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The German Facebook Antitrust Case – A Legal Opera

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With the adoption of the 10th amendment to the Act against Restraints of Competition (ARC, 'Gesetz gegen Wettbewerbsbeschränkungen') on 14.01.2021 by the German Parliament ('Bundestag'), the curtain will lower on an antitrust opera [previously reported by Silke Heinz here]:

'The Abduction from (not the Seraglio) the Düsseldorf Court of Appeals'.

Overture

For the following, the Federal Cartel Office's (FCO, 'Bundeskartellamt') investigations against Facebook in March 2016 may be construed as an overture.

Facebook develops and operates various digital products, services and applications for smartphones. In 2016, the FCO announced that it was investigating suspicions about Facebook's specific terms of service on the use of user data [see Silke Heinz here], and it held in 2019 that Facebook had abused its dominant position in the market for social networks [see Silke Heinz here]. Accordingly, it prohibited the data processing and implementation provided for in Facebook's terms of use. The latter decision prohibited the terms of use allowing for Facebook's collected data to be linked with user and device-related data collected by the Facebook group's other services or on third-party websites without the consent of users. The FCO ordered that Facebook remedy past data usage within a given period.

The FCO argued on the basis of Facebook's dominant position in the market for social networks for private users, as it required its users to agree to contractual conditions that violated the General Data Protection Regulation in order to receive its services, and the users thus suffered a loss of control over their right of data self-determination. In addition, the FCO held that there was an obstructive effect to the detriment of other competitors in the same market and on third markets [see Silke Heinz here].

Act 1

The curtain rises on the first act before the 1st Cartel Senate of the Düsseldorf Court of Appeals.

Facebook sought interim relief against the FCO's decision and requested an interim suspension of the same. The Düsseldorf court entertained considerable doubts about the FCO's decision.

According to the Düsseldorf judges, the FCO had wrongly reasoned from the possible infringement in the context of data collection and the terms of use to an obstructive effect vis-à-vis other competitors, and thus to an infringement of cartel law. The FCO's main argument in that regard was therefore directed, firstly, at infringements and violations in the area of data protection law. Only in a second step did the FCO deduce that such a violation of data protection law (almost automatically) entails a violation of competition law. The court in Düsseldorf, however, rejected this (normative) causal notion and emphasized that a (direct) causal relationship must exist between a dominant position and the relevant effect, in the form of abusive terms and conditions. Accordingly, only the dominant market position is to be taken into account; the test for causation must be whether this dominant position enabled Facebook to impose abusive terms and conditions.

As a result, Facebook was granted interim relief. The Düsseldorf judges held that the FCO had not proven causation between Facebook's dominance and an abuse of terms and conditions.

Act 2

Ten months later, the curtain rises again; this time on a scene set before the Federal State Court ('BGH' or 'Bundesgerichtshof').

The FCO appealed the decision of the *Düsseldorf Court of Appeals* before the BGH, which allowed that appeal. Notably, the BGH did not share the view of the Düsseldorf judges and decided – somewhat surprisingly – that no causation in the sense proposed by the Düsseldorf judges is needed with regard to abuse of a dominant market position. According to the BGH, any causal link between the dominant position and result within the relevant market suffices, as long as the result indicates a lack of competition. In the two-sided platform market at hand, such causation was identified, because Facebook was held to have exploited its users and, at the same time, limited the prospects of other market participants.

In a passionate aria, the BGH developed its own theory of harm of a dominant position through the use of personal user data, which data is also collected where websites outside of one's own social network are loaded up. For this purpose, the BGH drew a comparison to the hypothetical product of a competitor offering a less data-intensive variant for users and thus enabling them to choose between an 'experience' with consent to the use of all data and one with only limited consent to the use of data.

However, neither Facebook, nor the FCO, nor indeed the Düsseldorf court ever even mentioned the slightest possibility of this kind of less data-intensive alternative: despite the BGH's limited role as an appellate court deciding points of law, the court simply went beyond its remit.

Act 3

As all of this still lay within the realm of interim measures, Facebook, in a kind of 'intermezzo', yet again applied for interim relief before the competent Düsseldorf court.

The Düsseldorf judges stood behind their original decision and held, in opposition to the BGH, that there were considerable doubts over the FCO's reasoning and that a detailed examination was necessary with a view to the changes made by the BGH.

As a result, the Düsseldorf judges rendered a 'Hängebeschluss', that is, they ordered a form of interim relief until the main proceedings can be conducted.

Act 4

As expected, the FCO appealed and, at the time of writing, the BGH has accepted the appeal for a future decision.

However, the last act is always good for a surprising twist – in the play at hand, fresh protagonists, in the form of the German Parliament ('Bundestag') and its committees enter the scene.

The latter parliamentary committees made a last-minute change to an amendment to the Act against Restraints of Competition and entered the following provision:

'The Federal Court of Justice ('Bundesgerichtshof') shall decide as a court of appeal in the first and last instance on all disputes against orders of the Federal Cartel Office ('Bundeskartellamt') under Section 19a …'

Of course, the observer will know that sec. 19a ARC, addressing 'the abusive conduct of undertakings of paramount significance for competition across markets', was intended for application to Google, Apple, Amazon and – *drumroll* – Facebook.

The curtain falls.

Review

Certainly, the FCO made a quite laudable attempt to deal with the digital economy's competition problems. However, we would argue that the metaphorical 'sound' was entirely wrong. The FCO's competence does not lie within the realm of data protection or the German legal system as a whole, but within the protection of competition and, perhaps and indirectly, consumer welfare: Not every infringement of the legal system's norms, and not every dominant position constitutes, in and of itself, an infringement of competition law.

As mentioned, the BGH's reasoning is also questionable. As an appellate court, the BGH could not simply argue the facts, which were addressed by neither the Düsseldorf court of first instance, nor the FCO. The BGH's role was limited to questions of law, as the court is bound by the findings of fact made in the contested Düsseldorf decision. Against this background, the case should have been remitted to the Düsseldorf court insofar as the BGH wanted to use new factual reasons.

Recent amendments to the GWB have established the exclusive and sole jurisdiction of the BGH. The relevant committee introducing this (last-minute) change referred to the dynamics of the digital economy and the rapid growth of the large online markets that ask for faster procedures.

With a view to the litigation at hand, this is, of course, correct. 5 years seems to be an extraordinarily long time in the context of the digital economy. However, it remains to be seen whether the BGH's sole jurisdiction will actually enable faster proceedings in practice. The BGH has to establish facts, which is – in any court – a time-consuming enterprise. Additionally, the BGH's resources are those of an appellate court and, hence, rather limited in relation to fact-finding. Any potential 'overload' of the BGH will inevitably result in delays to the proceedings, if not in the digital economy cases then most probably in other appellate cases.

There are some constitutional issues to consider as well: The German Constitution requires 'effective legal protection'. This does not require an appellate procedure. However, the purpose of the establishment of supreme courts is generally to complete a cycle of instances and to function as the highest court of appeal and not as a court of first and – at the same time – final instance. Only exceptional circumstances may justify such a first and final instance court; for instance, where administrative acts of federal authorities that are of fundamental importance require a rapid final clarification. However, in competition law, such an exceptional case does not exist, as the FCO's orders are always immediately enforceable. Even filing for an interim measure does not change the immediate enforceability of the order. The length of the litigation at hand does not itself represent a rather slow and lumbering procedure, but simply a working legal system. One can hardly escape the impression that the committee confused proper working courts with slow-working courts; the committee arguably also did not even contemplate the idea that the FCO's observations and the BGH's 'replacement theory' were either wrong or at the very least uncalled for. In essence, they have killed the messenger, the Düsseldorf court.

Just a few days ago, the FCO opened proceedings against Facebook in relation to Oculus' virtual reality glasses [see Silke Heinz here]. As sec. 19a ARC is already in force, the Düsseldorf court is not competent to hear the case. Observers will be anxious to see the BGH perform in its new role here.

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