
Kluwer Competition Law Blog

Facebook in Europe – a Competition (Cinematic) Universe

Thomas Thiede (Spieker & Jaeger) · Thursday, August 19th, 2021

When we earlier reported the German Facebook proceedings in terms of a legal opera [\[Link\]](#), this metaphor was, as I am afraid we have to admit, a little ill-fitting. As things now seem, we can observe a whole oeuvre, a whole cinematic universe, as a good number of spin-offs, sequels and side-stories centred around Facebook emerge in a number of European Member States and before the European Commission.

Germany

Take a new case reported for Germany. Here, the Bundeskartellamt has initiated proceedings against Facebook to examine whether its planned acquisition of the start-up Kustomer falls under the scope of German merger control. Kustomer is based in New York, USA, and provides a cloud-based customer management platform for business customers [\[Link\]](#). Official requests for information have already been sent to Facebook and Kustomer to determine whether the proposed merger crosses (what is termed the) transaction value threshold in German merger control – a threshold introduced by the legislature in 2017 in the 9th amendment to the German Competition Act (GWB) in order to close a gap in the merger control system. Under these new rules, mergers, whereby companies or assets which generate little or no turnover are acquired at a purchase price of more than EUR 400m, can be examined under competition law.

In addition, the Bundeskartellamt has initiated abuse proceedings against Facebook for the linkage between Oculus and Facebook using new competences introduced by changes made to competition law with regard to digital companies in Section 19a GWB [\[Link\]](#). As a consequence, the Bundeskartellamt is extending the scope of its (earlier) proceedings, also now examining whether Facebook is subject to the new rules applying to undertakings of paramount significance for competition across markets and whether linking the services is to be assessed on this basis. We will report on these proceedings as soon as further information becomes available.

A Stiff Fine in Italy

Whereas some European Member States have issued studies and (somewhat) held back on proceedings, the Italian Autorità Garante della Concorrenza e del Mercato sanctioned Facebook to the tune of EUR 7m [\[Link\]](#) in February this year. The Autorità accused Facebook in November

2018 of unfair practices in relation to the use of user data and ordered Facebook to cease such practices and to publish an amending declaration requested by the Authority. In particular, the Autorità held that Facebook misled users into registering with its platform and did not immediately and adequately inform them that the data provided would also be used for commercial purposes or, more generally, of the remunerative purposes underlying the service, emphasizing instead that the service was free of charge. Moreover, it is argued that the information provided by Facebook is generic and incomplete and fails adequately to distinguish between the use of data to personalize services and the use of data to carry out advertising campaigns aimed at specific targets. Despite this, Facebook did not suspend the misleading practice: though they removed the claim that the service was by nature free of charge, Facebook still did not provide any immediate and clear information on the collection and use of user data for commercial purposes. According to the Autorità, consumers need such information in order to decide whether to subscribe to the service, in particular considering the economic value that the data transferred assume for Facebook, which value constitutes the consideration for using the service.

Studies and first proceedings in France

As is well known, it was already back in 2018 that the Autorité de la concurrence initiated a vast sector-specific investigation into online advertising [\[Link\]](#) – Niclas Fafchamps and Lena Hornkohl reported on the topic of that investigation, which is targeted advertisement earlier [\[here\]](#) The Autorité held that internet advertising in France had become the leading form of advertising, notably ahead of television. According to the Autorité de la concurrence, one explanation for the success of online advertising, and especially as compared to television advertising, is that it can be targeted based on collected data. Thus, it is currently crucial for companies to access this data since this information makes it possible to set up targeted ads and address an identified population. Over the past several years, this development has led to the generation of new business areas, new stakeholders, and new technologies. There are now services for advertisers, such as trading desks and platforms specialized in programmatic purchasing and the optimization of campaigns. The study conducted by the Autorité exhaustively describes and analyses the functioning of this new market and notes that, while very few (French) stakeholders have entered the online advertising market and been able to capture any portion of its value, the sector's competitive equilibrium is fragile, since stakeholders are confronted with competition from global stakeholders, present at several levels of the value chain.

Facebook leads that pack. The Autorité's study then identifies several significant competitive advantages secured by the latter: It is argued that its strong market position is based on the operation of sites and services popular among Internet users, such as Instagram, WhatsApp, and of course, Facebook's social network. Facebook is also held to be unsurpassed on its own sites and applications, the inventories of which are only accessible through the company's own advertising tools. By collecting data not only from their services but also from third-party sites and applications that use their advertising services, Facebook is said to have amassed unrivalled volumes of data due to the number of users of their services and, moreover, the type of data collected. Certainly, many consequent impacts on competition are then discerned: Among the technical intermediaries, many stakeholders do not have proprietary sites where they can directly sell advertising space; their position is thus deemed fragile, as they cannot offer advertisers access to inventories that are as extensive as those offered by Facebook and they remain in an uncertain situation in regards to their ability to collect data on third-party sites and applications and so offer

customized advertising. The Autorité considers some practices to be bundling or tied sales, low pricing, and exclusivities. Additionally, a leveraging of key positions in certain service markets to enable development on other markets, as well as discriminatory treatment, impediments to interoperability and, lastly, restrictions concerning the possibility of collecting and accessing certain data all feature in the screenplay for this particular episode.

Somewhat expectedly, and following the aforementioned investigation, the Autorité opened an investigation into Facebook in June 2021 [Link] following a complaint from Criteo, which criticized the lack of clarity and objectivity in accessing Facebook's advertising services. In the course of the investigation (and in line with the earlier study), it became apparent that Facebook's practices were likely to impair the conditions of access to advertising inventories and to data concerning ad campaigns on Facebook. In essence, Facebook's conditions were deemed neither transparent nor objective, resulting in "denigration" actions and differences in treatment. In response to these accusations, Facebook proposed several commitments it would make to the Autorité, including "maintaining" the objectivity, clarity and non-discriminatory application of the performance criteria, providing compliance training to its sales teams, and developing and making available a "recommendation functionality" to partners. The Autorité has decided to submit these commitments to a market test; at the end of the procedure, and depending on the market test results, if the proposed commitments are sufficient to meet the competition concerns expressed, the Autorité may close the case and make these commitments binding.

Another study in Spain

It is not just the French Autorité that has been conducting studies on online advertising, though; the Spanish Comisión Nacional de los Mercados y la Competencia (CNMC) has also rendered a report on competition conditions in the online advertising sector. [Link] This has come, however, with a slightly different spin: CNMC identified the impact of digitalization as most clearly visible in advertising as one of the key sectors for competition throughout the economy, as it allows advertisers to reach their current or potential consumers when they have new or improved products. Therefore, CNMC held that a more competitive advertising industry will help start-ups or innovative companies better communicate their messages. This will increase the efficiency of the whole economy by empowering businesses and consumers with greater choices to make optimal decisions. Within the different advertising channels, the online channels are described as particularly relevant.

Of course, and inevitably, Facebook was identified as having acquired notable weight in that area. The CNMC's internal estimates suggest that advertising on display could have generated in Spain some EUR 1,950m, with Facebook's market share exceeding 40 % and other participants coming in a notable distance behind. The analysis of the online advertising sector, with a special focus on the Spanish market, allowed CNMC to draw a series of conclusions. On the positive side, online advertising implies substantial efficiencies: digitalization has endowed advertising with new features, such as the capacity for personalization and for measuring the performance of campaigns, and it has also favoured the entry of new players and media, broadening the possibilities for advertisers and consumers. At the same time, however, the CNMC found a number of risks to competition that may ultimately harm overall efficiency and, in particular, consumer welfare: the sector tends towards a notable concentration in very few players, and the dynamics of the sector lead to positions that are difficult to contest due to the role of data accumulation in the hands of a

few companies. Additionally, actors at the ends of the value chain face asymmetric information involving these few companies hindering optimal decision-making and favouring of platforms. Additionally, these platforms combine simultaneous access to their own attractive spaces, with large and well-profiled audiences and third parties' inventories. It is argued that this leads many advertisers/agencies to use them as a priority, or even exclusive, buying tools. As a result, costs may be higher for advertisers as compared to an alternative scenario of increased competition and are likely to be passed on in higher prices for final goods, eroding consumer welfare.

Mergers, fake news and data gathering in the United Kingdom

To stay in our metaphor: as is usual in cinematic universes, one storyline approaches the material from an entirely different angle. In the United Kingdom, Facebook faces proceedings relating to the acquisition of Giphy in May last year [\[Link\]](#). Giphy is an online database and search engine that allows users to share GIFs and stickers, either via Giphy's website or app or through online platforms such as Facebook, Instagram, Twitter, and Snapchat. In March 2021, the Competition and Markets Authority (CMA) raised competition concerns in relation to digital advertising and the supply of GIFs and held that, before the deal, Giphy competed with Facebook outside the UK in digital advertising. The CMA announced that it had uncovered evidence that Giphy had planned to expand its digital advertising partnerships to other countries, including the UK. If Giphy and Facebook remain merged, the CMA held, Giphy could have less incentive to expand its digital advertising, leading to a loss of potential competition in this market. This was particularly concerning given Facebook's existing market power in display advertising. The CMA also held that the deal could harm rival social media platforms, as it could mean Giphy would stop supplying GIFs to these companies or do so on worse terms; for instance, they might require rivals to provide more user data to Facebook in order to access Giphy GIFs. This could potentially lead to reduced choice for users and further increase Facebook's market power in relation to social media. At the time of writing, the proceedings are in phase two. The statutory deadline is 6 October 2021 [\[Link\]](#).

The second (slightly off-beat) "spin-off" tackled the eminent topic of fake and misleading reviews, which continue to be bought and sold on Facebook's social media platform [\[Link\]](#). Although, in January 2020, Facebook committed to better identifying, investigating and removing groups and other pages where fake and misleading reviews were being traded and to prevent them from reappearing, and despite giving a similar pledge in relation to its Instagram.com business in May 2020 after the CMA had identified similar concerns, the follow-up investigation found evidence that the illegal trade in fake reviews was still taking place on both Facebook and Instagram. The CMA, therefore, has intervened for a second time.

In June 2021, the CMA launched a probe into whether Facebook has gained an unfair advantage over competitors in providing services for online classified ads and online dating through how it gathers and uses certain data [\[Link\]](#). The CMA argues that Facebook collects data from its digital advertising services, which allow other businesses to advertise to Facebook users, and from its single sign-on option, Facebook Login, which offers people the ability to sign into other websites, apps and services using their Facebook log-in details. The CMA announced that it would investigate whether Facebook has unfairly used the data gained from its advertising and single sign-on to benefit its own services, in particular, Facebook Marketplace and Facebook Dating (a dating profile service it launched in Europe in 2020), and look into Facebook's use of data to assess whether its business practices are giving it an unfair advantage in the online dating and

classified ad sectors. Any such advantage can make it harder for competing firms to succeed, including new and smaller businesses, and may reduce customer choice.

Formal investigation by the European Commission

Finally, the European Commission opened a formal investigation into the possible anticompetitive conduct of Facebook in June [\[Link\]](#) to assess whether the company violated EU competition rules by using advertising data gathered in particular from advertisers in order to compete with them in markets where Facebook is active. The formal investigation will also assess whether Facebook ties its online classified ads service, “Facebook Marketplace”, to its social network in breach of EU competition rules. As part of its investigation, the Commission will examine in detail whether Facebook’s position in social networks and online advertising allows it to harm competition in neighbouring markets, where Facebook is also active thanks to its social network, and in particular in online classified ads. When advertising their services on Facebook, companies that also compete directly with Facebook may end up providing it with commercially valuable data. Facebook might then use this data in order to compete against the companies providing it. According to the Commission, this applies in particular to online classified ads providers, the platforms on which many European consumers buy and sell products. Facebook could, for instance, receive precise information on users’ preferences from its competitors’ advertisement activities and use such data in order to adapt Facebook Marketplace. The Commission will also examine whether the way Facebook Marketplace is embedded in the social network constitutes a form of tying which gives it an advantage in reaching customers and forecloses competing for online classified ads services.

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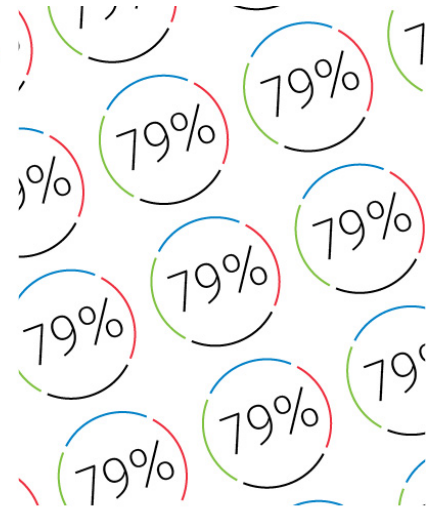
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