



HOW MANY “LIKES” FOR THE GERMAN FACEBOOK ANTITRUST PROBE?



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I. INTRODUCTION

The German Federal Cartel Office (“FCO”) caused quite a stir, not only among antitrust lawyers, when it announced five months ago that it had opened an investigation against Facebook based on the allegation of abuse of dominance.² Even though little is public about the status of the investigation and its progress so far, there are three fundamental questions at the heart of the proceedings which will shape the future discussion about the case.

- First: Is there a market on which Facebook is "dominant", i.e. do social networks constitute a market for the purpose of antitrust analysis?
- Second: What particular features and market dynamics need to be taken into account when assessing the competition on multi-sided platforms such as a social network?
- And third: If Facebook is considered dominant, can a breach of data protection rules amount to "abusive behavior" within the meaning of antitrust law?

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² Press release of March 2, 2016,

http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568.



II. IS THERE A MARKET ON WHICH FACEBOOK IS "DOMINANT"?

The first discussion point revolves around the question whether services that are provided free of monetary charges can, as a matter of principle, constitute a market.

Facebook is a social networking platform, which connects more than 1.3 billion users worldwide. It allows users to engage with each other for social purposes: They connect, share, communicate and express themselves online or through their mobile app by posting pictures or videos, sharing links to their timelines, commenting or “liking” other user’s activities or playing games connected to Facebook. The platform’s services are provided for free, i.e. users do not pay to use Facebook. Instead, the system is monetized through advertising, i.e. providing non-search advertising services on Facebook’s networking platform (both on PCs and on mobile devices).

In the past, German courts and the FCO considered monetary charges and price-setting as essential competitive parameters for services to constitute a "market." The view expressed explicitly or implicitly in the body of case law created over the past decades was that if there is no payment, there is no market. Therefore, for example, the FCO did not consider the viewer side of free TV to constitute a market in its *Axel Springer/ProSiebenSat1* decision (as opposed to the advertising side).³ Based on this theory, the services of a social media platform for which users do not pay any money, would not qualify as a "market."

This is different from the view taken by the European Commission who analyzed several “markets” in its recent *Facebook/Whatsapp* decision, most of which did not involve paid services.⁴ The Commission is currently also investigating Google’s dominance on internet search markets (which are “free” to users). Even in the past, the Commission was less inclined to reject the existence of a market only because no charges were being paid.⁵

It is quite remarkable that the FCO is currently in the process of abandoning its earlier view and drawing closer to the Commission’s position. It has started to acknowledge that companies can compete on aspects other than price, such as the quality of service or the amount of data collected on each individual user. By opening an investigation against Facebook based on an abuse of dominance allegation the FCO implicitly takes the position that even services for which no monetary compensation is paid can, in principle, constitute a market. For instance, providing user data in exchange for a specific service can be sufficient to qualify as a "market relationship." The authority also explicitly confirmed this position in a paper that was published jointly with the French *Autorité de la Concurrence* on the general interrelations of Competition Law and Data in June 2016.⁶

Moreover, draft legislation that is expected to enter into force in Germany by the end of

³ B6-103/05 – *Axel Springer/ProSiebenSat1*.

⁴ See COMP/M.7217 - *FACEBOOK/ WHATSAPP*.

⁵ See, for example, COMP/M.1889 – *CLT-UFA/CANAL+/Vox*; COMP/M.6281 – *Microsoft/Skype*.

⁶ Competition Law and Data, June 10, 2016,

http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2.



2016 will explicitly endorse this change of dogma and clarify that services provided free of charge can in principle constitute a market and are therefore not *per se* out of the scope of competition law analysis.⁷

III. WHAT PARTICULAR FEATURES AND MARKET DYNAMICS NEED TO BE TAKEN INTO ACCOUNT WHEN ASSESSING COMPETITION ON MULTI-SIDED PLATFORMS?

The finding that social networks can, in principle, constitute a market still begs the question whether Facebook is dominant on such a market.

When the European Commission analyzed social networks in the context of *Facebook/Whatsapp*, it did not reach a conclusion on the exact market definition or Facebook's market position. It did, however, note a number of online services that include a social networking functionality as well. This spectrum includes quite a variety of services of very different nature and focus, including consumer communication services with some sort of networking functions. Thus, the competitive landscape is highly differentiated. Companies clearly considered part of the same competitive orbit as Facebook by the Commission include Google+, LinkedIn, Twitter and MySpace. In terms of the geographic scope, the Commission assumed an at least EEA-wide, if not worldwide, market for social networking services.

It has been discussed among economists, legal scholars and antitrust practitioners whether it is appropriate to assess market power in digital economies according to traditional criteria or whether specific market dynamics need to be reflected in the competition analysis. In particular, there is a question to what extent market shares are indicative of market power in platform and network markets or whether other factors can be more telling, such as indirect network effects, scale effects, congestion and the extent to which users are active on multiple platforms ("multi-homing"). Moreover, market shares are difficult to determine according to traditional parameters because these cannot be easily applied. For example, where services are provided for free, turnover will not be an appropriate measurement of market power. Instead, the number of registered users or, possibly even only the number of "unique users," page impressions, the time spent by users on certain platforms and the extent to which users are active on multiple platforms or use one platform exclusively ("single homing") are better indicators.⁸

Generally, while network effects and scale benefits have an inherent tendency to support concentration, multi-homing and congestion risks tend to decrease concentration effects. For example, the more users active on a dating platform or a social network, the more attractive it will be for new users.

In relation to data-driven markets, an additional level of complexity comes in because the more control a network has on user data, the better it will be able to optimize its services

⁷ See <https://www.bmwi.de/BMWi/Redaktion/PDF/G/neunte-gwb-nouvelle,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

⁸ See also the FCO's working paper Market Power of Platforms and Networks, published on June 9, 2016, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/09_06_2016_ThinkTank.html. The draft legislation that will enter into force in Germany by the end of 2016 also takes account of some of these factors and their relevance for the competitive analysis of certain markets.



for its users and keep them in the network. This can make it harder for new entrants to establish a critical mass of users and build up a competitive alternative. However, concentration in this sense must not necessarily be harmful to competition. Instead, it can be ambivalent. With a sufficient degree of platform differentiation and users using various platforms, innovative new offers can become a competitive alternative quite quickly in some markets.

Two important factors in the analysis of data-driven markets – which were also pointed out by the British Competition and Markets Authority in its 2015 report *The Commercial Use of Consumer Data* – are first: whether data is scarce or whether it can easily be replicated (“non-rivalry of data”). And second: whether the scale/scope of data collection matters in the specific context of, for example, a social network such as Facebook.⁹

The FCO is considering all these parameters in its current investigation. Of course, the dynamics of the social network market and its particularities must be closely examined, e.g. to what extent network effects exist and whether multi-homing is common practice among users. It will remain to be seen whether the FCO will actually come to the conclusion that Facebook can be considered “dominant” according to these standards or whether it will identify market dynamics that undermine this proposition.

IV. CAN A BREACH OF DATA PROTECTION RULES AMOUNT TO "ABUSIVE BEHAVIOR"?

In relation to the abusive conduct, the allegation currently investigated by the FCO is (1) whether Facebook’s conditions of use and its specific terms of service on the use of user data are in breach of data protection rules and (2) to what extent such a breach could be connected to Facebook’s possibly dominant position.

Facebook users must agree to the collection and use of their data by accepting Facebook’s terms of service, which the FCO considers “opaque and difficult to understand.”

The FCO acknowledges that privacy concerns are not in and of themselves within the scope of intervention of competition authorities but rather governed by data protection law. In addition, not every breach of the law by a dominant company is necessarily abusive conduct. However, given the importance of user data to advertising-financed internet services, such as Facebook, the authority examines whether there is sufficient transparency, i.e. whether consumers are sufficiently informed about the type and extent of data collected. After the investigation became public, Andreas Mundt, President of the FCO said: “Dominant firms are subject to special obligations. These include the use of adequate terms of service as far as they are relevant to the market.” If the FCO finds its theory of harm confirmed, it could come to the conclusion that Facebook’s specific conduct in question constitutes an abusive imposition of unfair conditions on users.

The position paper on Competition Law and Data, which the FCO co-published with the

⁹ The Commercial Use of Consumer Data, June 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398283/Consumer_Data_-_CFI.pdf; p. 95.



French Authority in June adds clarity to the theory of harm that the FCO is testing.¹⁰ This paper states 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.

It is worth noting that the European Commission took a different position in its *Facebook/Whatsapp* decision in 2014 (albeit under a different theory of harm).¹¹ The Commission tested a number of theories of harm in relation to the proposed merger of the consumer communication service Whatsapp and the social network Facebook. However, it did not consider any privacy-related concerns flowing from the increased concentration of data in Facebook's control as falling within the scope of EU competition rules. Instead, it viewed the EU data protection rules as the appropriate regime to test and scrutinize such potential concerns. In the *Facebook/Whatsapp* decision, the Commission only analyzed potential data concentration to the extent that it was likely to strengthen Facebook's position in the online advertising market (or any sub-segments thereof). Since Whatsapp was not active in online advertising and since Whatsapp did not collect any advertising-relevant user data, the transaction did not give rise to any horizontal overlaps between the merging parties in this respect. Moreover, the Commission noted that a number of market participants collect user data along with Facebook, including Google, Apple, Amazon, eBay and Microsoft. Facebook's share in the collection of data across the web amounted to only between 6 and 7 percent whereas the remaining shares were out of Facebook's exclusive control.

The fact that the FCO is now analyzing a competition law infringement, where a breach of data protection rules is connected to market dominance, could have significant consequences. Sanctions provided by the German data protection law regime are currently capped at €300,000 in Germany, whereas fines imposed by the FCO can amount to 10 percent of worldwide turnover. In Facebook's case this could, in theory, mean a fine of 1.8 billion USD. Naturally, a number of other companies active in data-driven markets are also watching the investigation closely.

V. CONCLUSION

In recent years, the FCO opened investigations into booking platforms, online distribution, amazon.com and now Facebook. While all of these investigations pursue different theories of harm, this level of activity shows that the agency is prepared to step into a gap left by other authorities in Europe and worldwide. It also means that tech-giants face a greater risk of scrutiny in Germany than elsewhere. However, if other competition authorities follow these

¹⁰ Competition Law and Data, June 10, 2016, http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2.

¹¹ See COMP/M.7217 - *FACEBOOK/ WHATSAPP*.



footsteps, this risk may soon expand across Europe and potentially further. The FCO's Facebook investigation 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. The European Competition Commissioner, Margarethe Vestager, has already voiced very clearly that the FCO is exploring new territory; its pioneer role may soon inspire other competition authorities to follow. Given its significance for all kinds of digital economy business models, it will continue to be under close watch by stakeholders and businesses across Europe.