SLAUGHTER AND MAY

Competition & Regulatory Newsletter

13 December 2017 - 2 January 2018 / Issue 1

Quick Links

Germany hits Facebook for data collection

On 19 December 2017 the Bundeskartellamt, the German national competition authority, informed Facebook of its preliminary legal assessment in the abuse of dominance proceeding it had initiated in March 2016. In its preliminary assessment, the Bundeskartellamt found that Facebook held a dominant position in the German market for social networks and was abusing this position through the imposition of exploitative terms of service on its users. In particular, it expressed concern over Facebook's collection and use of data from third party sources – that is, data generated by users from their online activities external to Facebook.

Background to the investigation

On 2 March 2016 the Bundeskartellamt **announced** the opening of an administrative proceeding against Facebook. It said it had indications that Facebook held a dominant market position in the market for social networks. In order to use Facebook's social networking service, users must first agree to the company's collection and use of their data by accepting its terms of service. The Bundeskartellamt expressed its concern as to whether users fully understand these terms of service and highlighted that Facebook's use of unlawful terms and conditions could represent an infringement of data protection rules. The Bundeskartellamt further indicated that it would examine to what extent a connection exists between a possible infringement of national data protection law and market dominance, which could also constitute an abuse under competition law.

The Bundeskartellamt's preliminary assessment

Nearly two years after initiating its proceedings the Bundeskartellamt provided its **preliminary legal assessment** taking the view that Facebook holds a dominant position in the German market for social networks and is abusing this dominant position through its collection and use of users' data from third party sources.

Facebook's dominance in Germany

Regarding the product market, in its preliminary assessment the Bundeskartellamt concluded that Facebook operated in the market for social

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

networks. Interestingly, the product market was defined narrowly, with the German competition authority finding that professional networks including LinkedIn, messaging services such as WhatsApp and Snapchat and other social media such as YouTube and Twitter were not part of the relevant product market. The Bundeskartellamt argued that these services are only in parts competitive substitutes of Facebook and from a user's perspective, they are complementary services. The Bundeskartellamt defined the geographic market as national.

Subsequently, the Bundeskartellamt preliminarily concluded that Facebook maintained a dominant position in the German market for social networks. This conclusion was reached on the basis of Facebook's high market share, estimated to be more than 90 per cent. Also, it identified high barriers to entering the German market, noting that in order to viably compete with Facebook, a new market entrant would need to reach a critical mass large enough to sufficiently attract advertising customers and therefore receive a revenue. Finally, the Bundeskartellamt noted that Facebook's popularity and large number of users created network effects, such that users were essentially 'locked in' and could not switch easily to a new market entrant.

Abusing its dominant position

The Bundeskartellamt then preliminarily concluded that Facebook was abusing this dominance. It reached this view by finding that aspects of Facebook's terms of service amounted to exploitative business terms that the company was able to make users agree to by virtue of its dominant position. In particular, the Bundeskartellamt took issue with terms of service allowing Facebook to collect and use data generated from third party sources. This refers to personal data created when an individual uses a website or service outside of Facebook, for example the use of (Facebook-owned) services such as WhatsApp or Instagram or when browsing a third party website. At present, data generated through the use of WhatsApp, Instagram or any third party website that contains an embedded Facebook product (such as a Facebook login option) is transmitted to Facebook through an 'application programming interface' or API. In other words, in certain circumstances, Facebook users generate personal data that are collected and used by Facebook while browsing websites and using services external to Facebook. In the Bundeskartellamt's view, this practice was unfair and exploitative of Facebook users who suffered a loss of control over their personal data. It noted that "*Facebook's users are oblivious as to which data from which sources are being merged to develop a detailed profile of them and their online activities*"[1] and commented that Facebook's dominance resulted in users agreeing to such terms of service since a failure to accept them would mean "*not using Facebook at all*".[2]

Next steps and significance

Having received the Bundeskartellamt's preliminary assessment, Facebook now has the opportunity to respond and provide justifications for its conduct or offer possible solutions. Following this, the Bundeskartellamt will adopt its final decision which is not expected before early summer 2018. In the final decision, it will either clear Facebook of any anti-competitive conduct, accept commitments offered by the company or prohibit Facebook from carrying on this abuse of dominance. Since the Bundeskartellamt

[1] *Background information on the Facebook proceeding*, Bundeskartellamt, 19 December 2017, p.4.
[2] *Ibid.*, p.2.

initiated an administrative proceeding as opposed to a fine proceeding, Facebook is not at risk of a financial penalty unless it does not comply. It is however expected that Facebook will defend its terms of service vigorously. On the same day that the Bundeskartellamt issued its preliminary assessment, Facebook **responded** publicly, asserting that it was not a dominant company in Germany or anywhere else in the world.

The Bundeskartellamt's preliminary assessment is interesting due to the novel application of the concept of unfair business terms to personal data. It places a national competition authority at the interface between antitrust and data protection law. As the Bundeskartellamt reasoned: "*[w]here access to the personal data of users is essential for the market position of a company, the question of how that company handles the personal data of its users is no longer only relevant for data protection authorities. It becomes a relevant question for the competition authorities, too*".[3] It is worth noting that section 18 paragraph 3(a) of the **German Competition Act** expressly provides that access to personal data is a criterion for assessing market power. Therefore, the Bundeskartellamt's consideration of issues relating to personal data in its assessment of competition law concerns is not as radical as would appear at first glance. It remains to be seen whether other competition authorities will take a similar approach in the future and consider issues of data protection in their antitrust analyses.

Other developments

Merger control

KFTC shortens review period for eligible foreign joint ventures to 15 days

On 20 December 2017 the Korea Fair Trade Commission (KFTC) **announced** an amendment to its Guidelines on the Review of Merger Notifications (Merger Review Guidelines), simplifying and shortening its regulatory review process for the establishment of offshore joint venture companies (JVs) that have no effect on the Korean market. It should be noted that the simplified review process is not necessarily applicable to JVs formed by acquisition of shares in an existing company.

Following the amendment to the Merger Review Guidelines, the KFTC is now required to complete its review of foreign JVs with no local nexus in Korea, but which meet the jurisdictional thresholds, within 15 calendar days from the date of filing. In addition, the scope of the KFTC's review will be limited to verifying the accuracy of information provided in the submissions, without commencing an in-depth competitive assessment. This marks a significant change from the previous regime, where foreign JVs were subject to the regular 30-day waiting period.

In its announcement, the KFTC gave two examples of foreign JVs that would be eligible for the expedited review process. The first is the setting up of a JV by two foreign (i.e. non-Korean) companies, and where the JV's business is solely confined to a foreign country. The second is the setting up of a JV by Korean companies in a foreign country, and where the JV's business operation is located within the foreign country. Both examples demonstrate that the simplified review process is available for the establishment

[3] *Ibid.*, pp.1-2.

of an offshore JV with no business (and thus no competitive effect) in Korea, even if the JV's parent companies are Korean.

The amendment has left the level of information required in the filing form and the jurisdictional thresholds unchanged. It is therefore worth carefully considering the transaction structure to see whether it is possible to avoid the filing requirement in Korea altogether by structuring the transaction as an acquisition of shares rather than the establishment of a JV.

Antitrust

FCA consults on approach to competition

The UK Financial Conduct Authority (FCA) has launched a consultation on its approach to competition. It wants to ensure that its regulation "*evolves with financial services rather than holding them back*", and is therefore keen to understand "*how and when regulation can provide unnecessary barriers to new firms entering the market*." Its consultation document, "**Approach to Competition**", therefore looks at how the FCA delivers its competition objective, to promote competition in the interests of consumers, rather than for its own sake. The consultation follows the FCA's decision, issued last November and reported on in our previous **newsletter**, to issue the first statement of objections under its competition enforcement powers.

The consultation document contains an introductory chapter on the FCA's competition remit, followed by an explanation of the FCA's decision-making framework. The latter consists of four stages: the FCA (i) identifies potential harm (in a preliminary assessment of competition stage); (ii) sets out 'theories of harm' based on the indicators of the potential harm identified (the diagnostic stage); (iii) identifies remedies to address the competition problems (using remedy tools in the remedies stage); and (iv) evaluates the success of those remedies to inform future decisions (the evaluation stage). The document also asks stakeholders a number of questions, including whether there are indicators of potential harm and remedy tools that they should consider other than those listed in the document. The FCA requests any responses and comments on the document by 12 March 2018. There is a **form** on the FCA website for those who wish to submit questions and/or comments. Its final "Approach to Competition" document will be published later in 2018.

State aid

Court annuls Commission's order to recover Spanish terrestrial TV network aid

On 20 December 2017 the Court of Justice of the EU (the Court of Justice) **annulled** the European Commission's **decision** ordering the recovery by Spain of State aid aimed at financing the digitisation and extension of the terrestrial television network in remote and less urbanised areas of Spain. In its 2013 decision, the Commission found that the non-notified aid (worth €260 million) only funded the digitisation of terrestrial transmission technology. Alternative transmission platforms (such as satellite, cable or the internet) could not benefit from the aid. The Commission therefore took the view that the scheme selectively favoured terrestrial television operators over operators using other technologies, in violation of

the principle of technological neutrality.[4] It declared the aid incompatible with the internal market, and ordered the recovery of the incompatible aid from the digital terrestrial television operators. Spain, a few regional communities and a number of operators subsequently requested the lower Court of the EU (the General Court) to annul the Commission's decision. But the General Court **dismissed** their actions and confirmed the decision.

The Court of Justice, however, has reached a different conclusion. It finds that the Commission's decision was not supported by an adequate statement of reasons.[5] In particular, neither the Commission's decision nor the General Court's judgment explained why undertakings active in the broadcasting sector, and specifically terrestrial broadcasters, should be regarded as factually and legally comparable to undertakings active in other sectors or using other technologies. The Commission had argued that no reasoning was necessary because the selectivity condition is automatically satisfied if a measure applies exclusively to a specific sector or to undertakings in a particular geographic area. The Court of Justice, however, considers that a measure that benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. According to the Court of Justice, the measure is selective only "*if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation.*"[6]

The Court of Justice concludes that this failure to state reasons constitutes "*an infringement of essential procedural requirements and therefore impedes judicial review.*"[7] It therefore sets aside the General Court's judgment and annuls the Commission's decision.

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600

[4] Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits aid "*favouring certain undertakings or the production of certain goods*".

[5] Para. 61. Only the Autonomous Community of Galicia and the operator Retegal put this ground of appeal forward (Case C-70/16P *Comunidad Autónoma de Galicia and Retegal* v *Commission*, judgment of 20 December 2017). It was not included in the appeal of the other communities and operators (Joined Cases C-66/16 P *Comunidad Autónoma del País Vasco and Itelazpi* v *Commission*, C-67/16 P *Comunidad Autónoma de Cataluña and CTTI* v *Commission*, C-68/16 P *Navarra de Servicios y Tecnologías* v *Commission* and C-69/16 P *Cellnex Telecom and Retevisión I* v *Commission*, and in Case C-81/16 P *Spain* v *Commission*, judgments of 20 December 2017).

[6] Para. 61.

[7] Para. 62.