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Preliminary communication

PRESENT AND FUTURE - A PREVIEW STUDY OF FACEBOOK IN THE CONTEXT OF THE SUBMITTED PROPOSAL FOR DIGITAL MARKTES ACT*

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ABSTRACT

In this paper authors analyse a case of Facebook which was assessed by German competition authority – Bundeskartellamt. Facebook has been suspected of abusing its dominant position in the context of protection of personal data. This case was subsequently considered by the competent national judicial authorities, which finally referred the questions to the Court of Justice of the European Union (Oberlandesgericht Düsseldorf) in case C-252/21. At the present stage of the proceedings are published exclusively Application and Request for preliminary ruling. The authors aim heads to examine the disputed action of platform in the context of the proposed Digital Markets Act and to confront them with the obligations imposed by this proposal for a regulation for new category of entities – so called- gatekeepers.

Keywords: *Competition law, dominant position, gatekeepers, Proposal for Digital Markets Act*

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1. INTRODUCTION

The purpose of this article is to analyse the Facebook[1] case, which began to be assessed by the German competition authority - the Bunderkartellamt on March 2, 2016. After a thorough examination of the decisive circumstances, competition authority issued a decision on 6 February 2019 prohibiting Facebook from combining user data from various sources. This case deserved the attention of the professional public for several reasons: competition law is closely interlinked with the field of personal data protection, more specifically the German competition authority found that Facebook's terms and conditions were inconsistent with the GDPR regulation. And last but not least, the popularity of perhaps the most well-known social network, used every day by millions of its users who are interested in where their sensitive personal data go and which entities ultimately use it, contributed to the interest in this case. Lastly, in literature we meet with opinions that regulatory tendencies in relation to gatekeeper we find currently in the consumer protection law, personal data protection law[2] and ultimately in competition law.[3]

Against Bundeskartellamt's administrative decision concerning Facebook was lodged complaint to the Oberlandesgericht Düsseldorf on 11 February 2019. The legal case therefore went from administrative level to judicial proceedings. However, the competent German judicial authorities has not yet issued a final verdict (whereas only preliminary decisions have so far been rendered). After the hearing, which took place on 24 March 2021 the court decided to stay the proceedings and to refer questions to the Court of Justice of the European Union for a preliminary ruling according to Art. 267 TFEU.

The Oberlandesgericht Düsseldorf has referred overall 7 questions to the Court of Justice of the EU (some consisting of several partial sub-questions) and the proceeding is conducted under file no. C-252/21, between the parties to the original national judicial proceedings, thus Facebook (1. Facebook Inc., USA, 2. Facebook Ireland Ltd., Ireland, 3. Facebook Deutschland GmbH, Hamburg, Germany) as the complainant in the main proceedings, against the Bundeskartellamt, with the participation of the Verbraucherzentrale Bundesverband.[4]

1 For the purposes of this article, we will use the term „Facebook“ as used in the administrative and judicial proceedings, even though the term Meta is already relevant at present

2 Hutchinson, Ch., S.; Treščáková, D., *The challenges of personalized pricing to competition and personal data protection law*, European Competition Journal, 2021, DOI: 10.1080/17441056.2021.1936400

3 Mazúr J.; Patakyová M.T., *Regulatory Approaches to Facebook and Other Social Media Platforms: Towards Platforms Design Accountability*, Masaryk University Journal of Law and Technology, Vol. 13, No. 2, 2019, pp. 219–242, [https://doi.org/10.5817/MUJLT2019-2-4]

4 Federal association of consumers

It is indisputable, that the discussed case of Facebook could be analysed from a several legal points of view, what is finally reflected in other scientific literature, which we will refer to in this contribution. However, our aim is to describe the course of proceedings across the various stages and analyse the specific practices of the digital platform and dispensation that Facebook is found culpable for, in the context of the Proposal for the Digital Markets Act. In terms of the used methodology, we will analyse publicly available decisions (and partial decisions) of competent authorities and related legislation. Subsequently, the specific practices of the concerned platform would be examined, and then we will accede to their subsumption under the rules set out in the Digital Markets Act and describe the consequences, which the applicability of this Act would (or could) cause.

2. CASE OF FACEBOOK - ASSESSMENT OF THE GERMAN COMPETITION AUTHORITY (BUNDESKARTELLAMT)

Interesting and stimulating question was posed by Anna Blume Huttenlauch in her contribution (which was published shortly after the commencement of the proceedings) - and therefore: "Is there a market on which Facebook is "dominant", i.e. do social networks constitute a market for the purpose of antitrust analysis?"[5] We identify with the analysis and subsequent arguments of the author in the cited article, and we point out to the fact, that under the current conditions we can already state that even services for which no monetary compensation is paid can, in principle, constitute a market - in the light of the diversion made by the Commission in its decision-making[6] but also in the light of the changes made, for example, by Germany in particular in their national legislation (9th amendment to the GWB- § 18(2)- which has changed the existing case law). [7] In this context, we also refer to the findings of Botta and Wiedemann who assert that" …we take for granted that the online platform has a substantial degree of market power in order to be considered dominant (e.g. the platform owns a large amount of personal data, while network effects discourage new entries in the market), and thus its market behaviour could fall within the scope of Art. 102 TFEU…"[8]

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[5] Huttenlauch, D. A. B., *How many "Likes" for the German Facebook Antitrust Probe?* Competition Policy International, Vol. 6, 2016, p.1, Available online at: [https://www.blomstein.com/perch/resources/cpi-facebook-investigation-15.8.2016.pdf], Accessed 29 March 2022

[6] *Ibid.,* p. 2

[7] Bejček, J.*, O vlivu digitalizace na soutěžní právo – mnoho povyku pro nic?* in: Scuhoža, J.; Husár, J., Hučková, R. (eds.): Právo, obchod, ekonomika VII. Košice: Univerzita P.J. Šafárika v Košiciach, 2017, p. 28

[8] Botta, M.; Wiedemann, K., *Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision*, Journal of European Competition Law & Practice, Vol. 10, No. 8, 2019, p. 466, [https://doi.org/10.1093/jeclap/lpz064], *referring to* Graef, I., *Market Definition and Market Power in*

The Bundeskartellamt is a German competition authority. The scope and competencies of this institution are regulated by the German Act against Restraints of Competition (Competition Act) (hereinafter also „GWB")[9]. Part 2 Competition Authorities, Chapter 1 General Provisions Section, § 48 Competencies of the GWB states that „The competition authorities are the Bundeskartellamt, the Federal Ministry for Economic Affairs and Energy, and the supreme Land authorities competent according to the laws of the respective Land."[10] In relation to the specific powers of this institution is crucial above all article 48 paragraph 3 „The Bundeskartellamt shall monitor the degree of transparency, including that of wholesale prices, and the degree and effectiveness of liberalisation as well as the extent of competition on the wholesale and retail levels of the gas and electricity markets and on the gas and electricity exchanges. The Bundeskartellamt shall without delay make the data compiled from its monitoring activities available to the Bundesnetzagentur."

As mentioned above, administrative proceedings against Facebook was initiated on March 2, 2016. As one of the main objective for initiating proceedings was that user and device-related data which Facebook collects when other corporate services or third-party websites and apps are used and which it then combined with user data from the social network. The proceeding did not address the issue of information processed on the use of the social network after users registeration.[11] This might initially seem essential, especially with regard to the protection of personal data, which should be assessed by the data protection authority. Germany does not have one central Data Protection Authority but a number of different Authorities for each of the 16 German states (*Länder*) that are responsible for making sure that data protection laws and regulations are complied with. In addition the German Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte* für *Datenschutz und Informationsfreiheit* – 'BfDI') is the Data Protection Authority for telecommunication service providers and represents Germany in the European Data Protection Board.[12] However,

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Data: The Case of Online Platforms, World Competition, Vol. 38, No. 4, 2015, pp. 473–506; Filistrucchi, L.; Geradin D.; van Damme E., *Identifying Two-Sided Markets,* World Competition Vol. 36, No. 1, 2013, pp. 33–59

9 *The official title of the law in the German language* - Gesetz gegen Wettbewerbsbeschränkungen (GWB)

10 Act against Restraints of Competition (Competition Act – GWB), Federal Ministry of Justice, Federal Office of Justice, [https://www.gesetze-im-internet.de/gwb/BJNR252110998.html]

11 Case Summary 15 February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 1, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

12 Data protection laws of the world, National Data Protection Authority, Germany, [https://www.dlapiperdataprotection.com/index.html?t=authority&c=DE], Accessed 18 January 2022

these considerations are quickly changed by the fact that Facebook has an official headquarters in Ireland, and, therefore, the above-mentioned authorities would not be competent following the relevant provisions "…and the lead supervisory authority under Article 56(1) of the GDPR is the Irish supervisory authority, since Facebook Ireland is Facebook's main establishment in Europe, operates the social network in Europe, uses standard terms of service in all Member States of the European Union and is the controller for the processing of personal data for the entire territory of the European Union within the meaning of Article 4(7) of the GDPR."[13] Data Protection Commission announces decision in Facebook (Meta) inquiry on 15th March 2022. The decision followed an investigation by the Data Protection Commission into a series of twelve data breach notifications received between 7 June 2018 and 4 December 2018. The investigation focused on Meta Platforms' compliance with GDPR Articles 5(1)(f), 5(2), 24(1), and 32(1) in relation to the processing of personal data relevant to the twelve breach notifications. As a result of its investigation, the DPC determined that Meta Platforms violated Articles 5(2) and 24(1) GDPR. In the context of the twelve personal data breaches, the DPC determined that Meta Platforms lacked appropriate technical and organizational measures that would allow it to readily demonstrate the security measures that it implemented in practice to protect EU users' data. Meta Platforms Ireland Limited were fined with €17 million [14]

Bundeskartellamt considered it necessary to intervene from a competition law perspective because the data protection boundaries set forth in the GDPR were clearly overstepped, also in view of Facebook's dominant position. [15] As follows from the official documents of the German competition authority and as it is usual in assessing whether a dominant position has been abused, Bundeskartellamt from a factual point of view took into account the relevant facts and circumstances of the case. To the category of relevant facts we should include for instance, the nature of Facebook, quantity of daily/weekly/monthly users within the defined territory (Germany), what are the basic principles of its operation, basic aspects

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[13] Case C-252/21, *Meta Platforms and Others,* Request for a preliminary ruling of 24 March 2021, [https://curia.europa.eu/juris/showPdf.jsf?text=&docid=242143&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1565434], Accessed 1 May 2022

[14] Data Protections Commission, Data Protection Commission announces decision in Meta (Facebook) inquiry
15th March 2022, [https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-decision-meta-facebook-inquiry], Accessed 12 April 2022

[15] Case Summary 15 February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, pp. 1-2, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

of the conditions of use of this social network, or even mentioning "subsidiaries" social networks belonging to Facebook as a result of the merger. It is also desirable to mention the division of Facebook users into daily users and monthly users in order to illustrate the power of the user base. As it is set out in the decision of the Bundeskartellamt in the case of Facebook, in 2018 the number of daily active users in Germany was 23 million, while 32 million users were classified as monthly active users.[16]

From a factual point of view, it is possible to access Facebook.com via the websites www.facebook.com, www.facebook.de or via a mobile app. Facebook. Private Facebook.com use is conditional upon registration by creating a user profile. Using their real names, users can enter information on themselves and their personal situation and set a profile picture. The registration process is crucial mainly because during the process of registration platform requires to express consent with the conditions, under which this platform can be used. Based on this information, a personalised site is created for each user, which is subdivided into three subsites: the "profile", "home" and the "find friends" pages. Users can see the latest news ("posts") of other private and commercial users in the "Newsfeed" on their start pages. The order of appearance is based on an algorithm to match the user's interests. Facebook Messenger is integrated into the social network and serves for real-time bilateral or group communication. In the social network, Facebook.com offers a variety of further functionalities, e.g. a job board, an app centre or event organisation.[17]

Not only private users but also businesses, associations or business individuals can use Facebook.com to publish content in the social network to increase their reach. Publishers can create their own pages to publish content and connect with private users, e.g. via subscriptions or likes. Facebook funds its social network through online advertising offered to publishers and other businesses. The ads match a social network user's individual profile. The aim is to present users with ads that are potentially interesting to them based on their personal commercial behaviour, their interests, purchasing power and living conditions.[18] In these circumstances it

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[16] Case Summary 15 February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 2, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

[17] *Ibid.*, p. 2

[18] Case Summary 15 February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 2, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

is distinct, that Facebook has long been more than just a social network that connects its users in order to share statuses, photos, videos, or other information. It is also possible to argue that Facebook goes beyond the traditional definition of the platform in terms of the sharing economy, based on P2P activities.

From a legal point of view, the competition authority considered it important to define at first market definition. Based on the concept of demand-side substitutability, Bundeskartellamt stated that we understand Facebook as „private social network market with private users as the relevant opposite market side. The relevant geographic market is Germany. "[19] The new provisions of the German Competition Act were also taken into account in defining the market „....new provisions of Section 18(2a) and (3a) of the German Competition Act (GWB), the Bundeskartellamt first of all examined Facebook's business model and its special characteristics as a multi-sided network market with free services."[20] In analysing the nature of Facebook, the Bundeskartellamt came to the expected conclusion that this platform is not just a social network. „... Facebook.com Facebook offers an intermediary product, which, according to the content of its services, is a combination of a network and a multi-sided market pursuant to Section 18(3a) GWB. Essentially the product is a network financed through targeted advertising, which forms a multi-sided market precisely because of this form of financing. "[21]

Then competition authority divided the Facebook users into two basic groups with regard to the nature and objectives they carry out through the online platform "...key user groups are private users using Facebook.com without monetary compensation on the one hand, and advertisers running targeted advertisements on the other. Indirect network effects exist between the two user groups."[22]

In relation to market dominance Bundeskartellamt came to conclusions that, according to Section 18(1) in conjunction with (3) and (3a) GWB, Facebook is the dominant company in the national market for social networks for private users because, based on an overall assessment of all market power factors, the company has a scope of action in this market that is not sufficiently controlled by competition. [23]

Following the abusive data policy it has been found that using and actually implementing Facebook's data policy, which allows Facebook to collect user and device-

19 *Ibid.*, p. 3
20 *Ibid.*, p. 4
21 *Ibid.*, p. 4
22 *Ibid.*
23 *Ibid.*, p. 5

related data from sources other than Facebook and merge it with data collected on Facebook, constitutes an abuse of a dominant position in the social network market in the form of exploitative business terms under Section 19(1) GWB's general clause. Considering the assessments made under data protection law in accordance with the General Data Protection Regulation (GDPR), these are inappropriate terms that harm both private users and competitors. [24]

After a thorough examination of the available evidence and facts, the BKA finally issued a decision by which „Bundeskartellamt has prohibited the data processing policy Facebook imposes on its users and its corresponding implementation pursuant to Sections 19(1), 32 GWB and ordered the termination of this conduct. The prohibition refers to the terms of processing personal data as expressly stated in the terms of service and detailed in the data and cookie policies as far as they involve the collection of user and device-related data from other corporate services and Facebook Business Tools without the users' consent and their combination with Facebook data for purposes related to the social network. The Bundeskartellamt also prohibited the implementation of these terms and conditions in actual data processing procedures which Facebook performs based on its data and cookie policies."[25] The concerned entity was not fined as a result of the decision in question; instead, the assessor gave the entity a 12-month period to implement the alleged practices contained, in particular, in Facebook's terms and conditions for used data.

In this context, it is also necessary to emphasize the fact that the whole administrative procedure lasted from 20 March 2016 to 06 February 2019 (when the decision on the merits was given). The investigation results in a high-profile[26] and extensive decision.[27] The investigation process and the decisive factual and legal circumstances were also published in abbreviated summary form.[28] Finally, the

24 *Ibid.*, p. 7

25 Case Summary 15 February 2019, *Facebook*, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 12, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

26 Witt, A. C., *Excessive Data Collection as a Form of Anticompetitive Conduct: The German Facebook Case*, The Antitrust Bulletin, Vol. 66, No. 2, 2021, pp. 276–307, [https://doi.org/10.1177/0003603X21997028]

27 6th Decision Division, B6-22/16, Bundeskartellamt, [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5], Accessed 29 March 2022

28 Case Summary 15 February 2019, *Facebook*, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 2, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 29 March 2022

recent Facebook decision by the Bundeskartellamt represents the 1rst case of exploitative conduct sanctioned by the national competition authority in the digital world.[29]

We also consider it necessary to refer to the literature, which addresses the issue of the possibility of analysing defined procedures through competition law instruments in which we encounter two currents of opinions. According to the contribution of *Schneider*[30] we meet with opinion which „...rejects the possibility that privacy or data protection concerns can be analysed and remedied under competition law“[31], whereas the contribution of Schneider can be described as the one that „argues in favour of the interaction of these areas of market regulation and thus of the Bundeskartellamt´s approach against Facebook.[32] Schneider also pointed to a change in perspective comparing the approach of the European Commission and the Bundeskartellamt noting, that German competition authority „...focuses its analysis on the zero-price side of the market of social networking services, which the EU Commission did not do in prior investigations against digital platform owners“ referring to the other relevant decision-making activities of the Commission.[33]

As the second aspect author draws attention to the choice of legal basis by the Bundeskertellamt „…while the Commission in both the Google/Double Click and the Facebook/Whatsapp investigations focused on traditional exclusionary conduct as the basis of the violation, the German antitrust authority apparently centres its investigation on the existence of an exploitative conduct under art.

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[29] Marco, B.; Wiedemann, K., *op. cit.*, note 9, pp. 465–478, [https://doi.org/10.1093/jeclap/lpz064]

[30] Schneider, G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Vol. 9, No. 4, 2018, pp. 213–225, [https://doi.org/10.1093/jeclap/lpy016]

[31] Schneider, G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Vol. 9, No. 4, 2018, Page 2 [https://doi.org/10.1093/jeclap/lpy016] reffering to: Manne, G., A.; Wright, J. D., no.8, 250, 258; Kerber, W., *Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection,* Journal of Intellectual Property Law & Practice, Vol. 11, 2016, p. 856

[32] Schneider, G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Vol. 9, No. 4, 2018, Page 2 [https://doi.org/10.1093/jeclap/lpy016] reffering to: Huttenlauch, A. B., *How many likes for the German Facebook Antitrust Probe?*, Competition Policy International, 2016, Available online at: [http://www. blomstein.com/perch/resources/cpi-facebook-investigation 15.8.2016.pdf.], Accessed 29 March 2022

[33] Schneider, G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Vol. 9, No. 4, 2018, Page 2, [https://doi.org/10.1093/jeclap/lpy016]

102 TFEU." [34] Finally, as is follows from the decision of the German competition authority, as the initial legal framework was finally not used art. 102 TFEU, but national provisions of German regulation (Sections 19(1), 32 GWB). This procedure was reasoned by Bundeskartellamt as follow: "...according to the catalogue of facts set forth in Article 102 sentence 2 lit. a TFEU, any abuse may consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. However, the examination has shown that the concept of protection developed by German case law on the general clause of Section 19(1) GWB, which relies heavily on decisions about values based on both fundamental rights and ordinary law in order to determine abusive conduct, has so far found no equivalent in European case law or application practice. The intended prohibition is therefore based on Section 19(1) GWB in conjunction with the relevant domestic case law. Pursuant to Article 3(2) sentence 2 of Regulation 1/2003, the Member States are not precluded from adopting or applying stricter national provisions in their territory in order to prevent or punish unilateral actions by undertakings".[35]

3. FROM THE ASSESING OF BUNDESKARTELLAMT TO THE GERMAN JUDICIAL AUTHORITIES

In accordance with the instructions on rights of appeal of the decision of 09 February 2019, Facebook addressed the appellate court (Düsseldorf Higher Regional Court) appeal and requested the suspensive effect of the appeal to be restored. Düsseldorf Higher Regional Court rendered a court decision (of a preliminary nature) on 29 August 2019. At the request of the applicants, the suspensive effect of their appeals against the administrative decision of the Bundeskartellamt's decision of 6 February 2019 was ordered and declared the appeal admissible. The interim ruling will be further briefly discussed below, after a concise analysis of the Bundeskartellamt's reasoning. Detailed analysis of the court order would go beyond the scope of this contribution and therefore we will only point out to selected aspects that we consider most fundamental.

Firstly, we fully identify with the view, that this preliminary decision was decision in favour of Facebook.[36] As it is apparent from the reasoning of decision, court

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34 *Ibid.*, p. 3

35 6th Decision Division, B6-22/16, Bundeskartellamt, p. 257, [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5], Accessed: 29 March 2022

36 Marco, B.; Wiedemann, K., *op. cit.*, note 9, pp. 471, [https://doi.org/10.1093/jeclap/lpz064]

directly stated in the reasoning of the decision, that it tends to „...the annulment of the contested decision is predominantly probable." [37]

As first the court first emphasized, that "… there are serious doubts as to the legality of these resolutions by the antitrust agency."[38] Currently, the aspect of doubt about the legality of an administrative decision entitles the acting court to grant the appellant's request for suspensory effect. Secondly, at the same time the court commented on data processing issues, stating that "…the data processing by Facebook which it complained about does not give rise to any relevant competitive damage or any undesirable development in competition. This applies both with regard to an exploitative abuse to the detriment of consumers participating in the social network of Facebook and with regard to an exclusionary abuse to the detriment of an actual or potential competitor of Facebook."[39] In this regard, we also point out the statement of Botta and Wiedemann "….*inter alia*, the Court argues that causality between Facebook's dominant position and users agreeing to its terms of service cannot be proven, and that the excessive data collection leads to neither an abusive situation nor a loss of control for consumers, as the latter knowingly and willingly consent to the data processing."[40]

On the contrary, the court agreed with the definition of the relevant market „...it can be assumed that the Bundeskartellamt has correctly defined the relevant product and geographic market and that *Facebook* is the norm addressee of the abuse prohibition pursuant to Section 19 GWB on that market for social networks for private users in Germany ".[41] In addition, the court agreed with the other assessment of the competition authority "…Furthermore, it can also be assumed as correct that the Office's assessment that the "Terms of Use" provided by *Facebook*, in-

[37] Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 6

[38] Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 5

[39] Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 6

[40] Botta, M.; Wiedemann K*., op. cit.,* note 8, p. 471, [https://doi.org/10.1093/jeclap/lpz064]

[41] Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 7

cludingthe “Data Directive” and the “Cookie Directive”, are conditions or terms of business within the meaning of Section 19 (2) no. 2 of the GWB.” [42]

But finally Düsseldorf Higher Regional Court states that “…Facebook cannot be found to have violated the abuse prohibition in Section 19 Paragraph 2 No. 2 GWB. This is because the Bundeskartellamt has not carried out sufficient investigations into an “as-if” competition and, as a result, has not made any meaningful findings on the question of which terms of use would have been formed under circumstances of competition." Following the mentioned findings “…. Facebook cannot be accused of having abused its dominant market position within the meaning of Section 19 (1) GWB either. According to this general clause, the abuse of a dominant market position is prohibited.”[43]

4. QUESTIONS REFERRED TO THE EUROPEAN COURT OF JUSTICE FOR A PRELIMINARY RULING (C-252/21)

The documents published so far show, that Düsseldorf Higher Regional Court at the hearing on 24 March 2021, stayed the proceedings by the court order. For the purposes of the main proceedings, the Düsseldorf Higher Regional Court considered it necessary to answer the questions referred to the Court of Justice of the EU. Referred questions concern in particular interpretation of the selected provisions of the GDPR regulation and article 4(3) of the TEU. While the GDPR Regulation does not need to be presented separately, article 4(3) TEU discuss about principle of sincere cooperation, more precisely defines, that the “Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”[44]

The proceeding conducted at Court of Justice of the EU is traceable under the file number C-252/21. Currently are available to the public solely Application and Request for a preliminary ruling. As the questions referred about the interpretation of GDPR regulation and TEU are too extensive, we will try to focus only on selected aspect.

By the first preliminary question, the Düsseldorf Higher Regional Court is practically asking whether the German competition authority has the competence to assess the contractual terms relating to data processing of Facebook in the context

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42 Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), pp. 6-7

43 *Ibid.*, p. 6

44 Art. 4 (3) Treaty on European Union (Lisbon)

of GDPR regulation and issue an order to end breach of such regulation. By the sub-question, the national court essentially asks whether it is compatible with the principle of sincere cooperation, when at the same time, the lead supervisory authority in the Member State in which is the undertaking established, within the meaning of Article 56(1) of the GDPR is investigating the undertaking's contractual terms relating to data processing.

The sixth preliminary question is whether consent, as defined in Article 6(1)(a) and Article 9(2)(a) of the GDPR, can be given effectively and freely to a dominant undertaking such as Facebook Ireland, in accordance with Article 4(11) of the GDPR as it points to the competences of the competition authority in the intentions of the GDPR. Last, the seventh preliminary question is basically directed to that if the national competition authority has the competence to assess the terms of the undertaking in context the GDPR.

In summary, the questions referred to the Court of Justice of the EU do in fact seek to interpret the provisions of the GDPR and the principle of sincere cooperation and aspect of the competition are only marginal. We consider question number 6 and number 7 to be a marginal part of competition issues.

5. A FEW REMARKS ON THE SUBMITTED PROPOSAL OF THE DIGITAL MARKETS ACT

The previous formation of the European Commission reflected the priorities in the digital field through its priority - Digital Single Market.[45] Within the current second priority of the European Commission – Europe fit for the digital age, were on 15 December 2020 published two proposals for the regulation – Digital Services Act and Digital Markets Act. While Digital Services Act aims to contribute to the proper functioning of the internal market for intermediary services, set out uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected, [46] Digital Markets Act lays down harmonised rules ensuring contestable and fair markets in

[45] Hučková, R.; Sokol, P.; Rózenfeldová, L., *4th industrial revolution and challenges for european law (with special attention to the concept of digital single market)*, in: Duić, D.; Petrašević, T. (eds.), EU law in context – adjustment to membership and challenges of the enlargement, Conference book of proceedings. – Osijek, Vol.2, 2018, pp. 201-215, Available online at: [https://hrcak.srce.hr/ojs/index.php/eclic/issue/view/313/]

[46] Art. 1 of the Proposal for Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 final

the digital sector across the Union where gatekeepers are present.[47] Undoubtedly, the European Union is attempting to harmonize in specific areas.[48]

Digital Markets Act introduces a new category - so called gatekeepers. The market power of these entities lies primarily in the fact that they have a very stable position in the defined areas and represent a type of "gateway" for commercial users, which is necessary to overcome to enter the relevant markets. For this reason too, these entities are referred to in the current proposal for the regulation Digital Markets Act as gatekeepers. These entities will be identified on the basis of qualitative (Art. 3 para. 1. a-c) of Digital Markets Act) and quantitative criteria (Art. 3 para. 2. a-c) of Digital Markets Act). In the Article 2 DMA defines gatekeeper as provider of core platform services designated pursuant to Article 3, online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, advertising services- including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services, in the category of core platform services.

The published Act on Digital Markets in its non-binding part, resp. the preamble quite clearly states that "there are more than 10,000 online platforms in the European digital economy and most of them are SMEs, with a large number of large online platforms receiving the largest share of total value added."[49] From the above mentioned qualitative and quantitative indicators is evident, that this is a group of so – called "Big Tech"[50], also referred to by the abbreviation GAFAM (Google, Amazon, Facebook, Apple, Microsoft), while it is not excluded that other entities could be marked as gatekeepers according to established criteria. In this context we also emphasize that the nature of the DMA regulation consists on *ex ante* rules.

The obligations for the gatekeepers arising from their position, ie. for entities fulfilling qualitative and quantitative criteria, are enshrined in Art. 5 and Art. 6 of the proposal for a regulation Digital Markets Act. Article 5 of the DMA is referred to as "Obligations for gatekeepers" and Article 6 of the DMA is referred to as "Ob-

47 Art. 1 of the Proposal for Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final

48 Dolný, J.; Mrázová, Ž., *Recent Developments in European Company Law: Harmonisation of Restructuring and Cross-border Conversion*, in: Evolution of Private Law – New Challenges, Publisher Instytut Prawa Gospodarczego, pp. 63-71

49 Dôvodová správa, DMA, p. 1

50 Cabral, L., Haucap, J., Parker, G., *et. al.*, *The EU Digital Markets Act*, Publications Office of the European Union, Luxembourg, 2021, p. 9, [https://publications.jrc.ec.europa.eu/repository/handle/JRC122910], Accessed: 1 May 2022

ligations for gatekeepers susceptible of being further specified." Article 6 can be seen as a legal basis for a relatively new element - more specific, as creator of space for dialogue between the concerned gatekeeper and the European Commission to fulfil specific obligations. As the proposal for a DMA regulation presupposes, individual obligations arising from this regulation will be directly incorporated into the technological solutions (procedures) used by the gatekeeper for a particular product. As a result, for a specific category of obligations falling under Art. 6 DMA, further clarification will be required, which will be accomplished directly by the concerned entity with the cooperation of the European Commission.

For the purpose of completeness must be specified, that legal act prior to the Digital Markets Act was Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services, which is a P2B (Platform to Business) regulation. In the literature, we meet with the statement that Regulation 2019/1150 was to a large extent also a model regulation for the Digital Services Act.[51] In this regard, we note that Regulation 2019/1150 laid down obligations for online intermediary providers, which consisted in particular of the requirement of transparency, unrestricted availability and complexity of the business conditions of online intermediary service providers vis-à-vis the commercial user. In addition, Regulation 2019/1150 imposed an obligation on the online intermediary service provider to indicate the main parameters determining the order and reasons for the relative importance of those main parameters compared to other parameters.

In order to maintain regulatory consistency, the Digital Markets Act builds on Regulation 2019/1150, not only by building on the definitions set out in Regulation 2019/1150, but also by the fact that the Commission can benefit from the transparency that online brokerage services and search engines must 2019/1150 to ensure that practices which, according to the list of obligations, could be illegal if access guards were involved. These aspects indicate, that Regulation 2019/1150 was in certain aspect a predictor of the Digital Markets Act.

6. SCRUTINIZED PRACTICES OF FACEBOOK IN TERMS OF RULES DEFINED BY DIGITAL MARKETS ACT

It is necessary to introduce that *Kerber* and *Zolna*, for instance, have already comprehensively dealt with the case of Facebook in an article which goes beyond the

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51 Busch, C,; Mak, V., *Putting the Digital Services Act into Context: Bridging the Gap between EU Consumer Law and Platform Regulation*, Journal of European Consumer and Market Law (EuCML), 2021, p. 12, European Legal Studies Institute Osnabrück Research Paper Series, No. 21 - 03, [https://ssrn.com/abstract=3933675], Accessed 1 May 2022

scope of this paper. [52] Kerber and Zolna pointed in particular to the Article 5(a) of DMA, which defines that "in respect of each of its core platform services identified pursuant to Article 3(7) DMA, a gatekeeper shall refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679." In this regard, we also add that article 6(a) DMA would be relevant, falling into the category of obligation susceptible of being further specified. In practice, this will mean that there will be a dialogue between the concerned company and the European Commission on the technical incorporation of this obligation.

Whether and how the situation would change in the case of Facebook if we were based on the assumption that the DMA regulation is in force, hence applicable? First to be mentioned is that the nature of the DMA Regulation lies in its *ex ante* effects. Therefore, if an entity is identified as a gatekeeper, it is its duty to act in accordance with the wording of the DMA regulation. These obligations therefore result directly from his position. Consequently, no further investigation is required, if we could, for example, compare this with the necessity to define the relevant market in the context of competition. What is crucial for the nature of digital markets - is the ability of a fast, efficient and effective tool. As it turned out, competition law institutes have so far served very effectively to prosecute practices with certain digital specificities. Such enforcement through competition law institutes would prove problematic in the context of time - that is, the reasonable duration of proceedings by competition authorities that investigate and ultimately sanction such practices. This fact is also emphasized by the Commission in its proposal for a regulation DMA "… Article 102 TFEU does not always allow intervening with the speed that is necessary to address these pressing practices in the most timely and thus most effective manner."[53] Secondly, the institute of non-abuse of the dominant position may not be suitable and applicable in every case "…the Commission considered that Article 102 TFEU is not sufficient to deal with all the problems associated with gatekeepers, given that a gatekeeper may not necessarily be a dominant player, and its practices may not be captured by Article 102 TFEU if there is no demonstrable effect on competition within clearly defined relevant markets. ".[54]

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[52] Kerber, W.; Zolna, K. K., *The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law*, 2021, [https://ssrn.com/abstract=3719098 or http://dx.doi.org/10.2139/ssrn.3719098], Accessed 29 March 2021

[53] Explanatory memorandum to Digital Markets Act, p. 8

[54] *Ibid.*

If we were based on the assumption, that company Facebook (currently already Meta) would be designated as a so-called gatekeeper, under ideal circumstances, combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services will be prohibited for this company. However, we consider it crucial that refraining from combining personal data may be validated by the consent of the user. It is questionable in this context that, if the conditions for using the platform were formulated in such way - that the platform could only be used under the given conditions- how and whether this would change the current situation. From a purely theoretical point of view (not just applying to the Facebook case) it would be an interesting concept that users would be given room to decide - one group of users would only have access to the basic service package provided that their data (from the third parties) would be not collected and further processed, while users who choose to provide their data as an alternative to "currency" would have additional benefits at their disposal. However, in the outlined case, special consideration should be given to legislation governing customer equality and non-discrimination.

7. CONCLUSION

Competition law is currently used as one of the tools to penalize the practices of large online platforms. These practices contain digital specificities, mostly in the context of personal data protection, the processing of large amounts of data generated by activity on these platforms, or the access of their competitors to the market (if the gatekeeper is in a dual position). Large online platforms, which could fall under the definition of a gatekeeper, have significant market power and it is unlikely that in the near future there will be entities in the defined areas that could compete with them or provide users with an alternative. This stable position provides the platforms a space to create conditions that may not be beneficial to users in all circumstances, not only in terms of data protection, but also in terms of the creation of the offer presented to them on the basis of the collected data. In this way, the position of commercial users of these platforms is also weakening. In the field of digitization, however, the ability to intervene quickly and efficiently is crucial. Referring to the Facebook case study, it can be stated that the classic tools of competition law can be perceived as effective, but they can be not very flexible in the dynamically evolving digital environment. The proceedings of the national competition authority began in 2016, with the administrative proceedings being referred to the national judicial authority, which referred preliminary questions to the Court of Justice of the EU, whereas the court considered it necessary to answer referred questions for the purposes of the main proceedings. The

proposed Digital Markets Act aims to address the issue of the competitiveness of the digital markets with new categories of obligations. These obligations are the result of an examination of the most fundamental unfair practices of gatekeepers and their aim is to eliminate them. The role of the Digital Markets Act is therefore to supplement or create an "extension of competition law" in the form of stricter rules for extremely large online platforms, which currently have a large market power in the defined markets of the digital sector. Obligations of gatekeeper resp. the objective of the proposal for the DMA does not interfere with the obligations created by the competition law framework, competences and powers for competition authorities, which are imposed and entrusted under the competition law rules. In practice, this will mean that if the access guard violates competition law rules even though he has complied with the obligations set out in the Digital Markets Act, his conduct may and will normally be affected by competition law. Simultaneously, Member States are not permitted to enact national legislation in the defined area that regulates the same aspects as DMA, in order to maintain regulatory consistency at EU Member State level.

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