

Facebook: Germany Investigation Combines Privacy Issues with Antitrust Enforcement; Likely to Spur Other Enforcers in the Region to Follow Suit

German Antitrust Update

In March 2016, Germany's federal antitrust enforcer, the Bundeskartellamt (BKA) stated it had opened an investigation into Facebook's practices in the country, and recently, Andreas Mundt, President of the BKA, [told](#) attendees at an International Bar Association conference, "I think we will present first results of this case before the end of this year."

The German enforcer's investigation is likely to have consequences beyond Germany and could foreshadow wider, regional enforcement actions against Facebook. Moreover, the BKA's investigation – relying as it does on antitrust rules rather than privacy or data protection rules – could also set a precedent for other enforcers in Europe who may wish to use antitrust rules to pursue dominant data collecting companies.

Further, the behavior at issue in the BKA's investigation may be analogous to the behavior at issue in some of the Google complaints, thereby expanding the potential legal arguments against the dominant search engine in Europe.

In-Depth Look at Investigation

BKA's theory of harm puts this case at the intersection of antitrust, consumer protection, and privacy law. The BKA is investigating whether Facebook's terms and conditions – which allow Facebook to collect a veritable treasure trove of data from its users – are unfair or violate data protection provisions, and whether this unfair or illegal data collection constitutes an abuse of dominance in the social networks market.

Thomas Höppner, a competition partner at Hausfeld in Berlin, says that the time was ripe in Germany for this case because, despite an appeal court's ruling in January 2014 that Facebook's terms and conditions violated consumer protection provisions and a subsequent fine for non-compliance (which under procedural rules was limited to € 100,000), Facebook did not change its T&Cs in any meaningful way.

At the same time, politicians – including then-economics minister Sigmar Gabriel, an outspoken critic of big technology platforms – started calling for stronger enforcement of competition law rules in digital markets. As the European Commission was already investigating Google and Amazon, Höppner reasons that "Facebook was a good target: there was no investigation at the EU level which would have blocked the Bundeskartellamt from acting and all attempts from consumer protection groups to bring Facebook to reason regarding its unfair T&Cs had failed."

While critics say that the BKA's theory of harm is novel and untested, Mundt argues that the case rests on traditional legal principles: At Concurrence's Innovation Economics [Conference](#) in London earlier this year, Mundt emphasized that "This is nothing experimental . . . I do not believe we are going beyond competition law in any sense." In his view, competition law is "lively" and "adaptive," and gives enforcers flexibility in dealing with issues in the technology industry.

Höppner notes that in one respect, Mundt is right: in 2013, the German Federal Supreme Court concluded that a company's infringement of civil law rules relating to terms and conditions could simultaneously constitute an abuse of dominance. Nevertheless, "in my view, the Facebook case is not the most straightforward case from a

competition law perspective, as it is fundamentally an exploitative abuse case that triggers many questions regarding the value of data and the equivalent (free) use of it by Facebook.”

In contrast to U.S. antitrust, under German and European competition law, charging excessive prices – or, in the tech context, collecting excessive data – can constitute an abuse of dominance. Höppner points out that in practice, however, there are very few cases, mostly limited to the public utilities sector, in which European enforcers have actually prohibited a dominant company from engaging in exploitative abuse.

Because of the difficulties in making an exploitative abuse case, the BKA is not guaranteed an easy win in the event of an appeal from an infringement decision. That said, the case is also going to potentially create a new theory of harm in abuse of dominance cases and expand the concept of exploitative abuse from a narrow application in limited industries to a wider application in the technology markets. Given the timely issues and the political environment in Germany, Höppner says, “I foresee that if the Bundeskartellamt finds an abuse this goes to the Supreme Court.”

Facebook’s Teutonic troubles, in other words, are unlikely to end in the near future.

BKA’s investigation could have European-wide implications. European data protection and consumer protection authorities are keeping a keen eye on the BKA’s investigation, according to Christian D’Cunha, Head of Private Office of the European Data Protection Supervisor: “There is a tendency for authorities in different sectors – antitrust, consumer protection, and data protection – to think in silos,” but “the Germans do not work in silos so much. We need to see more of that across the EU.”

D’Cunha explained that the situation in Germany is typical and reflects the historically weaker enforcement powers of consumer and data protection authorities in terms of actually changing a powerful company’s behavior relative to competition law enforcers in Europe. As he says, “Antitrust enforcers have much more powerful tools in their armory so they can go after dominant players.” In other words, the BKA’s case could set a powerful precedent for antitrust enforcers using data privacy or consumer protection issues as part of their abuse of dominance analysis.

As Augustín Reyna, digital team leader of the European consumer organization consortium BEUC, says European enforcers are interested in the outcome of the BKA investigation because it could provide a template for analyzing privacy issues in zero price markets. Moreover, he says that because the business practices that the BKA is investigating in Germany are practices that Facebook has implemented throughout all of Europe, “we believe that if there is an infringement decision, the solution needs to be European-wide.” Reyna adds that if the BKA’s eventual decision includes an analysis of whether there has also been an infringement under European law, it may be possible to then bring a complaint at the Commission level.

For her part, Vestager told [Law360](#) “It’s a novelty, what the Bundeskartellamt, the Germans are doing. It is important for us all to see what comes out of it – what are the lines of analysis, how do they get there – before we do something similar.”

If the Commission were to follow in the BKA’s steps, it would not be the first time it takes its analytical cues from the German enforcer. In late 2016, for example, the Commission opened a consultation to ask for feedback on whether it should change its notification criteria to consider the value of the deal, rather than to only focus on the merging companies’ revenues. The BKA introduced just such a size-of-transaction test in March 2017 in response to the 2014 Facebook/WhatsApp merger, as part of a series of changes to the merger notification rules designed to adapt to the particularities of the digital economy.

BKA case may strengthen some of the other vertical search cases against Google. According to Höppner, who also represents press and image providers in the investigations against Google, the German case may have important implications for some of the other vertical search cases against the search engine.

Höppner thinks that the German case could, for example, be useful in creating a new theory of harm: namely, that a dominant company may be abusing its dominance if it forces users to provide more data than proportionate for the service. He adds, “If you say it is unfair to exploit users by pressuring them to give you an excessive amount of data, then it is difficult to see how it can be acceptable to force content providers, another user group, to grant you an excessive amount of content to be visible on the platform.”

Even if these types of arguments do not gain traction at the European level, he points out that “when it comes to unilateral conduct, that is, conduct undertaken by a dominant company, the national competition authorities are free to be stricter than the Commission.” That, indeed, is the case in Germany, which currently goes further than European competition law in proscribing certain types of conduct. Thus, even if the Commission declines to follow the BKA’s lead, other national authorities in Europe will nevertheless be free to do so.

In an e-mailed statement, a Facebook spokesperson stated, “We are confident that we comply with the German law and are looking forward to working with the Federal Cartel Office to answer their questions.”