

Data protection through the lens of competition law: will Germany lead the way?



On 2 March 2016, the *Bundeskartellamt*, the German competition authority, **announced** its decision to initiate proceedings against Facebook on suspicion that the social network provider had abused its dominant position by infringing data protection rules. **Inge Graef** and **Brendan Van Alsenoy**, Legal Researchers at the *KU Leuven Centre for IT and IP Law*, argue that the case represents the first attempt by a European competition authority to integrate data protection interests into competition analysis, and raises interesting questions about the interface between these two areas of law.

The policy debate

The decision of the *Bundeskartellamt* can be placed in the broader context of the **ongoing debate** on the ways in which competition, data protection and consumer protection law interact in the digital economy. The increased attention from data protection advocates for competition enforcement seems to stem from the concentrated nature of online markets which may reduce possibilities for users to exercise effective control over their personal data. Against this background, it is often **argued** that strong competition enforcement could render data protection rules more effective by facilitating genuine consumer choice.

In 2012, former EU Competition Commissioner Almunia **acknowledged** that '[a] single dominant company could of course think to infringe privacy laws to gain an advantage over its competitors'. However, the European Commission has so far been reluctant to consider data protection issues in competition cases. This was particularly visible in the merger decisions of **Google/DoubleClick** and **Facebook/WhatsApp** where the Commission explicitly stated that: 'Any privacy-related concerns flowing from the increased concentration of data [...] do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'. The *Bundeskartellamt* is thus acting as a pioneer by pursuing an alleged breach of data protection law under competition enforcement.

Parallel initiatives

The *Bundeskartellamt* is not alone in investigating Facebook's data protection practices. Facebook has attracted increased regulatory scrutiny ever since its **announcement** in 2014 that the company would be updating its privacy policy, cookie policies and terms of use. At the moment of writing, a total of five European Data Protection Authorities (DPAs) have active **ongoing investigations** into Facebook. In November 2015, the Belgian DPA obtained an **injunction** from the Court of Brussels in relation to Facebook's **tracking** of non-users through social plug-ins (e.g. the "Like Button"). On 9 February 2016, the French DPA issued a **formal notice** in light of Facebook's failure to comply with the French Data Protection Act. The same day, the French Ministry of Economic affairs **ordered** Facebook to modify or delete certain unfair provisions from its terms and conditions. The DPA of Hamburg undertook an **enforcement action** concerning Facebook's real name policy in July 2015, but recently saw its decision **overturned** by the Hamburg Administrative Court on jurisdictional grounds.

A complementary approach

The *Bundeskartellamt* suspects that Facebook is violating data protection law by not **properly** informing individuals of its data collection and use practices. It is planning to examine **whether** a

connection exists between this alleged infringement and Facebook's possible dominance in the market for social networks. If such a connection is identified, the imposition of unfair conditions on users by Facebook could, in the view of the *Bundeskartellamt*, also be regarded as an abusive practice under competition law. Precedent for such an approach, whereby the breach of one area of law could be relevant for establishing a violation of competition law as well, can be found, for instance, in *AstraZeneca*. In this case, the Court of Justice of the European Union made clear that the misuse of regulatory procedures in order to unlawfully obtain patent rights should be regarded as abuse of dominance, where such conduct has a potential anti-competitive effect.

Even if Facebook's policies and terms are found to violate data protection law, it can be questioned whether competition law is really the appropriate instrument to remedy such an infringement. After all, competition enforcement is a body of law mainly concerned with economic efficiency. The *Bundeskartellamt* should proceed with caution to avoid an outcome whereby any law infringement by a dominant firm automatically becomes of relevance to competition enforcement.

Competition authorities have traditionally focused on addressing conduct of dominant companies that leads to the exclusion of competitors, rather than on challenging behaviour that directly harms consumers. This because it remains difficult to establish at what point a certain type of exploitative behaviour becomes anti-competitive. Nevertheless, the investigation of the *Bundeskartellamt* might well set an important precedent. By using data protection principles as a benchmark for assessing whether there has been an abuse of a dominant position under competition law, the current competition law framework for assessing exploitative behaviour could be enhanced. The investigation of the *Bundeskartellamt* may not only help to alleviate data protection concerns, but also to better enable competition authorities to address new forms of anti-competitive behaviour in digital markets.

Looking ahead

It will be particularly interesting to see how the *Bundeskartellamt* will link the alleged infringement of data protection rules with Facebook's possible dominance in the market for social networks. While the exact scope for competition enforcement in these cases remains controversial, this abuse of dominance investigation by the *Bundeskartellamt* indicates that data protection interests closely relate to competition law and that, as a result, there is a need for competition and data protection authorities to collaborate when investigating companies active in digital markets.

This article gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

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