

Bundeskartellamt sends preliminary assessment to Facebook

Kluwer Competition Law Blog

January 9, 2018

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Please refer to his post as: Silke Heinz, 'Bundeskartellamt sends preliminary assessment to Facebook', Kluwer Competition Law Blog, January 9 2018, <http://competitionlawblog.kluwercompetitionlaw.com/2018/01/09/bundeskartellamt-sends-preliminary-assessment-facebook/>

On December 19, 2017, the Federal Cartel Office (“FCO”) published a press release on its preliminary assessment in the ongoing Facebook dominance probe, accompanied by a background paper (available in English [here](#)).

The FCO considers that Facebook abuses its dominant position through imposing unfair general terms and conditions (“t&cs”). The published materials provide some interesting insights to the FCO’s approach.

1. Market definition and dominance

The FCO defines a separate (digital) social networks market in Germany. Some smaller social network operators as well as Google+ are active in the same market, but in the FCO’s view they can only provide limited substitutability, as Facebook has significantly more users (direct network effects). Professional networks (LinkedIn and Xing), messaging services (WhatsApp and Snapchat) or other social media (YouTube or Twitter) are not in the same market, because they satisfy complementary needs on the demand side. The market is limited to Germany, because the FCO found that German users mainly use Facebook to keep in touch with users in Germany.

Facebook is seen as quasi-monopolist, with a market share of more than 90% (user numbers). The FCO finds that direct network effects due to Facebook’s large user numbers enhance this position and lead to high entry barriers. Users are “locked

in” as they find it “extremely difficult” to switch to other social networks. Indirect network effects impede market entry – it would be difficult for a new entrant to offer services financed by advertising revenues, given that this would require a critical number of users. The FCO did not find “multi-homing” – the parallel use of more than one digital platform by the same users – in the social networks market.

2. Abuse

The FCO considers that the use of unfair t&cs, notably the collection and use of user data from third-party websites and apps, infringes EU data protection law and thus constitutes an abuse of Facebook’s dominant position under German competition law.

a) Infringement of data protection law

Facebook’s t&cs allow the company to collect data from users surfing third-party websites or apps with an embedded Facebook API (application programming interface), i.e., the Facebook “Like-Button”, to match the data with the users’ Facebook accounts and to use it for any additional data processing activities. Users do not have to click on the said button – surfing on such sites is sufficient. The proceedings do not concern data collection and use within the Facebook social network platform, including other Facebook companies, like Whats’App or Instagram, but from genuine third-party websites, millions of which in Germany have these embedded APIs.

The FCO notes that users are unaware of the massive data collection. In addition, they can only agree to the whole t&c package or refrain from opening a Facebook account, and given Facebook’s dominant position, cannot switch to other social networks. Therefore, the FCO doubts that users have effectively consented to this broad data collection and use, with the result that the practice violates EU data protection law. The FCO says it is still cooperating with data protection authorities on this aspect of the proceedings.

b) Test under German competition law

The background paper shows that the FCO tackles Facebook’s practice under national law, Section 19 ARC, the general prohibition to abuse a dominant position. The FCO considers the case under exploitative abuse aspects. The theory of harm is conditions abuse (unfair terms and conditions), which is similar to price abuse (excessive pricing).

Typically, abusive conditions are determined by comparing the t&cs in question with those prevalent in comparison markets characterized by competition. The FCO does explicitly not follow this concept here, but the general approach to the abuse test under German law, which requires an overall balancing of interests of all parties concerned. In this context, the FCO refers to Facebook's t&cs infringing data protection law and the basic rights protected therein, which in turn might render the t&cs inadmissible under civil law principles. Imposing these t&cs is supposed to constitute an abuse of dominance.

The FCO relies on Federal State Court decisions (*Pechstein* and *VBL-Gegenwert II*) to back its approach. In the cases the Court stated that if t&cs are a manifestation of dominance or superior market power and would be inadmissible under the legal principles on general t&cs (laid down in the German Civil Code) they can constitute an abuse of dominance. In *Pechstein*, the Court required an extensive balancing of interests, including of basic rights. In particular, the Court ruled that in case a dominant company was practically able to dictate the terms of the contract and disposed of the other party's constitutional rights, the law had to intervene to uphold protection of these rights.

3. Next steps

The FCO clarifies that this is a preliminary assessment only. Facebook can now defend its position and/or offer solutions, and the FCO foresees negotiations in the next phase of proceedings. The press release indicates possible solutions in terms of granting users more control over the data collection and use processes and providing options to limit the data collection. The proceedings' outcome is open: termination of proceedings, commitments or a prohibition decision, but the end is not expected before summer 2018. These are administrative proceedings, not administrative offence proceedings with a view to imposing a fine.

4. Comments

The publication, in particular of a background paper in an ongoing probe, is quite unusual. It can be explained by the huge interest in the proceedings, but it seems the FCO also wanted to raise awareness of and possibly put some pressure on Facebook's data collection practice.

In substance, this is another abuse case in the Internet economy dealing with "fairness" aspects. Interestingly, the FCO leaves Article 102 TFEU aside, on which it usually relies in parallel to national law. One possible reason is that national law on

unilateral conduct may be stricter than EU law (Article 3(2) Reg. 1/2003). The restriction to national law might also be the result of discussions within the ECN – it avoids having the FCO setting a controversial EU law precedent.

The explanations on determining the abuse unfortunately remain vague compared to other parts (like market definition). While indeed there is caselaw that balancing the interests in abusive conditions cases requires taking into account the civil law principles on general t&cs, *VBL Gegenwert II* explicitly states that not every inadmissible clause is automatically an abuse of dominance – this is only the case if the company can impose the clause because of its very market dominance or superior market power. It remains unclear after reading the published materials whether this is really the case for Facebook. The FCO repeatedly points out that the users cannot switch – but data protection infringements are unfortunately not only committed by dominant players in the digital world. This issue seems to be at the heart of the analysis – otherwise any infringement of a legal provision protecting other market participants by a dominant company would automatically be an abuse of dominance.

The FCO fails to mention that *VBL Gegenwert II* concerned the provision of retirement benefits and a condition inappropriately impeding customers from exiting a long-term agreement with the dominant supplier, which the Court qualified as abuse of dominance. *Pechstein* concerned an agreement imposed by monopolist International Skating Union on athletes for competing in the world championships, so essentially concerning the basic right to carry out their profession (and the abuse was ultimately rejected). These seem to be rather different scenarios than the one at stake in the Facebook case, i.e., access to a social network for leisure purposes – which needs to be taken into account in the balancing of interests exercise. It will be interesting to see the FCO's final analysis on these issues.