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The intersection between competition and data privacy – Note by Germany

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More documents related to this discussion can be found at www.oecd.org/competition/intersection-between-competition-and-data-privacy.htm

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1. Introduction

1. For many years now, the digital economy has been a key focus of the Bundeskartellamt's work. This has even intensified since the German legislator introduced a new provision, Section 19a, in the German Competition Act in 2021. It allows the Bundeskartellamt to intervene more quickly and effectively against anti-competitive practices by large digital companies.

2. Accordingly, the intersection between data protection law and competition law has become ever more important for the Bundeskartellamt. Intensive cooperation with other authorities can be crucial in cases involving data-driven business models or data-related theories of harm.

3. The interplay between data protection law and competition law is particularly evident in the Bundeskartellamt's Facebook case. In the following, this case is therefore first described in more detail (under 2.) before it is briefly outlined how this case has inspired both national and European legislation (under 3.). Furthermore, cooperation with the (national) data protection authorities is illustrated on the basis of two concrete case studies (under 4.). The paper closes with a short summary (under 5).

2. Where it all began: The Bundeskartellamt's Meta case

4. In February 2019 the Bundeskartellamt issued a novel, not to say, at the time, controversial decision. After an in-depth market analysis the Bundeskartellamt found that Meta (at that time Facebook) was dominant in the German market for private social networks and that by way of its general terms and conditions it effectively forced its users to allow the company to combine data collected from customers when using Facebook with data from sources other than the social network Facebook itself.[1] In analysing whether such behaviour was abusive, the Bundeskartellamt weighed up the conflicting interests at hand, taking into account the rules of the General Data Protection Regulation (GDPR), which it considered an adequate yardstick for balancing the interests of controller and data subject. While remaining impassive on the collection and use of on-Facebook data, the authority found that the combination of on-Facebook and off-Facebook data was excessive and outweighed by the users' right to informational self-determination. Accordingly, and in line with the GDPR, such combination of data could only be allowed where sufficient grounds for justification were shown to exist, in particular valid consent given by the Facebook user. As Meta had not brought forward any substantiated justification during the administrative proceedings, the Bundeskartellamt prohibited the combination of on-Facebook data with off-Facebook data without users' GDPR-compliant consent.[2]

1 The former came to be known as "on-Facebook" data, the latter as "off-Facebook" data, referring to data collected when using other corporate services as well as to information collected on websites visited or through third-party mobile apps used via programming interfaces ("Facebook Business Tools").

2 Bundeskartellamt, decision of 6 February 2019, case no. B-6/22-16, courtesy translation available at

5. The Bundeskartellamt decision came under fire, the main reproach being that, as a competition authority, it had applied data protection law and thus overstepped its remit. This, however, is a misconception. At no point in time had the Bundeskartellamt applied data protection rules. It merely borrowed from the GDPR regime what it considered to be an adequate yardstick in assessing a competition issue with regard to personal data. In other words, the very same approach of weighing interests could have been used without reference to the GDPR, by simply focusing on the conflicting interests involved and possible grounds for justification. Furthermore, had the result of the GDPR-oriented weighing of interests contradicted the principles of competition law, the authority would have had the possibility to adjust its findings.

6. Meta appealed the decision, resulting in a preliminary ruling by the court of first instance, the Düsseldorf Higher Regional Court (Oberlandesgericht), which in essence found that there was no harm to competition. However, this ruling was overturned by the Federal Supreme Court (Bundesgerichtshof), which upheld the Bundeskartellamt's finding that Meta had a dominant position. It also stated that – given the enormous value of personal data for commercial purposes – the collection of data based on exploitative business terms also gave the company an unjustified advantage over its competitors. The Federal Supreme Court also rejected the idea that it was necessary to combine data to further personalise the service offered to customers. Rather, the Court saw the more personalised experience as a service expansion imposed on customers, whether they wanted it or not.[3]

7. So the main proceedings before the Düsseldorf Higher Regional Court continued. In March 2022 the Düsseldorf court requested a preliminary ruling from the European Court of Justice, which was handed down in July 2023[4], clarifying that it was admissible for a competition authority to look to data protection rules in its antitrust assessment of data-related cases. The Court even stated that access to personal data had become so important that data protection rules should be taken into account so as not to undermine the effectiveness of competition law in the European Union. However, when ruling on the question of whether or not a dominant undertaking's conduct was in compliance with the GDPR, the Court held that, to ensure consistency, the competition authority was under an obligation to cooperate with the relevant data protection authorities. The Court found, firstly, that decisions by these authorities were binding as far as GDPR conformity was concerned, and, secondly, that the national competition authority had to consult the competent supervisory authority even where no such decision existed. That being said, the Court concluded that – subject to verification by the referring court – the Bundeskartellamt appeared to have fulfilled its obligations of sincere cooperation with the relevant data protection authorities in the case at hand. The Court then turned to a number of questions that, although arising in antitrust proceedings, concerned the interpretation of specific provisions of the GDPR. The Court seized this opportunity to clarify, inter alia, that for data processing to be justified as necessary for the performance of a contract it must be objectively indispensable for a purpose which is integral to the contractual obligation intended for the data subject. With this narrow interpretation the Court dismissed the

https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html.

3 Bundesgerichtshof, decision of 23 June 2020, case no. KVR 69/19, courtesy translation available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/BGH-KVR-69-19.pdf?__blob=publicationFile&v=1.

4 Judgment of the Court of 23 July 2023, C-252/21 – Meta Platforms Inc and Others v. Bundeskartellamt, available at https://curia.europa.eu/juris/document/document.jsf;?text=&docid=275125&doclang=EN.

approach taken by Meta and other companies to declare the processing of personal data necessary for monetising the service through targeted advertising, even where these data were not necessary for the provision of the service itself. Accordingly, the Court mandated that users must be offered a version of the service in question that processes only the personal data necessary for the provision of this service, "if necessary for an appropriate fee". It is worth mentioning in this context that "if necessary" may not be the most suitable translation of the German term "gegebenenfalls" used in the original judgment. It literally means "as the case may be" and could be interpreted as anything from "optionally (at the controller's discretion)" to "only in exceptional cases where absolutely necessary". It doesn't take a prophet to predict that this question will be intensely discussed by enforcers, courts and academics and ultimately answered in Luxembourg. Possibly, the Court will then also have the opportunity to give some guidance on when a fee is appropriate and when it is not.

8. The case is currently still pending before the court of first instance, the Higher Regional Court of Düsseldorf, while the parties are seeking to reach an agreement on the steps that Meta needs to take in order to comply with the Bundeskartellamt's decision. It goes without saying that the setting has become more complex due to changing circumstances since the decision was adopted in 2019. For instance, Facebook has been rebranded as Meta, with Facebook becoming one of many Meta services. Probably nobody remembers Meta's selfie app MSQRD, while services like Meta Quest, Facebook Marketplace, and especially Instagram have become much more important. Meta's Twitter (now X) clone Threads did not even exist until 2023. The enforcement environment has also been largely reshaped, with the General Data Protection Regulation (GDPR) coming into force in May 2019 and the Digital Markets Act (DMA) being fully enforceable against Meta since March 2024.

3. Data-related practices and competition law

9. In January 2021, the German Competition Act was amended to include the new Section 19a. This new section provides for a two-step process to more effectively address the competition concerns brought about by companies referred to as undertakings of paramount significance for competition across markets.

10. In a first step (subsection 1 of Section 19a) the Bundeskartellamt can designate an undertaking as being of paramount significance for competition across markets. This designation is based on the analysis of a number of structural criteria which are applied to the undertaking in question when assessing its position and the question whether this position allows for a scope of action across markets which is insufficiently controlled by competition. Once an undertaking has been designated in this way, the Bundeskartellamt can prohibit such an undertaking from engaging in certain practices in order to remedy or at least reduce the competition concerns caused by the said undertaking (subsection 2 of Section 19a). The Bundeskartellamt may, for example, prohibit undertakings from creating or appreciably raising barriers to market entry or otherwise impeding other undertakings by processing data relevant for competition that have been collected by the undertaking, or demanding terms and conditions that permit such processing. The Section 19a regime clearly draws on the Bundeskartellamt's experience in enforcing the Facebook decision, in particular the cumbersome process of establishing market dominance and the lengthy court proceedings. Section 19a now enables the Bundeskartellamt to react more swiftly to threats to competition posed by designated undertakings. Secondly, the legal process is accelerated, with Germany's Federal Supreme Court handling appeals against Section 19a decisions in the first and last instance.

11. At the European level, the DMA, too, draws inspiration from the Facebook case in some respects. This is particularly true of Article 5(2) DMA, which in principle prohibits data flows from a so-called core platform service to other services offered by the gatekeeper or to third parties without valid prior consent. Naturally, this may lead to overlaps in enforcement when dealing with abusive conduct by undertakings that have been designated as "gatekeepers" by the European Commission. While the latter may often be the best placed authority to deal with such cases, support by national competition authorities may still prove useful, for example in providing relevant expertise. Moreover, as the DMA is a deliberately focussed instrument, national competition authorities can complement it, for example where companies have not been designated as gatekeepers by the Commission or by imposing further obligations on gatekeepers.

4. Further examples from the Bundeskartellamt's recent case practice

12. The Bundeskartellamt is well aware of the entanglements between the different regimes and works in close coordination with both the European Competition Network, including on DMA-related issues, and data protection authorities. This is illustrated in particular by two examples related to Section 19a(2):

13. In May 2021 the Bundeskartellamt initiated proceedings based on Section 19a(2) of the German Competition Act concerning a number of Google services, which led to a commitments decision in October 2023. The decision declared binding Google's commitments not to process any user data across its own services or across Google and third-party services without valid user consent. Google further committed to only seeking such consent on the basis of the users' free and informed choice. This meant, in particular, that Google could not make consent the default option and that any reject buttons would have to be designed in such a way that they would not be perceived as less attractive by the users (for example by greying them out). While these commitments protect users' control over the use of their data, they also curb Google's data-driven market power. The Bundeskartellamt's decision followed extensive consultations with the European Commission, which is the sole enforcer of the DMA. To align with the DMA, the decision is limited to combinations of services that do not involve a "core platform service" as designated by the Commission. Notwithstanding this limitation, the decision covers more than 25 other services including Gmail, Google News, Assistant, Contacts and Google TV.[5] In the course of the proceedings, the Bundeskartellamt also exchanged views with the German data protection authorities.

14. In June 2022, the Bundeskartellamt opened proceedings against Apple based on Section 19a of the German Competition Act and Article 102 TFEU to investigate whether the rules imposed by Apple in relation to its App Tracking Transparency Framework (ATTF) constitute self-preferencing and/or impede other companies on Apple devices. The ATTF requires a second prompt designed by Apple ("ATT prompt") to be displayed in addition to the user consent request under data protection law, which is usually shown the first time an app is started. User consent to the ATT prompt is required for app publishers to be allowed and able to combine user and device data with other companies' data for advertising purposes. Without the ATT prompt consent, such a combination is not permitted, even if users provide their consent in accordance with data protection law. The ATT prompt does not have to be shown, however, if data are combined for advertising

5 Bundeskartellamt, decision of 5 October 2023, case number B7-70/21, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2023/B7-70-21.pdf?__blob=publicationFile&v=3.

purposes between different apps or services within the same company. In its investigation, the Bundeskartellamt aims to elucidate whether the ATTF and additional rules imposed by Apple on app publishers affect the app publishers' ability to carry out targeted advertising, attribute advertising success and prevent advertising fraud. One aspect of the investigation is Apple's distinction between cross-using data within a company and processing data between different companies. In particular, this distinction relieves Apple from seeking user consent in the ATT prompt for its own targeted advertising business. The Bundeskartellamt has consulted with the competent German data protection authorities on the relation between the ATTF and Apple's user choice architecture on the one hand and data protection laws on the other hand. Compliance with data protection laws and the suitability of Apple's practices to increase users' privacy could be considered, for example, when assessing whether any potential competition restraints are objectively justified or are outweighed by the benefits to customers. The proceedings are still ongoing.

5. Conclusion

15. So far, there are only few formal rules governing cooperation between competition and data protection authorities. While Section 50f(1) of the German Competition Act allows for the exchange of information – including confidential information – among competition authorities and data protection authorities in Germany, there are no such cooperation rules at the European level. In *Meta platforms Inc. and Others v Bundeskartellamt*, the European Court of Justice underscored the need for cooperation, but the judgment remains silent on the issue of exchanging confidential information.

16. Overall, cooperation with data protection authorities has been very smooth. Throughout its past and ongoing data-related proceedings the Bundeskartellamt has received valuable input from German data protection authorities. Over time, the Bundeskartellamt has also acquired a proficient level of expertise in the data protection areas closest to competition law. As a rule, competition and data protection objectives tend to be aligned. However, it may be the case that practices which are prohibited under data protection rules do not, or do not significantly, hamper workable competition. Conversely, data flows that might appear insignificant from a data protection point of view (for example non-personal data) could have tangible consequences on the competitive situation in a market. It is, however, hard to imagine that the enforcement of one of the two legal regimes would irreconcilably interfere with the enforcement of the other. That being said, in some rare cases it might be advisable to fine-tune the enforcement measures so as to bring them in line with the other legal regime.