Kluwer Competition Law Blog

# Of Pricing Guns, Social Networks and GDPR: The Düsseldorf Higher Regional Courts submits Facebook Case to the CJEU

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On 24 March 2021 the Higher Regional Court ('Oberlandesgericht') of Düsseldorf put yet another twist to the 'Facebook Saga'. Although the formal written submission is not yet available, the Düsseldorf closed the hearing by staying the proceedings and announcing the referral to the CJEU of questions on data protection law.

**Pricing Guns**

To be sure, this referral to the CJEU comes as quite a surprise to German competition lawyers and academics. To understand their astonishment, it seems quite useful to expand on the German law on abusive practices. The leading case in that regard is a case on Pricing Guns (see 'Kammergericht', 18.02.1969, Kart V 34/67). A Pricing Gun is universally known – if only for its distinctive sound – and is used, for instance, to put price labels on products in supermarkets. Pricing Guns were developed and initially only offered by one, thus dominant, manufacturer. The manufacturer attached quite drastic conditions to the purchase of the labeller: The labels had to be purchased exclusively from the manufacturer and were significantly more expensive than those of the competitors.

With this conduct, the manufacturer had committed not one, but two violations of German Competition Law within the meaning of Section 19 German Competition Act ('Gesetz gegen Wettbewerbsbeschränkungen').

First, the manufacturer impeded other undertakings ('Behinderungsmissbrauch'). In German competition law, such an **impediment** includes any conduct by a dominant undertaking that restricts the possibilities of competitors. In the case of the Pricing Guns, this impediment lies in the long period of exclusivity with regard to labels. This made it impossible for competitors to successfully launch or sell their own labels on the market. Since, however, not every impediment of competitors is to be prevented by competition law, an impediment within the meaning of section 19 German Competition Act ultimately requires a balancing of interests between the interests of the dominant undertaking vis-à-vis its competitors. Such interests include amongst others technical aspects, product safety and the like. Moreover, legal principles usually not included in competition law are accepted within this weighing of interests. In the Pricing Gun case, the Kammergericht could not discern any justified interests of the manufacturer for the exclusivity of the labels.

In addition to an impediment, German law recognizes an **exploitation** of customers (‘Ausbeutungsmissbrauch’). An exploitative abuse within the meaning of section 19 Competition Act exists if a dominant undertaking demands unreasonable prices or terms and conditions from its customers or suppliers (of course, due to the lack of competition). Notably, the impediment, above, protects competitors whereas the exploitation addresses the dominant companies conduct vis-à-vis customers or suppliers. Thus, in the Pricing Gun case, the exclusivity is irrelevant under the heading of impediment of competitors. The relevant abusive exploitative conduct is the excessive pricing of the labels. The interests to be balanced with regard to an abusive exploitation are those of the dominant undertaking vis-à-vis its customers or suppliers only – in that balancing of interests, legal principles are irrelevant as only the relation between performance and consideration are addressed.

As a result and in simplified terms, the ban of abusive impediment of competitors addresses only competitors and all overarching legal principles are relevant for the assessment, whereas the ban of abusive exploitative conduct protects customers and suppliers. In this latter case, performance and consideration have to be balanced.

## Facebook

The German Federal Cartel Office’s (‘Bundeskartellamt’) accusations against Facebook do not fall within the above legal categories. Therefore, the Higher Regional Court of Düsseldorf had to unravel the mystery of whether the collection and aggregation of data generated by Facebook outside the facebook.com platform (such as WhatsApp or Instagram) constitute an impediment to competitors or exploitation of customers within the meaning of section 19 German Competition Act.

Against that context, however, the referral to the CJEU on questions of the GDPR is somewhat surprising. As expanded above, legal considerations, such as those in the GDPR, are only relevant with regard to an abusive impediment to competitors. However, in order to arrive at this balancing of interests at all, Facebook’s (hypothetical) competitors would have to be impeded by Facebook’s data collection and aggregation. The German Federal Cartel Office found no such conduct (at least, in detail) and a brief look into past social platforms reveals that data collection and aggregation does not impede competitors. For instance, Alphabet’s now abandoned online platform Google+, originally started as Facebook’s alternative, did certainly not fail due to lack of data. One may argue, in turn, that Facebook’s data collection and aggregation does not impede competitors.

Of course, there very well might be abusive exploitation of customers on the part of Facebook. However, for such an abuse, legal principles such as the GDPR do not matter as those are not part of the balancing of interests. Under the heading of abusive exploitation, the court (only) needs to address whether Facebook’s products are adequate to users’ data (as consideration).

## Technicalities

During the hearing, the Düsseldorf court addressed a further aspect in relation to the GDPR: Apparently, the court held, the German Federal Cartel Office based its verdict not (sufficiently) on competition law, but on data protection law. This would be in itself fine, if, however, the German

Federal Cartel Office was the competent authority within the meaning of the GDPR. Apparently, it is not. Hence, the German Federal Cartel Office acted ultra vires – which should be clarified by the CJEU.

A final argument is similarly 'technical': The readers of this Blog will be well aware of article 3 Regulation 1/2003. According to that provision Member State's Competition Agencies have to apply article 102 TFEU (at least to undertakings such as Facebook). The German Federal Cartel Office did not apply article 102 TFEU. Hence, it is expected that the Düsseldorf court will refer questions on the relationship between article 102 TFEU, section 19 German Competition Act and article 3 Regulation 1/2003.

**Time**

In the digital economy (as in competition law) time is of the essence: products that were all the rage just a moment ago are already obsolete tomorrow (see Google+, above). This principle of 'entropy' is a major risk in the proceedings at hand. The German Federal Cartel Office initiated the proceedings in 2016 and submitted its decision in February 2019. In August 2019, the Düsseldorf court handed down its decision on interim relief, only to be repealed by the Feral Court of Justice ('Bundesgerichtshof'). The referral to the CJEU will probably take another 1.5 years.

It must be duly noted that this delay, however, is not due to the Düsseldorf court. The German Federal Cartel Office was fully aware of the views of the Düsseldorf court and could have amended or added reasons even in the hearing on 24 March 2021 and could have amended its decision, as it were.

Once the Düsseldorf court has phrased its questions it will up to the CJEU.

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