications.⁴ The German authority found that third-party data is made available to Facebook in a number of instances, e.g. when users use digital services that are owned by Facebook, such as WhatsApp or Instagram; when a third-party website embeds visible Facebook interfaces such as the "Like" or the "Share" buttons - even if the user does not click on any such option; and also when a website relies on Facebook Analytics without this being visible to the user. In order for Facebook to track user behavior, the user does not need to be logged onto or registered with Facebook. By combining extensive third-party data sets with the data it gathers through its own website and applications, Facebook is able to turn multi-source data into comprehensive user profiles. Users do not freely agree to this practice, as theirs is an all-or-nothing choice: Either access Facebook's popular social networking services and accept its exploitative data practices, or be shut out from that dominant social network. In the eyes of the Bundeskartellamt, this does not represent voluntary consent.

For the Bundeskartellamt, Facebook has a special responsibility under the competition laws due to its dominant position on the German market for social networks. The case rests on the finding that Facebook abused its dominant position through the extent to which it collects, uses, and merges data in user accounts. This amounts to an exploitative abuse akin to excessive prices, with the twist that in this digital market, it is excessive data that is being collected.

Comment

At a time at which data is widely regarded as the new oil of the economy, and users pay for digital services with their personal data (and their eyeballs) rather than with money, there is a possibility that digital platforms exploit users through excessive data collection. Through amendments of its Competition Act, the German legislature has already drawn attention to the importance of data for competition law: Under Section 18(3a) of the Act, the assessment of a company's market position in multi-sided markets should now consider access to data that is relevant to competition. In addition, the Act also recognizes in Section 18(2a) that a relevant antitrust market may exist where a service is provided free of charge in monetary terms. The *Facebook* decision is the first major case that navigates the question of what type of abuse merits antitrust scrutiny in the data-driven digital environment. In Europe,

competition law has mostly neglected exploitative abuses in recent years. With the *Facebook* case, this may be set to change.

A controversial issue in the *Facebook* case is its relationship with the EU's data protection laws. The Bundeskartellamt is of the opinion that Facebook does not obtain effective user consent for its data gathering and processing practices under the General Data Protection Regulation ("GDPR").⁵ This understanding is backed by a passage in the GDPR's recitals, which states that consent by a data subject "is presumed not to be freely given 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."⁶ This data protection breach by Facebook, according to the authority, is linked to Facebook's market power.⁷ The *Facebook* case appears to rely on a breach of data protection rules which, framed from the vantage point of competition law, constitutes user exploitation. Here, it may be worthwhile to reflect on whether or not such a competition law infringement needs to be premised on a breach of data protection rules.⁸

The Bundeskartellamt's analysis of the abuse of dominance relies on the asymmetry in the bargaining power between Facebook and its users.⁹ Users are overwhelmingly unaware of the extent of third-party tracking and of the value of their personal data that Facebook gathers, merges and exploits commercially. Facebook, on the other hand, relies on personal user data for its commercial success, which in turn reinforces its dominant market position. By relying on this imbalance, the authority makes its case for an exploitative abuse. The authority also believes that Facebook's data practices inflict competitive harm on advertising customers and competitors.

The Facebook case was decided based on Section 19(1) of the German Competition Act.¹⁰ In that respect, it might be recalled that national rules on abuse of dominance may be stricter than their European equivalent, Article 102 TFEU.¹¹ However, Article 102 TFEU may just as well provide a suitable basis for such an antitrust action, as it explicitly prohibits "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" (Article 102(a) TFEU). This is also recognized by the Bundeskartellamt.¹²

The German authority relies on judgments by the German Bundesgerichtshof in which the latter held contract terms to be abusive within the meaning of competition law if they violated the German Civil Code. The authority argues that this must also hold true for violations of data protection rules.¹³ Under European competition law, one might look to cases such as *SABAM* or *Duales System Deutschland* in order to establish benchmarks for data policies that are unfair within the meaning of Article 102(a) TFEU. These cases show that while exclusive data collection may constitute a new type of abuse, it can rely on precedent in order to flesh out the theory of harm that it relies upon.

In the early case of *SABAM* (1974), the Court of Justice of the European Union held that a collecting society's trading conditions may be unfair where the society's members need to agree to conditions that are not indispensable for the contract, "and which thus encroach unfairly upon a member's freedom to exercise his copyright."¹⁴ And in *Duales System Deutschland* (2001), the European Commission held that a company in a dominant position needed to observe the principle of proportionality in its commercial terms in order for them to be compliant with Article 102(a) TFEU.¹⁵

This analysis, it would seem, can be transferred to the data exploitation that is at issue in *Facebook*. It is also in line with the view of the EU's data protection advisory body, which

holds that the collection of personal data may be unfair where third-party tracking goes beyond the user's reasonable expectations.¹⁶ Under EU competition law, the respective bargaining power of users on the one side and the social network on the other, as well as the proportionality between what a user gives in terms of third-party data and what he receives in return, will need to be at the heart of any such analysis.

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² Facebook has already appealed the decision; Bundeskartellamt, *Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* (February 15, 2019) at 12, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3.

³ Bundeskartellamt, *Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources* (February 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html; Bundeskartellamt, *Background Information on the Bundeskartellamt's Facebook Proceeding* (February 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FA_Qs.html; Bundeskartellamt, *Case Summary*, *supra* note 2.

⁴ See already Ariel Ezrachi & Viktoria HSE Robertson, *Competition, Market Power and Third-Party Tracking*, 42 *World Competition* (forthcoming 2019), pre-print version available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272552.

⁵ Bundeskartellamt, *Background Information*, *supra* note 3, at 6.

⁶ Regulation (EU) 2016/679 of April 27, 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) [2016] OJ L119/1, Recital 43.

⁷ Bundeskartellamt, *Case Summary*, *supra* note 2, at 11.

⁸ See Ezrachi & Robertson, *Third-Party Tracking*, *supra* note 4.

⁹ Bundeskartellamt, *Background Information*, *supra* note 3, at 5; Bundeskartellamt, *Case Summary*, *supra* note 2, at 8.

¹⁰ Gesetz gegen Wettbewerbsbeschränkungen (German Competition Act), Federal Law Gazette Nr I 2013/1750, as last amended; Bundeskartellamt, *Case Summary*, *supra* note 2, at 7.

¹¹ Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47; Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2004] OJ L1/1, art 3(2).

¹² Bundeskartellamt, *Background Information*, *supra* note 3, at 6.

¹³ Bundeskartellamt, *Case Summary*, *supra* note 2, at 7 f.

¹⁴ Case 127/73 *BRT v. SABAM* EU:C:1974:25, para 15.

¹⁵ *Duales System Deutschland* (Case COMP/34.493) Commission Decision of April 20, 2001 [2001] OJ L166/1, para 112. Upheld on appeal in Case T-151/01 *Duales System Deutschland* EU:T:2007:154; Case C-385/07 P *Duales System Deutschland* EU:C:2009:456.

¹⁶ Article 29 Data Protection Working Party, *Opinion 03/2013 on Purpose Limitation* (April 2, 2013) at 13, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf.