

BUNDESKARTELLAMT VS FACEBOOK: TIME TO REFRESH 'GDPR'S WALL'?

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1. INTRODUCTION

On 19 December 2017, the Bundeskartellamt, the German national competition authority (hereinafter "GCA") informed Facebook² of its preliminary legal assessment in the abuse of dominance proceeding it had initiated in March 2016³.

The GCA found that Facebook held a dominant position in the German social networks market and abused its dominant position by imposing exploitative business terms on its users, regarding the use of data from third parties and the possibility to merge

them with users' Facebook accounts⁴. In addition, the GCA is investigating whether there is also potential competitive harm on the side of online advertisers, who are facing a dominant supplier of advertising space.

The GCA stated that the damage of users lies in a loss of control on how their data are used. In the GCA's preliminary assessment, the abovementioned terms and conditions are neither justifiable under data protection, both based under the then applicable 95/46 EC Data Protection Directive, and under the new European General Data Protection Regulation (GDPR)⁵ and civil principles nor under competition law standards.

¹ Italian Competition Authority.

² More precisely Bundeskartellamt informed Facebook Inc., USA, the Irish subsidiary of the company and Facebook Germany GmbH, Hamburg.

³ For further information see Colangelo and Maggiolino, *Big Data, Protection and Antitrust in the wake of the Bundeskartellamt case against Facebook*, Italian Antitrust Review, n. 1 (2017).

⁴ As third data, the GCA means data generated by the use of services owned by Facebook, such as Whatsapp and Instagram, and data generated by the use of services owned by websites and apps. These last ones are generated thanks to Facebook's products such as the 'like' button or 'Facebook login' option or analytical services such as 'Facebook Analytics' embedded in the third party websites. Specifically, data are transmitted to Facebook via APIs the moment the user calls up for the first time the third party's website. For example, for more practical information on these kind of products and services see: <https://developers.facebook.com/docs/plugins/like-button/>

⁵ Regulation (EU) 2016/679, Official Journal of the European Union, L.119/1, May, the 4th, 2016. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>

2. MORE DETAILS

Consistently with the Facebook/WhatsApp case investigated by the European Commission in 2014⁶, Facebook's dominance was assessed considering a narrow product market of social networks⁷.

Particularly, first of all the GCA assumed that the size and the "identity-based networks effects" – the possibility for users to find other people to be in contact with – were the main criteria for choosing a social network⁸.

The GCA left out from the relevant product market other specialized social networks as LinkedIn and Xing⁹, as well as messaging services such as Snapchat and WhatsApp and other social networks namely YouTube and Twitter¹⁰. This

because from the user's perspective, such networks serve distinct albeit complementary needs.

Then, the German authority defined the geographical market as national in scope. According to its preliminary assessment (not abundant in details), GCA's inquiry proved that German users use social networks to stay in touch with friends and acquaintances within Germany.

This preliminary conclusion seems to be at odds with the approach of the European Commission in the Facebook/WhatsApp case. Here, the Commission concluded that the geographic scope of relevant market for social networking services was at least EEA-wide, if not worldwide¹¹.

However, in the more recent Google Shopping case¹², the European Commission affirmed that the relevant geographic markets for general search services¹³ and comparison shopping services¹⁴ were all national in scope. This latter

⁶ Case No Comp/M.7217 – Facebook/WhatsApp, 3 October 2014.

⁷ Social networks can be defined as services enabling users to create a public or semi-public profile and a list of friends or contacts. Other important features include exchanging messages (one-to-one, one-to-group or one-to-many), sharing information (for example, posting pictures, video or links), commenting on postings and recommending friends. A service does not necessarily have to have all of these functionalities to be qualified as a social network (Case No Comp/M.7217 – Facebook/WhatsApp, 3 October 2014, p. 9).

⁸ This should explain why German users prefer to subscribe to Facebook rather than other smaller German social networks and other providers such as Google +.

⁹ Business networks used for professional purposes.

¹⁰ Youtube and Twitter are 'content oriented' (and not 'user oriented' like Facebook or Google +). In other words, on these platforms, networks are not determined by their underlying social relationships but instead by their common interests. (See Inge Graef, *EU Competition Law, Data Protection and Online Platforms*, p. 13, Wolters Kluwer, The Netherlands, 2016).

¹¹ Case No Comp/M.7217 – Facebook/WhatsApp, 3 October 2014, p. 11.

¹² Case No Comp/AT.39740 – Google Search (Shopping), 27 June 2017, p. 55.

¹³ Google offers national sites for each EEA country and in every official language of the Union and because it exists barriers to the extension of search technology beyond national and linguistic borders. Specifically, "the costs associated with upsizing search technology to cover sites in other countries and in different languages can be prohibitive", case No Comp/AT.39740 – Google Search (Shopping), 27 June 2017, p. 55.

¹⁴ Google has national comparison shopping services for each EEA country and in every official language of the Union and language is a particularly important aspect of comparison shopping services. Indeed, comparison

decision will perhaps relaunch the debate for more in-depth definitions of geographical national markets in antitrust cases involving such online giants as Google or Facebook.

However, the GCA preliminary concluded that Facebook maintained a dominant position in the German social networks market. As in the approach of both the General Court in the Microsoft/Skype¹⁵ and the European Commission in Facebook/WhatsApp¹⁶, this assessment was based not only on Facebook's high market shares but as well on

shopping services typically provide language-specific results; the provision of comparison shopping services requires a commercial workforce whose role is to enter into agreements with online retailers, most of which are active at a national level or run their business on a country-by-country basis; a product that sells well in one country may not necessarily have the same success in other countries; a product that may be promoted or sold without limitation in one country may be subject to promotion and/or marketing restrictions in another country; Google does not contest that the relevant geographic markets for comparison shopping services are national in scope, case No Comp/AT.39740 – Google Search (Shopping), 27 June 2017, p. 55-56.

¹⁵ “It follows that the very high market shares and very high degree of concentration on the narrow market, to which the Commission referred merely as a basis for its analysis, are not indicative of a degree of market power which would enable the new entity to significantly impede effective competition in the internal market”, §74, Cisco Systems Inc. and Messagenet S.p.A. v. Commission, T-29/12, ECLI:EU:T:2013:635.

¹⁶ “Even if the data provided by the Parties were to underestimate the Parties' combined market shares, the Commission notes that the consumer communications sector is a recent and fast-growing sector which is characterised by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, the Commission takes the view that in this market high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition”, §99, Case No Comp/M.7217 – Facebook/WhatsApp, 3 October 2014.

specific market features such as direct and indirect network effects and lock in effects¹⁷.

Subsequently, the GCA assessed whether Facebook's terms and conditions were exploitative and harmful for users. In this regard, the German authority took into account data protection principles.

3. THE GERMAN ‘DIGITAL ORDOLIBERAL’ APPROACH

Before going through the assessment of Facebook's business terms, it is worth reminding that the GCA's approach is consistent with Germany's “digital ordoliberal policy”¹⁸, whose aim is to strike a balance between a digital *laissez-faire* and a state-driven modernisation project.

To this purpose, Germany, as other European countries¹⁹, put digital platforms under

¹⁷ On the GCA's view, Facebook's dominance is strengthened by the existence of barriers to entry, namely indirect network effects. Social networks gather information on their users in order to sell target advertising. Therefore, social networks will more easily increase their advertising revenues, the more number of users they have. New competitors will have to reach a critical number of users in order to attract advertisers.

¹⁸ Federal Ministry for Economic Affairs and Energy, *White Paper on Digital Platforms of the Economic Affairs Ministry*, 20 March, 2017, p. 2.

¹⁹ For instance: The Italian Competition Authority has launched an inquiry on Big data (IC53) and several cases applying its national consumer law such as WhatsApp Inc. (PS10601), 11 May 2017: www.agcm.it/component/joomdoc/allegati-news/PS10601_scorrsanz_omi.pdf/download.html, *WhatsApp Inc. (CV154)*, 11 May 2017:

www.agcm.it/component/joomdoc/allegati-news/CV154_vessestratto_omi.pdf/download.html.

In particular, the Italian Competition Authority has recently launched an investigation against Facebook Inc. over alleged unfair commercial practices regarding, among others, the collection of users' data - generated by Facebook; services owned by Facebook; and third party websites/Apps - and the adoption by Facebook of the mechanism of opt-out for the authorization to the exchange of personal data from/to third parties every time the user accesses or uses third party websites and Apps.

According to the Authority, these behaviours comprise two distinct unfair commercial practices in violation of the Articles. 20, 21, 22, 24 and 25, of the Italian Consumer Code, because, on the one hand, users are not adequately and immediately informed by Facebook about the collection and use of their data when activating their accounts.

On the other hand, Facebook exercises undue influence on registered users, whom, in exchange of Facebook's services, give consent to the collection and use of all their data (i.e. information from their personal Facebook profiles, those deriving from the use of Facebook and from their own experiences on third-party sites and apps), in an unconscious and automatic way, through a system whereby consent is pre-selected. Moreover, this system may persuade users to not opt-out from Facebook's conditions in order to not incur in any limitations in the use of Facebook's services. See the related press release of the case (PS11112 – Misleading information for collection and use of data, investigation launched against Facebook), at:

<http://www.agcm.it/en/newsroom/press-releases/2455-misleading-information-for-collection-and-use-of-data,-investigation-launched-against-facebook.html>.

The French Competition Authority has published in cooperation with the GCA, a report on *Competition Law and Data*, 10 May 2016:

www.autoritedelaconurrence.fr/doc/reportcompetitionlawaanddatafinal.pdf, and, on the 6 March 2018, it concluded the sector specific investigation into Online advertising:

http://www.autoritedelaconurrence.fr/user/standard.php?lang=en&id_rub=684&id_article=3133

The Dutch Authority for Consumers and Markets (ACM) published a study into the market for online video streaming platforms, on the 6 October 2017:

spotlights in order to ensure competition, fairness, legal certainty and accessibility of digital markets.

Thus, the German competition law has significantly changed to adapt to the Digital Economy²⁰. As concerns the case at stake, it is important to mention the amendments to paragraph §18(3a), which now expressly state that direct and indirect network effects and access to personal data, among others, are criteria of the assessment of market power in digital economy, especially in the case of online platforms and networks.

Moreover, the German Economic Affairs Ministry, when deploying its measures for fair competition in digital markets, emphasized the need of strengthening GCA's powers. Most importantly, the GCA should have the power of directly sanction unfair business practices

<https://www.acm.nl/en/publications/closer-look-online-video-platforms>

²⁰ On June 9, 2017, the 9th Amendment to the German Act against Restraints of Competition entered into force, bringing several significant changes to German competition law. The Amendment adjusted the German Antitrust Law to Digital Economy by: (i) expressly acknowledging that products and services that are provided for free can constitute a relevant market for purposes of applying German Antitrust Law; (ii) setting out a list of factors to take into account when assessing market power such as direct and indirect network effects, the parallel of several online services and the possibility to switch, economies of scale, access to competitively relevant data, and the role of innovation in digital markets; (iii) including a new transaction value merger notification threshold with a value of more than € 400 million will potentially be notifiable if the target has "significant activities" in Germany.

and in general infringements of general law on fairness²¹.

Following this statement, the German Competition Authority has been recently awarded new competencies in the area of consumer protection. The GCA can launch a sector inquiry where there is a reasonable suspicion that consumer law provisions have been severely violated, such as the Act against Unfair Competition or legal requirements for general terms and conditions²².

4. AN INTERDISCIPLINARY APPROACH FOR ASSESSING EXPLOITATIVE ABUSES

In its preliminary assessment, the GCA pointed out that data protection could serve as a

normative yardstick when assessing exploitative abuses²³.

In its assessment the GCA included the principles of the harmonised European data protection rules, in particular both the 95/46 EC Data Protection Directive (which was in force as of the date of the decision) and the European General Data Protection Regulation which entered into force on 25 May 2018. Indeed, the GDPR expressly recognizes the right of natural persons to have control of their own personal data and especially on how they are collected and processed²⁴.

On this regard, the GDPR provides a set of rules for data subjects (i.e. Facebook users) which strengthens ownership and control over their data. For the purpose of the antitrust case at stake it is important stressing the following provisions.

²¹ Federal Ministry for Economic Affairs and Energy, *White Paper on Digital Platforms of the Economic Affairs Ministry*, March 20, 2017, p. 4.

Particularly, for fair competition, one of the main measures is to enable the competition authority to directly sanction infringements of the general law on fairness (protection of competition from distortion by unfair business practices). Moreover, among others, the measures include: the creation of a level playing field in the telecommunication market (i.e. OTTs' services should abide to the same rules on consumer protection, data protection and security as traditional tlc companies); further acceleration of competition procedures by making it easier to obtain precautionary measures before investigation proceedings have been completed (for instance suspending contractual clauses).

²²See:

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/12_06_2017_Abteilung%20V.html?jsessionid=77A42DC729FAAF6812E1D83264BB33E2.2_cid387?nn=3600108.

²³ See Orla Lynskey and Francisco Alves Da Costa Cabral, *Family Ties: The Intersection Between Data Protection and Competition in EU Law*, Wolters Kluwer, 2018.

See also Giulia Schneider, *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, *Journal of European Competition Law & Practice*, 2018, Vol. 9, No. 4. In particular, p. 221, whereby it can be found a list of cases of infringement of other branches of law for competition law assessments i.e. ECJ, *Belgische Radio en Televisie vs SABAM*, C-127/73; EC, *Banghalter & Homem Christo vs SACEM* at:

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37219; Comisión Nacional de la Competencia, *Resolución Expediente*, S/0466/13 SGAE Autores.

²⁴ Regulation (EU) 2016/679, Recitals 7, 58 and 60.

First of all, data processing shall be based on the consent of the data subject²⁵ within the meaning of art. 4.11²⁶, 6.1, 7 and 8 GDPR²⁷. In particular, consent should be obtained and bound to specific purposes²⁸.

Following art. 7.1, the burden of proof of consent lies on the data controller (i.e. Facebook). It should be noted that the GDPR does not prescribe how exactly the controller should prove how it obtained valid consent from the data subject²⁹ - which could be relevant for the GCA when assessing the facts.

²⁵ Art. 4 of Regulation (EU) 2016/679 defines 'data subject' as an "identified or identifiable natural person". In addition, art. 4 specifies that an 'identifiable natural person' is "one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".

²⁶ "consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".

²⁷ Franco Pizzetti, *Intelligenza Artificiale, Protezione dei Dati Personali e Regolazione*, G. Giappichelli, 2018, pp.16-17. Also art. 20 GDPR, on data portability, could be evidence of data ownership.

²⁸ "Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them. If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided" Regulation (EU) 2016/679, Recital 32.

²⁹ WP29, *Guidelines on Consent under Regulation 2016/679*, pp. 19-20, 17/EN WP259 rev.01, Adopted on 28 November 2017 as last Revised and Adopted on 10 April 2018.

Moreover, data subjects shall have the right to withdraw their consent at any time. Indeed, when consent is withdrawn data processing is unlawful³⁰. In particular, when consent is given with a written declaration regarding also other matters, any part of this declaration which constitutes an infringement of the GDPR shall not be binding³¹. Some scholars stated this provision remains unclear and it could leave room for different interpretations. For instance, processed data - based upon consent for specific purposes - could possibly be used for other purposes³². In turn, this provision could raise some doubts on whether using data collected from third parties is unlawful from a competition point of view.

Secondly, the GDPR empowers data subjects to control the use of their data in accordance with art. 12, 13, 14 and 34³³. In particular, following art. 12, the controllers shall provide any information listed in art. 13 and 14, when personal data are collected from the data subject or are not been obtained from the data subject. In particular, in the latter case, controllers shall provide the data subject with

³⁰ This provision is important because it implies that controllers (i.e. Facebook) should carefully assess the purposes for which data is actually processed and the lawful grounds on which it is based prior collecting the data. See WP29, *Guidelines on Consent under Regulation 2016/679*, pp. 21-22, 17/EN WP259, Adopted on 28 November 2017.

³¹ Regulation (EU) 2016/679, Art. 7.2.

³² Franco Pizzetti, *Intelligenza Artificiale, Protezione dei Dati Personali e Regolazione*, G. Giappichelli, 2018, pp. 18.

³³ Regarding the communication of a personal data breach to the data subject.

information on the purposes of the processing for which the personal data are intended as well as the legal basis for the processing³⁴.

The Working Party 29³⁵ has clarified that the purposes of, and legal basis for, processing personal data should be clear³⁶. Hence, statements such as “*We may use your personal data to develop new services*” or “*We may use your personal data to offer personalised services*” should be avoided, whereas good practice examples are “*We will retain your shopping history and use details of the products you have previously purchased to make suggestions to you for other products which we believe you will also be interested in*” or “*We will keep a record of the articles on our website that you have clicked on and use that information to target advertising on this website to you that is relevant to your interests, which we have identified based on articles you have read*”. Despite, their legitimacy under the GDPR, these last two statements seem too general for the assessment of unfair business terms, and especially in assessing whether users have lost control on their data.

In addition, art. 14.2 lett. c), provides that the controller should give notice to the data subject of “*the existence of the right to request from the*

controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject and to object to processing as well as the right to data portability”. This provision should be considered as competitive as to the extent that data portability is feasible. Indeed, it requires at least potential new suppliers of new services and the transmission of data in formats such as APIs.

5. CONCLUSION

The lack of detailed information on the GCA’s preliminary assessment in the Facebook case does not allow to attempt an advanced elaboration on the theory of harm.

Nevertheless, the analysis of the GDPR’s provisions on data ownership and data control, of the previous section, might contribute to the general policy debate on: whether the breach of data protection regulation by a dominant firm should be considered as abusive under competition law. Undoubtedly, the recently amended German Competition Act provides a solid legal basis for the GCA to act against Facebook³⁷. However, there are several aspects of the GDPR that should be clarified in order to render the theory of harm more effective (i.e. clarifications on how to prove the lawful acquisition of consent). This may suggest a tight cooperation among the Bundeskartellamt and the data protection regulators which

³⁴ Regulation (EU) 2016/679, art. 14.1 lett. c).

³⁵ The "Article 29 Working Party" is the short name of the Data Protection Working Party established by Article 29 of Directive 95/46/EC. It provides the European Commission with independent advice on data protection matters and helps in the development of harmonised policies for data protection in the EU Member States.

³⁶ WP29, *Guidelines on transparency under Regulation 2016/679*, p. 9, 17/EN WP260, Adopted on 29 November 2017 as last Revised and Adopted on 11 April 2018.

³⁷ See art. 3.2 Regulation 1/2003, L.1/1, 16 December 2003.

should be also consistent with the German digital ordoliberal approach previously described.

Thus, this cooperation could lead to relaunch the ‘old’ debate on defining boundaries between competition law and regulation on the basis of an advanced analysis. Suffice it now to emphasize that the German case will provide an even more pro-competitive reading of the GDPR³⁸. Therefore, should the German case trigger other national competition cases involving data protection regulations, this could lead to even more ‘progressive’ interpretations of the GDPR (for instance, on data portability).

If this is the forthcoming scenario, then, isn’t it already time to refresh the “GDPR’s wall”?!

³⁸ At present, the GDPR already has pro-competitive references. In particular, one of the aims of the GDPR is facilitating the free flow of personal data within the Union while ensuring data protection. See recitals 5, 6 and 7 Regulation (EU) 2016/679.