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The Facebook investigations by the Bundeskartellamt and the new forms of exploitative abuses in digital markets

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Outline

- Overview of the investigations by the Bundeskartellamt in the *Facebook* case.

- Discussion:

1) ECJ case law on unfair contractual practices as exploitative abuse of dominance.

2) The relationship between competition, data protection and consumer law in digital markets:

   a) *Facebook/WhatsApp* case.

   b) Italian *Facebook* case.

- Conclusions - questions for discussion.

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The *Facebook* investigations

Steps in the investigations

- 2nd March 2016: German NCA opens an investigations on Facebook "on suspicious on having abused its market power by infringing data protection rules".

- 19th December 2017: German publishes a **preliminary assessment notice:**

1) Abuse of dominance is limited to Facebook's collection and use of data from third-party websites ➢ off Facebook.
2) Second phase of proceedings: Facebook could put forward justifications

- **Final decision expected in summer 2018....**

Facebook business model

- Main social network in the world: 30 millions users in Germany; 23 million active users on a daily basis.

- **Facebook business model – dual-sided market:**

1) Users can “freely“ connect to friends and family members via Facebook.

2) Non-monetary compensation: by joining Facebook, users accept to transfer their personal data to Facebook.

3) Facebook collects users‘ and non-users‘ data also from third-party websites that have Facebook “like“ or “log-in“ details.

3) Facebook will sell the collected data to third parties ➢ target advertising.

Scope of the investigations

- Scope of the investigations by the Bundeskartallemt:

1) "On Facebook": personal data generated by users while using Facebook

➢ outside the scope of the investigations.

2) "**Off Facebook**": personal data collected by Facebook from third-party web-sites

➢ **focus of the current proceedings**.

- Bundeskartellamt investigates only Facebook collection and use of users' data from third-party websites, **NOT Facebook behavior in the advertising market**.

Relevant market

- Assessment of the relevant market by the Bundeskartellamt:

1) Product market: "social networks" ➢ professional social networks (e.g. LinkedIn) and messaging services (e.g. WhatsApp) excluded from the product market definition.

2) **Geographic market: "Germany"** ➢ German users use social networks to stay in touch with friends "within Germany".

Market power

- According to the German NCA, **Facebook is dominant** in the market of social networks in Germany.

- **Factors taken in consideration to assess market power:**

1) Number of users ➢ direct network expernality as entry barrier.
2) Number of advertisers ➢ indirect network externalities as entry barrier.
3) Large market share: above 90% ➢ only Google + is considered a competitor of Facebook.
4) NO evidence of multi-homing.
5) Superior access to personal data.

Abuse – theories of harm

- **Theories of harm investigated by Bundeskartellamt:**

1) Privacy degradation ➢ higher costs for consumers.

2) Users and non users are subject to "take it or leave it" dilemma when they use Off Facebook websites.

3) Loss of information self-determination ➢ users and non-users cannot avoid the merging data collected "On" and "Off" Facebook.

- **Basic assumption by the Bundeskartellamt:**

1) On Facebook: users are aware that their data will be used for advertising purposes; users can modify privacy settings in their Facebook account.

2) **Off Facebook**: users and non users are **NOT aware** what types of data Facebook will collect and how they will be used.

Abuse – legal basis

- According to Bundeskartellamt, Facebook has imposed "**exploitative business terms**" to its users ➢ explitative, rather than exclusionary abuse.

- Bundeskartellamt relies on **Art. 19(1) GVB as legal basis** ➢ equivalent to Art. 102 TFEU:

"The abuse of dominant position by one or several undertakings is prohibited"

- Bundeskartellamt relies on the case law of the German Federal Court of Justice (*VBL Gegenwert II; Pechstein)* to conclude that Art. 19 GVB sanctions unfair contractucal clauses imposed by dominant firms on final consumers.

Possible outcomes of the case

- **Preliminary assessment notice is NOT the final decision** ➢ Bundeskartellamt could fully re-consider its preliminary assessment.

Possible outcomes in case of infringement:

1) Fine: unlikely ➢ new form of abuse NOT sanctioned before.

2) Behavioural commitment: modification of Facebook conditions in relation to the use of data collected from third-party websites.

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Unfair contractual clauses under Art. 102

Reg. 1/2003

- **Art. 3 Reg. 1/2003:**

1) NCAs should apply Art. 101-102 TFEU when the conduct has an impact on "intra-community trade"

2) EU MS ".... shall NOT be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings ➢ relative market power (Art. 20 GVB).

- **Consequences :**

1) Art. 11 Reg. 1/2003: obligation to notify opening of the investigations and draft decision to the EU Commission / ECN ➢ peer-review.

2) ECJ case law applicable to cases investigated by NCAs under Art. 101-102 TFEU.

Art. 102 v. Art. 19 GVB

- Bundeskartellamt relies on a restrictive definition of the geographic market (i.e. Germany) ➢ **no impact on intra-community trade**????

- Art. 102 TFEU and Art. 19 GVB has similar language and the same objectives ➢ **exception under Art. 3(2) Reg. 1/2003 is NOT applicable in this case.**

- Bundeskartellamt should rely **on Art. 102 TFEU and Art 19 GVB in parallel.**

Art. 102(a) TFEU

- Example of abuse of dominant position: “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions“

- **Art. 102(a) sanctions exploitaitive, rather than exlusionary practices:**

1) Excessive pricing.
2) Unfair contractual conditions.

ECJ case law on unfair contractual clauses

- **NO exhaustive definition in ECJ case law.**

- **Conditions** elaborated by ECJ case law:

1) "**Unilaterally**" imposed ➢ dominant firm is an un-avoidable trading partner for the customer.

2) "**Unfair**": clauses NOT related/absolutely necessary for the performance of the contract.

- ECJ has analysed possible objective justifications, BUT rarely accepted in practice

Open questions

- **ECJ case law on Art. 102(a) is quite old** ➢ still relevant?

- Few cases due to the policy choice by Commission/NCAs to investigate exclusionary, rather than exploitative abuses ➢ **should we re-consider this enforcement pattern in the digital economy?**

- ECJ case law on Art. 102(a) focussed on industrial customers ➢ **should we extend this case law to final consumers in the digital economy?**

Relevance of Art. 102(a) in Facebook case

- **Off Facebook unfair contractual terms:**

1) "Unilaterally" imposed by Facebook on its users AND non-users:
   a) NO express consent.
   b) "Take it or leave it" dilemma.
2) "Unfair": not related to the use of Facebook.

- Objective justifications: transfer of data Off Facebook increases the quality of the social network.

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Relationship between competition, data protection and consumer law

Family ties

- *Facebook* case opens the discussion about the overlap between competition, data protection and consumer law in the digital economy.

- Competition, consumer and data protection law share the **goal of safeguarding the welfare of individuals in digital markets.**

Differences:

1) Objectives;
2) Scope of application;
3) Enforcement regime/remedies
4) The extent of rules harmonization at the EU level

ECJ case law

- ***Asnef-Equifax:*** competition law does NOT safeguard the privacy of individuals

➢ the 3 policies are clearly separate.

- ***Astra Zeneca:***

"...illegality of an abusive conduct under Art. 102 is unrelated to ist compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant position consist of behaviours which are otherwise lawful under branches of law other than competition law"

➢ consumer/data protection rules do NOT prevent the enforcement of EU competition law; margin of discretion left to the enforcers.

Cooperation among different authorities

- Since 2014, European Data Protection Supervisor has supported the establishment of a **Digital Clearing House**.

Possible cooperation among competition/consumer/data protection authorities:

1) Joint sector-inquiries
2) Share information during the investigations
3) Discuss remedies
4) Cases allocation????

- In *Facebook,* Bundeskartellamt has declared to have actively cooperated with the German data protection authority, BUT unclear the terms of the cooperation.

Facebook-WhatsApp saga

- In 2014, Facebook acquired the control of WhatsApp.
- In August 2016, Facebook modified WhatsApp terms of service, and merged Facebook and WhatsApp users' data.

- **Reactions by enforcers :**

1) Competition – May 2017: DG Comp fined Facebook for having provided misleading info during the 2014 merger review.

2) Consumer – May 2017: Italian NCA fined Facebook for the misleading communication to WhatsApp users.

3) Data protection – December 2017: French Data Protection Authority opened investigations for lack of consent to share WhatsApp data with Facebook.

- **Same conduct = 3 infringements ➢ where is the cooperation?**

Italian *Facebook* case

- **Facts**:

1) On 29th Nov. 2018, the Italian NCA imposed € 10 million on Facebook due to **2 violations of the Italian consumer law:**

a) Misleading info: at the moment of the registration, users were not adequately informed by Facebook concerning the future use of their personal data.

b) Aggressive business practice: users could not easily disactivate data sharing with with third-parties; users were encouraged NOT to disactivate data sharing

- **Italian NCA did NOT consider a possible violation of Art. 102(a) TFEU.**
- German and Italian *Facebook* cases are similar in relation to the issue of data sharing with third-parties, BUT NO cooperation between German and Italian NCAs ➢ **is the Digital Clearing House working?**

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Conclusions

Questions for the roundtable

- Are the relevant market and market power definitions followed by the Bundeskartellamt in *Facebook* appropriate?

- Why does the Bundeskartellamt rely on Art. 19 GVB, rather than Art 102?

- Do Off Facebook terms of service represent unfair contractual clauses under Art. 102(a) TFEU?

- What should be the relationship among competition, data and consumer law in a case like *Facebook*? Is the project of Digial Clearing House working?

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Thank you for your attention!

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