

German Antitrust Agency Probes Facebook Data Practices

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Development: Germany's Federal Cartel Office launches investigation into whether Facebook and its subsidiaries abused their market dominance by infringing data protection rules

By Jabeen Bhatti

(For More Information, the full text of the Federal Cartel Office's statement is available at <http://src.bna.com/c1t>.)

March 2 — Facebook Inc. is facing a new twist in its saga of seemingly endless data protection issues in Germany as the country's Federal Cartel Office (BKA) announced March 2 an investigation into Facebook and its Irish and German subsidiaries for allegedly abusing their market dominance by infringing data protection rules.

In what some are calling a new and untested direction for antitrust probes with implications for other big U.S. technology companies, the agency announced it is specifically investigating whether “unlawful terms and conditions could represent an abusive imposition of unfair conditions on users” because of its dominant position in the market.

“Dominant companies are subject to special obligations,” Andreas Mundt, president of the BKA, said in the announcement. “These include the use of adequate terms of service as far as these are relevant to the market. For advertising-financed Internet services such as Facebook, user data is hugely important.”

The authority said Facebook collects large amounts of personal user data, creating user profiles to better target its advertising. While users must first consent to the company's use of their data by accepting the terms of service, it is difficult for users to understand the agreement entered into, the BKA said.

“Germany's data protection laws may not allow for such a procedure, and if there is a connection between infringement and market dominance, it could constitute an abusive practice under competition law,” the authority said.

Justus Haucap, director of the Duesseldorf Institute for Competition Economics at the Heinrich-Heine-University Duesseldorf in Germany, and former member of the German Monopolies Commission, told Bloomberg BNA March 2 that there is “little doubt that Facebook has a dominant position in the market for social networks, with significant barriers to entry and effective competition.”

Facebook's dominant position means “incentives for abuse are inherent. Indeed, Facebook has repeatedly violated privacy and consumer protection laws in the past, therefore, an abuse of its dominant position is more than a purely theoretical possibility,” Haucap said.

“We are confident that we comply with the law and we look forward to working with the Federal Cartel Office to answer their questions,” a Facebook spokeswoman told Bloomberg BNA March 2.

Data as Currency

The probe is going to be difficult, especially as data is the new currency—a novel concept, Haucap said.

“As consumers do not pay with money, but with their data and attention to ads, the data required by Facebook can be seen as the monetary equivalent to prices paid in other markets,” he added. “Whether these requirements are indeed excessive and constitute an abuse will be difficult to evaluate for the Cartel Office. Nevertheless, the Cartel Office sends an important signal: Competition law can also be applied to markets even if consumers do not pay with money for the services they consume,” Haucap said.

The BKA is working with data protection officers, consumer protection associations, the European Commission and other European Union member state competition authorities on the investigation.

Germany Targets Facebook

Facebook has long come under fire in Germany for data protection and competition violations, most often by data protection authorities concerned over fan pages, “like” buttons and its terms of service.

Germany's Federal Court of Justice (BGH) Jan. 14 ruled that the social network's “Friend Finder” feature, which allows it to mine users' contacts data and send e-mails to non-members to join is “nuisance advertising” that violates data privacy and competition law (21 ECLR 87, 1/20/16).

Another case, involving a privacy regulator's takedown order of a Facebook Fan Page was referred by the Federal Administrative Court in Leipzig to the EU's highest court Feb. 25 (21 ECLR 280, 3/2/16).

Some competition professionals applauded the new probe.

Privacy Laws Applicable?

Michael Alber, an attorney at GÖRG's Berlin office, called the move by the antitrust regulator “ambitious,” saying “there are many uncertainties in this case.”

“It seems to be a rather new approach for the BKA,” he told Bloomberg BNA March 2. “I am not even sure German data protection law is even applicable in connection with Facebook—there has been long debates as to whether Facebook even has to respect the Federal Data Protection Act because they operate outside of Germany,” Alber said.

“The Federal Cartel Office, though, seems to think the Federal Data Protection Act is applicable here,” he said.

Alber said he had never seen a case connecting data protection with antitrust law in this manner in a German court, noting that it is rare such a dominant organization such as Facebook is trading in data in the first place. At the same time, he said it was unclear whether data protection violations could equal an anti-trust violation.

“I am not sure where they actually see the data protection violations—it seems rather vague to say, ‘they don't understand what they are consenting to,’” Alber said.

“I don't know whether certain action can violate data protection law,” he added. “In fact, it is difficult to evaluate whether a data protection violation can in fact pose an anti-trust violation. The point being, the violation of German data protection laws does not automatically make it a violation of antitrust law even though that is the approach that the BKA seems to take here—that the unlawfulness or invalidity of data protection regulations of Facebook indicate there is a violation of antitrust law—something that has not been held in a German court.”

In Germany, violations of data protection laws are an automatic violation of the Act Against Unfair Competition.

Attorneys say there is a danger that the BKA case could open the door to future cases using data protection violations to claim anti-trust violations.

“I don't really see it as a big field in the future because of the market position necessary to bring such a case but it could be very interesting regarding the big three—Google, Facebook and Amazon,” Alber said.

“First of all, the BKA is highly respected, also by the German courts—when it says something is problematic, the courts tend to follow the BKA. Then those decisions set the standard for other ensuing decisions.”

EU Oversight

Other U.S. tech giants have come under investigation for their dominance of markets.

Most recently, Google Inc. was the subject of a German competition probe for abuse of its market power, a case brought by press publishers to enforce their claim of fees for Google's use of snippets. The case was dismissed by German authorities in 2014. At the same time, European Union authorities have been examining whether the company has violated competition rules over its shopping searches and over Android operating software.

In February, EU officials announced they would begin to examine whether new rules would be necessary to prevent competition violations among companies for whom data collection was their main business.

The European Commission, the EU's executive arm, told Bloomberg News it will stay in contact with the German agency on the Facebook case, which concerns a “novel issue,” and one that could be “relevant” when investigating a possible violation of EU competition rules,” Commission spokesman Ricardo Cardoso told Bloomberg.

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