

17th Annual ACE Conference 2019

Facebook **Abuse through excessive data collection**

14 November 2019
Copenhagen



Bundeskartellamt

The views expressed are those of the
presenter and do not necessarily reflect
those of the Bundeskartellamt

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The case is about Facebook tracking its users outside Facebook

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- Prohibition in February 2019 of Facebook terms and conditions providing that users are only able to use the social network under the precondition that Facebook can collect user data also outside of the Facebook website in the internet or on smartphone apps and assign these data to the user's Facebook account
- Obligation to terminate the conduct, especially to set up a compliance plan, adopt explicit clarifications - implementation period 12 months
- Higher Regional Court Düsseldorf granted Facebook interim relief in August 2019
- Bundeskartellamt appeal to Federal Court of Justice pending

What is off-Facebook tracking?

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- Tracking through “Facebook Business Tools” used by other websites and apps (FB “pixel”, “graph”, SDK, ...) – more than 75% of 100 most used websites in Germany
- Services of Facebook group (WhatsApp, Instagram, Oculus, MSQRD)
- Some examples:
 - Privacy International study (Dec 2018): travel apps, job search apps, religious apps, period tracker apps
 - Netzpolitik.org (June 2019): most German newspapers sent individual info on which articles individual clicked on
 - Sueddeutsche Zeitung (Aug 2019): red cross blood donating service sent individual yes/no answers on HIV infection, pregnancy, drug consumption or diabetes

Facebook enjoys a quasi-monopoly vis-à-vis private users

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- National market for social network services for private users
- Facebook share of daily active users > 95%
- Increasing number of users - esp. increasing use intensity
- Strong direct network effects with lock-in, no countervailing multi-homing
- Market exits of competitors since 2011 - including Google+
- Superior access to data
- Competitors' innovation did not change Facebook's market position in the past

Consumer harm

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- Excessive prices are not the only way how consumers may be exploited by a dominant undertaking: e.g. too low quality, too little innovation, disadvantageous conditions
- Off-Facebook tracking imposes risk costs on the users tracked
 - Facebook has access to highly sensitive data set (possibly health status, sexual orientation, religious beliefs or political opinions)
- Consumer survey: data processing conditions of a social network are important / very important for 75% of users (second most cited aspect after presence of own friends on social network)
- Non-accountable damages for consumers amount to a negative externality (Jin 2018, Odlyzko 2003, Swire and Litan 1998)

When are prices / conditions exploitative in antitrust terms ?

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- Difficulty to gauge the counterfactual prices / conditions in a – necessarily hypothetical – situation without dominance
- Practical solutions adopted by competition authorities / courts in “excessive” pricing cases – benchmarks used:
 - a) prices of monopolists on other geographic (local) markets
 - b) hypothetical price = (efficient) costs plus a “reasonable” profit
 - c) price cap stated in non-antitrust law
- Bundeskartellamt used GDPR criteria as the relevant benchmark: with competition in place, any legal (data processing) conditions could be no worse than the minimum standard set by GDPR

Inadequacy of conditions according to GDPR criteria

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- Processing “off-Facebook” data to the extent determined by Facebook
 - is neither required for offering the social network
 - nor for its monetization
- No “freely given” consent
 - Facebook’s quasi-monopoly entails that users have no realistic alternative to switch to another social network
 - agreement to “off Facebook” data collection is a precondition to use Facebook → users have no choice (but to not use Facebook)

Efficiencies ?

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- Facebook's economist's argument: Off-Facebook data collection leads to higher Facebook advertising revenues leads to more Facebook investment in quality. Net consumer harm only if benefit from quality improvements is lower than harm from privacy losses. Competition authority needs to quantify!
 - quality improvements speculative and non-quantifiable
 - how much of additional ad revenues will be used for quality improvements? certainly not a 1:1 relationship
 - burden of proof for efficiencies not upon competition authority
- Qualitative appraisal: disutility (risk costs) >> benefits for consumers
- Efficiencies of a data-driven business model are acknowledged, but the extent of off-Facebook data processing at hand is inappropriate

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