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Antitrust Group Client Alert: German Federal Cartel Office Considers User Data as an Indicator for Market Power

On 2 March 2016, the German Federal Cartel Office (“FCO”) has initiated proceedings against Facebook to investigate whether the social network abuses its market position by infringing data protection law. The FCO considers to assess Facebook’s market position on the basis of the amount of user data collected by Facebook.

FACEBOOK INVESTIGATION

The FCO suspects Facebook to have a dominant market position on the market for social networks because of the amount of personal user data which Facebook collects from various sources. The FCO highlights that

“For advertising-financed internet services such as Facebook, user data are hugely important. [...] By creating user profiles the company enables its advertising customers to better target their advertising activities.”

The FCO states that, due to the significance of user data to Facebook,

“it is essential to also examine under the aspect of abuse of market power whether consumers are sufficiently informed about the type and extent of data collected.”

The FCO finds it difficult for users to understand and assess the scope of Facebook’s collection and use of data which users have to agree to in order to be able to use the social network. The FCO doubts whether Facebook’s terms and conditions as well as the specific usage of user data are in line with data protection law.

While not every violation of applicable laws by a dominant market player is also relevant under competition law, in the case of Facebook, the FCO will review whether and to what extent the potential dominant position of Facebook on the market for social networks and the use of its allegedly unlawful terms and conditions are

interconnected so that such use could represent an abusive imposition of unfair conditions on the users of Facebook.

DATA-BASED APPROACH ON THE RISE

The data-based approach on assessing Facebook's market power is in line with the views recently expressed by the president of the FCO, Andreas Mundt, who stated in an interview that turnover is not always a suitable means to evaluate the competitive significance of internet companies. Instead, he suggested considering the number of users or the amount of user data collected in order to determine the market power of data-driven businesses such as social networks. In addition, he mentioned the idea of introducing a new merger notification threshold based on transaction volume in connection with internet platforms. Regarding the latter, he referred to the Facebook/Whatsapp merger in 2014 which nearly escaped merger control despite a transaction volume of USD 19 billion and a huge number of users because Whatsapp had just generated enough turnover to meet the merger notification thresholds of three EU member states.

OUTLOOK

The move of the German FCO against Facebook is further evidence of the authority's focus on the internet business and its role at the forefront of enforcing antitrust laws in the digital sector. In fact, EU competition chief Margrethe Vestager said that the FCO is "well-suited" to investigating Facebook. The German authority had already taken strict views and a firmly interventionist approach in cases regarding

- best-price clauses of internet market places against digital leaders, such as Amazon and hotel booking platforms,
- dual-pricing systems regarding online and offline sales (Gardena, Bosch Siemens Hausgeräte, etc.) and
- other allegedly restrictive trade practices in the digital world (Adidas, Asics, Lego, etc.).

Bruno Lasserre, president of the French Autorité de la Concurrence, announced that the Autorité considers starting a sector investigation into personal data and competition. It can be expected that other competition authorities worldwide will also widen their scrutiny of the digital sector. Companies should reconcile with the idea that competition authorities will increasingly investigate the relevance of data when assessing market power or evaluating certain market conduct under the applicable antitrust laws.

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