Kluwer Competition Law Blog

And Thus the Divide Manifests: The Bundeskartellamt's First Proceedings Based on Section 19a(2) GWB (Meta/Oculus)

Alba Ribera Martínez (Deputy Editor) (University Carlos III of Madrid, Spain) · Tuesday, November 29th, 2022

The wheels of the German competition authority's enforcement of its dedicated rules on digital markets have started to turn (on the technical and substantive aspects of Section 19a GWB, see previous posts here and here). According to the recently introduced rules, the Bundeskartellamt first formally determines that an undertaking is of paramount significance for competition across markets under Section 19a(1) GWB. After the formal designation has been performed, the German competition authority can directly prohibit the undertaking from engaging in the anti-competitive practices which are set out in Section 19a(2) GWB.

On 23 November, the Federal Cartel Office issued its first preliminary assessment as a consequence of the application of Section 19a(2) GWB in the context of its proceedings regarding the integration of Oculus (now Meta Quest) into the Meta family and network (see case summary here). For the first time in its history, the Bundeskartellamt gave direct evidence of the real impact of its competition amendment under Section 19a(2) GWB, aside from the designation of Google, Facebook (now Meta) and Amazon as undertakings of paramount significance for competition across markets under Section 19a(1) GWB as well as Apple's on-going designation based on the same grounds. The intricacies of these preliminary results also prove the impending transition towards fragmented decision-making in terms of the interpretation of privacy and choice in the digital context.

The Proceedings So Far

In 2014, Facebook acquired Oculus, a VR headset manufacturer to impel its growth in the metaverse environment and the VR space. The acquisition was the first step of the way which has triggered the current concerns of the Federal Trade Commission regarding Facebook's expansion into the metaverse through its subsequent acquisitions, especially concerning its merger with Within (see the FTC's complaint and request for preliminary relief of the merger here and a previous entry on this approach, here).

Unlike the FTC, the Bundeskartellamt was originally worried about the choice architecture surrounding the VR headset and how it would interact with the rest of the social network's functionalities. Due to this reason, on December 2020, the German competition authority initiated

proceedings against Meta under Section 19 of the German Competition Act (GWB) and Article 102 TFEU, namely to examine "*whether and to what extent this tying arrangement will affect competition in both areas of activity*" (see the press release here). On January 2021, the amendment to Section 19 GWB was introduced into the German competition law regime, expanding the authority's powers regarding digital markets. A few days later from the passing of the amendment, the Bundeskartellamt powered up its competence and added the rules under Section 19a GWB into the same proceedings. The authority has also given priority to the additional charge of Section 19a GWB in other proceedings regarding the already designated platforms with paramount significance (for example, see the extension operated in Amazon's ongoing proceedings here).

The German competition authority's development in its Meta/Oculus case comes within this background at the stage of its preliminary assessment. According to the press statement released by the German competition authority, Meta has already given in to the authority's preliminary findings stemming from the application of Section 19a GWB regarding tying, whereas the interpretation of data processing across Meta's services is yet pending and being scrutinised further by the authority.

Qualified Analysis of Tying Through the Lens of Section 19a(2) No. 3 GWB

As indicated above, the core of the authority's concerns regarding Oculus in its integration with the Meta family was that the social network would compel end users to register on Facebook to access and use the VR headset.

Instead of bringing forward a theory of harm on tying under the traditional abuse of dominance proceedings, which has posed some problems in the past, the Bundeskartellamt opted to apply Section 19a(2) No. 3 GWB which confers the power upon the authority to prohibit an undertaking to *"(link) the use of an offer provided by the undertaking to the automatic use of another offer provided by the undertaking which is not necessary for the use of the former offer, without giving the user of the offer sufficient choice as to whether and how the other offer is to be used*".

In line with this prohibition, Meta agreed to enable the use of the Oculus (now Quest) VR headsets without them being conditional on the existence and use of a Facebook account or an account related to its family of apps and social networks. Instead, end users will have a choice to create and use a stand-alone Meta account for using the headsets, irrespective of the fact that they may later link this account with any other Meta-related accounts. Building upon the European Commission's own approach to tying in Microsoft, in terms of choice architecture, the Bundeskartellamt also prompts Meta to display a menu when using the headsets where end users are given a real choice to register or not into Facebook's different services.

The On-Going Saga on Meta's Processing of Personal Data: A First Attempt Based on Section 19a(2) No. 4 GWB

Under Section 19a(2) No. 3 GWB, users will have the choice to link their Quest VR account with the rest of the Facebook accounts. In this regard, the German competition authority voiced out its concern on the fact that, even if it's only optional to perform this action, there is a risk that Meta

will extensively link the data obtained from the VR headset into the rest of its datasets across the network. This could lead to a violation of Section 19a(2) No. 4 GWB. In this sense, Section 19a(2) No. 4 GWB prohibits similar conduct which was already analysed by the FCO on its famous *Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing case* (see the competition authority's ordeal on producing a final decision, here).

This case on appeal before the Higher Düsseldorf Court concerns the Bundeskartellamt's interpretation of consumer choice and the interaction between privacy and dominance. It is currently on hold since it is being analysed by the Court of Justice of the European Union in a pending preliminary ruling procedure (see comment on AG Rantos Opinion on the preliminary ruling here). In any case, the overarching interpretation of the FCO's initial decision made it to the Section 19a GWB amendment granting the authority with a prohibition to "*(make) the use of services conditional on the user agreeing to the processing of data from other services of the undertaking or a third-party provider without giving the user sufficient choice as to whether, how and for what purpose such data are processed*". The underlying rationale under the prohibition is that an end user/data subject cannot consent effectively in the sense of the GDPR due to the existing power imbalances between her position and the position of the data controller.

However, in its Meta/Oculus proceedings, the FCO develops the main principles it set out in its previous decision under review by the European Court of Justice, by questioning the choice architecture that is in place when a user accesses the VR headset. The starting point for the outcome of the Meta/Oculus sanctioning proceedings is flawed in this aspect, insofar as the Bundeskartellamt already declared that Meta's overall strategy for processing personal data did not comply with the GDPR. For instance, the German competition authority held that the combination of different datasets coming from both within the data produced on the social network by the user as well as from outside of Facebook through observed and inferred data did not stand up to the legal requirements set out in the regulation regarding the protection of personal data. Thus, via Section 19a GWB, Meta's VR headsets are pre-emptively placed on the side of an infringement, which has triggered its immediate reaction to collaborate to solve the competition authority's concerns.

In this regard, Meta has already confirmed that, for the moment being, there will be no data flow operating between the VR services and other services without taking recourse to user consent in the sense of Article 6(1)(a) of the GDPR, except for the purposes that Meta considers legitimate where processing is necessary in light of the legal basis provided in Article 6(1)(f) of the GDPR. The FCO has yet to decide whether end users will be capable of effectively granting consent as well as whether the social network's purposes for processing data are legitimate.

Consent Without Considering Market Power

The FCO in its initial decision on Meta's data processing terms in general found that consent was not rendered effectively when end users register into the social network Facebook. The authority considered that voluntary consent was not granted in the terms provided by the GDPR in light of the existing power imbalances between the end user and the controller, namely through dominance. Moreover, the authority also held that users had no genuine or free choice to refuse or withdraw consent without detriment. Given that registration was framed as an opt-out system, users would have been hindered from using the service altogether in the hypothetical case that they had not

agreed to the social network's terms and conditions. Based on the misconception that dominance always implies a lack of voluntary consent in a circular line of reasoning leading to the finding of an abuse, Meta is being hindered from combining data across its services and products regarding its VR headsets.

On the opposite side of the table, the question remains on whether consent may be rendered, if at all, effectively both compliant with the GDPR and with competition law (even considering the German specificity) in the context of dominance, given the spectacular size and scope of digital companies similar to Meta. In fact, from an engineering perspective and following the Cambridge Analytica scandal, Meta has confirmed that it cannot effectively account for the range of purposes and objectives to which each of its data systems is dedicated to. This means that the undertaking - dominant or else- is unaware of the full extent of the user data it holds and administers.

Under Section 19a GWB, the German authority will not need to support the finding of a dominant position to draw out the line of causality between effective user consent and the existence of an abuse, given Meta's prior designation. However, this implies that voluntary consent will have to be interpreted without recourse to imbalances in power deriving from dominance. In turn, the FCO has compelled the undertaking to redesign its registration VR headset system into an opt-in, so that argument will not be available either.

Against this background, the Meta/Oculus sanctioning proceedings' final decision will go beyond the terms of the decision rendered by the German competition authority in 2019. It will also carve out the key elements which will have to be considered for the interpretation of the intersection between data and antitrust. Awaiting the CJEU's preliminary ruling, it still remains to be seen whether these same criteria will go on to apply later to the substantiveness of the DMA, especially as far as Articles 5(2) and 6(10) are concerned.

This entry was posted on Tuesday, November 29th, 2022 at 9:00 am and is filed under Competition enforcement, Digital markets, Digital Markets Act, Enforcement, European Court of Justice, Facebook, Germany, Privacy, Tying and Bundling
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.