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In 2019, the Bundeskartellamt rendered one of the most controversial decisions in the recent competition law history, finding that Facebook's making the subscription to its social network conditional upon the acceptance of terms and conditions for the collection and processing of user data (i.e. combining the data collected from other Facebook services [Instagram, WhatsApp, Masquerade and Oculus] as well as from third party websites and applications through Facebook Business Tools, with users Facebook account [i.e. the processing of "**Additional Data**"]) amounted to an abuse of dominance merely based on the findings that these were incompliant with the GDPR and Facebook was in a dominant position, without establishing a causal link between Facebook's dominance and its ability to apply the allegedly GDPR-incompliant terms and conditions or setting forth concrete consumer harm ("**Facebook Decision**"). The said decision could have significant ramifications for competition-law jurisprudence, had it not been torn apart by the Higher Regional Court of Dusseldorf ("**Court**"). In doing so, the Court laid down a solid and systematic guidance with respect to the requirements that must be satisfied by the competition authorities in order to prove the existence of exploitative abuses. The Court's suspension decision also contains significant insights as to the meaning of consumer harm and the competitive dynamics in zero-price markets where such harm may not be associated with pecuniary parameters.

How to Establish Exploitation

The Bundeskartellamt's finding of an abuse in the Facebook Decision was founded on the Authority's assumption that it is sufficient to show that; (i) Facebook is in a dominant position in the social network market and (ii) Facebook's terms and conditions that renders subscription to its services conditional upon users' accepting Facebook to process Additional Data is in violation of the GDPR, in order to prove the existence of exploitation.

Under this assumption, the Bundeskartellamt absolved itself from the necessity to prove that Facebook's ability to establish a link between social network subscription and processing of Additional Data stems from its dominant position and that such a practice would not be possible in the absence of dominance (i.e. establishing a link of causality between dominance and the exploitative conduct). Rather, the Bundeskartellamt argued that whenever a dominant company acts in contrary to a legal provision that aims to protect the weaker party of an unequal contractual relationship (e.g. unfair contract terms, labour law etc.) to the disadvantage of the protected party (which, according to the Bundeskartellamt amounted to exploitation), this would automatically lead

to a violation of the competition law. This meant that in the Bundeskartellamt's view, all that was required to prove the existence of an exploitative abuse is to establish a causal link between dominance and exploitation.

The Court unequivocally rejected the Bundeskartellamt's view and provided thorough and detailed explanations as to why establishing a causal link between dominance and exploitation may not be sufficient in exploitative abuse cases and that a further causal link between dominance and exploitative conduct must also be shown.

The Court explained that legal provisions that aim to protect the weaker party of an unequal contractual relationship does not necessarily aim to address an imbalance that stems from the "*market power*" of the stronger party but rather a bilateral-imbalance that is inherent in the nature of such relationships (e.g. an employer in relation to a worker, a seller in relation to a consumer and a data controller in relation to a data subject are always stronger parties due to the nature of these relationships even if they possess no "*market power*" from a competition law perspective). The Court emphasized that the concept of exploitation, as a technical competition law term, refers to exploitation of consumers which is due to dominance and thus that exploitation may not be proven without showing that it would not be possible in the absence of dominance. The Court also set forth that the "*special responsibility*" of dominant companies only relates to obligations stemming directly from competition law and that the scope of such responsibility may not be extended to cover other legal provisions that serve different purposes.

After clarifying the necessity of a causal link between dominance and allegedly exploitative conduct, the Court goes on to examine whether it may be argued that Facebook is able to establish a link between social network subscription and processing of Additional Data because its social network services are indispensable for consumers. The Court stipulated that it is not reasonable to claim that Facebook provides indispensable services for the consumers due to the facts that these services do not relate to essential needs and that a significant portion of the German population prefers not to use these services at all. In light of this data, the Court held that the consumers make a rational choice of letting Facebook use their personal data in return for the provision of zero-price services financed by advertising. As per the view of the Court, the absence of other alternatives, may not justify the presupposition that the consumers have no choice but to allow Facebook to process Additional Data in order to benefit from its social network services.

Finally, the Court also set forth that the Bundeskartellamt erred in assuming that consumers' accepting Facebook's terms and conditions without reading these is an indication of their dependence of Facebook and thus a reflection of Facebook's ability to exploit consumers by way of abusing its dominant position. On the contrary, the Court stated that this is merely due consumers' indifference to Facebook's processing of Additional Data and their belief that the benefits of subscribing to Facebook's social network outweighs any potential disadvantages that may arise from the processing of Additional Data.

What is Consumer Harm in Zero Price Markets?

In its decision the Court also delved into the question of "*consumer harm*", a concept that was very widely interpreted by the Bundeskartellamt in the Facebook Decision.

The Bundeskartellamt claimed that consumers' "*loss of control*" over their data and the weakening of their "*right to informational self-determination*" due to "*excessive*" data processing of Facebook is sufficient to show the existence of consumer harm even at a conceptual level without need for further concretization. Here, the Bundeskartellamt argued that the excessiveness of processing was mainly due to disproportionality between Facebook's processing of Additional Data and the social network-related services it provides, under the assumption that the former is not a precondition of the latter.

The Court was of the opinion that the Bundeskartellamt's claims were off the mark on various fronts.

First, the Court made it clear that consumer harm in the case at hand must be due to the processing of the Additional Data, as this is the alleged abuse, and that all the data processing activities of Facebook may not be taken into consideration.

The Court noted that, despite Bundeskartellamt's assertions, it is not possible to accept that consumers have lost control of their data as their allowing Facebook to process Additional Data was a conscious decision and a result of rational calculation. The Court added that the fact that there is a significant amount of non-Facebook users in Germany is a clear proof that the consumers do have a discretion and that different consumers exercise this discretion in different ways.

Rather the Court stated that Facebook's processing of additional data does not weaken the consumer economically as Facebook's processing of Additional Data does not deprive consumers of their right to making the same data available to other third parties, including the competitors of Facebook in return for certain economic benefits. Moreover, the Court further recognized that a certain economic value may theoretically be assigned to excessive disclosure of data. However, according to the Court, such economic value must also be calculated in accordance with the fundamental principles of competition law. Since, from a competition law perspective, excessiveness under that framework refers to Facebook's disproportionate data processing that is only made possible due to its market power, the Bundeskartellamt should have conducted a counterfactual analysis or an "*as-if*" test. This test would require a comparison between the degree of data processing that could have emerged in a competitive market and the current degree of data processing. The gap between the former and the latter would point out the allegedly negative effects of Facebook's dominance over consumers and a valid exploitation claim could only be raised if this gap was deemed to be unreasonably high. This is due to the fact that the competition law does not prohibit all forms of subjective "*excesses*" but only those that are clearly due to an abuse of dominant position. The Court reflected that the Bundeskartellamt's findings were insufficient to prove such correlation.

Considering the foregoing assessments, along with other findings, the Court decided to suspend the execution of Facebook Decision which it deemed to be implausible.

Conclusion

The decision of the Court comprises significant insights with respect to the interplay of data protection and competition laws. Although the Court did not completely dismiss the possibility of exploitative abuses in zero price markets, it made it very clear that competition authorities should refrain from incorporating the concepts and purposes of data protection law into competition law without further assessment.

In light of the Court's decision, competition authorities should be vary of the dynamics of the zero price markets and the fact that the consumers of zero price services are very much aware that these services are financed by advertising, which is only made possible by the processing of their personal data, and that the absence of "*explicit consent*" (in terms of relevant data protection regulations) may not justify a blanket assumption that consumers are being forced to accept detrimental contractual terms and conditions by dominant companies. Furthermore, it is of utmost importance that the competition authorities realize that data protection regulations are drafted with a mindset aiming to protect data subject vis-à-vis data controllers due to the bilateral imbalance between these parties and there are fundamental differences between such regulations and competition law based prohibition of abuse of dominance that is designed to interfere only in case of an abuse of market power stemming from dominance.