

Competition and data

What can be inferred for the Facebook investigation from the report on competition and data co-published by the Bundeskartellamt?

May 12, 2016

The investigation of the German Federal Cartel Office (*FCO*) against Facebook because of suspicions that Facebook may have abused a possibly dominant position has prompted a considerable echo, not only among antitrust lawyers. The FCO is currently investigating (i) whether Facebook may have a dominant position in the market for social networks and (ii) whether it may have abused such position with its specific terms of service on the use of user data. The suspicion cited by the FCO in its press release of 2 March 2016 is that Facebook's conditions of use are in breach of data protection rules because users must agree to the collection and use of their data by accepting Facebook's terms of service, which are opaque and difficult to understand. While the FCO acknowledges that not every breach of the law by a dominant company is necessarily relevant under competition law, Facebook's conduct could represent an abusive imposition of unfair conditions on users.

On 10 May 2016, the FCO and the French Autorité de la Concurrence have published a detailed paper on the general interrelations of Competition Law and Data (*Joint Paper*), which sheds some light on the suspicions the FCO currently examines.

Overview of the Joint Paper

The Joint Paper identifies some key issues that the authorities consider relevant when assessing the interplay between data, market power and competition law. It discusses the **types of different data** and how they can be categorized (type of information, structured vs unstructured data, method of gathering), **the role of data in economic activities** (product/service improvement, exploitation of business opportunities, target-oriented models) and the possible **role of data in the competitive analysis** (source of market power, increase of market transparency, data-related anti-competitive conduct). It sets out both the **beneficial and the negative effects** that the increased collection, processing and commercial use of data can have and it stresses the importance of a **detailed case-by-case analysis** of the specific markets, business models and conduct at hand when assessing particular data-related fact patterns from a competition law perspective. Furthermore, the Joint Paper provides a **helpful overview of cases** at the U.S., EU and Member State level in which data-related issues have been assessed by competition authorities. For example, the French Authority has dealt

with a number of cases involving the use of data by companies that evolved from former state monopolies, i.e. cases in which data was not collected on the basis of innovation.

Implications for the Facebook investigation

While the Joint Paper expressly states that privacy concerns are not in and of themselves within the scope of intervention of competition authorities but rather governed by data protection law, it also points out that this does not imply that competition law is irrelevant to personal data. Instead, statutory requirements stemming from other bodies of law may be taken into account under competition law. It refers to the ECJ's decision *Allianz Hungária* (2013) where certain principles of Hungarian insurance law were taken into account in the competitive analysis and to *Universal/EMI* (2012), where the Commission considered cultural diversity issues. It also cites the European Data Protection Supervisor who advocated a **"more holistic approach to enforcement"** and a dialogue between competition, consumer and data protection authorities. Most importantly for the Facebook investigation, it refers to a decision of the German Federal Court of Justice, in which the Court stated that contract terms which are incompatible with the laws on general trade terms and conditions can be abusive if the use of such terms is based on a company's dominant position (*VBL Gegenwert*, 2013). The case related to certain terms imposed by a pension office and did not have any data protection aspects. The Joint Paper emphasizes that **privacy policies can be considered from a competition law angle** whenever "they are liable to affect competition, notably when they are implemented by a dominant company, for which data serves as a main input of its products/services: In those cases, there may be a **close link between the dominance of the company, its data collection processes and competition on the relevant markets**, which could justify the consideration of privacy policies and regulations in competition proceedings." The Joint Paper further states that **privacy reductions** could, in particular, be a matter of **abuse control** where a company collects data by clearly breaching data protection law and where there is a strong interplay between the data collection and the company's market position. Whereas competition authorities have so far focused on excessive pricing as (potentially) exploitative conduct, the Joint Paper considers that when looking at excessive trading conditions data privacy regulation could serve as a useful benchmark to assess a potential abuse. According to the paper, this is the case especially for terms imposed on consumers in order for them to use a certain product/service, notably where consumers do not read the terms or privacy policies of their various product/service providers.

Most theories of harm identified by the Joint Paper are **premised on a company's capacity to derive market power from its ability to sustain a data trove unmatched by its competitors**. In this context, the Joint Paper's observations on multi-sided markets, network effects, multi-homing and services provided without monetary consideration on a given side of the market are also interesting. In Germany, the traditional practice of the FCO has been to prevent such "free" services/products from being defined as part of a relevant market.

However, some recent decisions and proceedings including the Facebook investigation indicate that this may be about to change in the future given that companies compete on aspects other than price, such as the quality of service or the amount of data collected on each individual user.

The Joint Paper is very clear that before assessing whether data contributes to the creation or strengthening of market power, the market dynamics in the specific market at hand and its particularities – e.g. network effects and multi-homing in many online markets – must be closely examined. Whether data is scarce in a particular market or whether it can easily be replicated (non-rivalry of data) and whether the scale/scope of data collection matters in a specific context are two important factors in such analysis.

Conclusion

It is clear that the FCO's Facebook investigation, which is conducted in close contact with data protection officers, consumer protection associations as well as the European Commission and the competition authorities of the other EU Member States, will continue to be under close watch by stakeholders and businesses across Europe. The Joint Paper gives a first indication on which aspects the FCO is currently focusing.

For further information please contact

Dr. Anna Huttenlauch
anna.huttenlauch@blomstein.com

Dr. Max Klasse
max.klasse@blomstein.com

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