

## **Should the European Union’s Competition Law be applied in data protection cases?**

In this work, to better present the current views on the possible application of the European Union Competition Law to the matters of privacy and data protection law, I will examine legal proceedings against Facebook initiated in March 2016 by the German Federal Cartel Office (Bundeskartellamt). The outcome of these proceedings is yet to be determined as the German Federal Supreme Court (Bundesgerichtshof) has referred the matter to the Court of Justice of the European Union for a preliminary ruling. According to Marco Botta and Klaus Wiedemann, this case is extraordinary because this is “the first in which an exploitative abuse of dominance involving a digital platform has been decided under competition law”<sup>1</sup>. To better illustrate the differences in points of view on the matter of the application of competition law, I will also adopt the distinction that Arletta Gorecka used in her article titled ‘Competition Law And Privacy: An Opinion on The Future of a Complicated Relationship’ from June 8, 2022, and divide the academic opinions into two groups, namely, separationists, those who oppose the application of competition law in cases on data protection in the online market and integrationists, those who support such an application<sup>2</sup>. In March 2016, The German Federal Cartel Office (FCO) initiated proceedings against Facebook on the allegations that the social media giant has been exploiting its dominant position in the digital market for social media networks due to its unfair terms of use. In 2019, FCO ruled that Facebook: “*is abusing this dominant position by making the use of its social*

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<sup>1</sup> Botta, Marco, and Klaus Wiedemann. “The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey\*.” *The Antitrust Bulletin*, vol. 64, no. 3, July 2019, pp. 428–46, <https://doi.org/10.1177/0003603x19863590>.

<sup>2</sup> Górecka, Arletta. *Kluwer Competition Law Blog Competition Law and Privacy: An Opinion on the Future of a Complicated Relationship*. 6 June 2022.

*network conditional on its being allowed to limitlessly amass every kind of data generated by using third party websites and merge it with the user's Facebook account."*<sup>3</sup>

### Separatist's view on the FCO's decision

The decision raised controversies. Many of its critics indicated that not every abuse of a dominant position leads to a market failure<sup>4</sup>. Another argument against the ruling of the FCO was that the authority "chose to rely on competition law, to investigate Facebook's conduct"<sup>5</sup>for infringement of the provisions of the GDPR, which is the act of the data protection law. According to many academics, it is beyond the FCO's competence to invoke provisions similar to articles 101 and 102 of The Treaty of the Functioning of the European Union, in the case of breaking laws from another legal regime, in this case, data protection law.

The separatists argue that data privacy protection is not only beyond the main interest of the EU Competition Law, but also that its application in data protection cases would be detrimental for online users. This is due to the competition law's main objective of establishing a fair environment on the relevant market, which does not focus on the protection of privacy of the particular users but rather on the welfare of customers as a whole."In

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<sup>3</sup> "Bundeskartellamt - Homepage - Preliminary Assessment in Facebook Proceeding: Facebook's Collection and Use of Data from Third-Party Sources Is Abusive." *Www.bundeskartellamt.de*, 19 Dec. 2017, [www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19\\_12\\_2017\\_Facebook.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html).

<sup>4</sup> Thiede, Thomas, and Laura Herzog. *Kluwer Competition Law Blog the German Facebook Antitrust Case -A Legal Opera*. 2021.

<sup>5</sup> Botta, Marco, and Klaus Wiedemann. "The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey\*." *The Antitrust Bulletin*, vol. 64, no. 3, July 2019, pp. 428–46, <https://doi.org/10.1177/0003603x19863590>.

addition, the fact that companies are subject to different legal regimes creates an unstable business environment, whether they are already operating in the market or seeking to enter it. This is because there is uncertainty about the possibility of repeated punishments and fines for violating different regulations from different legal regimes. To improve their situation, companies may change their services to the detriment of customers in the relevant market<sup>6</sup>.

To further support the view that competition law should not concern privacy matters, separationists often cite the decision of the CJEU from 2006 in the *Asnef-Equifax* case, which concerned the exchange of information between financial institutions. In this ruling, the CJEU separated the spheres of 'operation' of the EU competition law from the data protection and consumer law, saying *that*

*"since ... any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection"*<sup>7</sup>.

Another argument of this academic group in the debate is the Italian vs. Facebook case from 2018<sup>8</sup>. On November 29, 2018, Autorita Garante Della Concorrenza e del Mercato (ACGM) decided to punish Facebook by imposing a fine for two infringements of data protection: misleading customers and aggressive commercial practices. In this case, Facebook was found guilty of inappropriately informing its users that the services provided by the website were free of charge. At the same time, Facebook was using the data obtained from its users for

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<sup>6</sup> Botta, Marco, and Klaus Wiedemann. "The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey\*." *The Antitrust Bulletin*, vol. 64, no. 3, July 2019, pp. 428–46, <https://doi.org/10.1177/0003603x19863590>.

<sup>7</sup> "EUR-Lex - 62005CJ0238 - EN - EUR-Lex." Europa.eu, 2022, [eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0238](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0238).

<sup>8</sup> Botta, Marco, and Klaus Wiedemann. "The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey\*." *The Antitrust Bulletin*, vol. 64, no. 3, July 2019, pp. 428–46, <https://doi.org/10.1177/0003603x19863590>.

targeted advertising. The second charge against Facebook concerned discouraging users from blocking the data that were provided for Facebook by other websites. This blocking was achieved by establishing the default option in Facebook data settings as agreeing to transfer such data. When users tried to change those settings, they were warned about a possible loss of access to some of the services provided by the website. In their article "The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey" Marco Botta and Klaus Wiedemann rightly pointed out that the FCO and ACGM investigated "the automated flow of personal data between Facebook and third parties"<sup>9</sup>. Separationists argue that if these two cases were so similar, why the FCO decided to base its ruling on competition rather than consumer law as the ACGM did?

### Counterarguments

Despite being separate legal regimes, data protection and competition laws share some similarities. Kerber and Wiedemann argue that "From an economic angle, all negative effects on privacy can be considered in competition law as long as they can also be interpreted as a reduction of consumer welfare..."<sup>10</sup>. However, the difficulty here lies in the definition of privacy or, more precisely, the definition of infringement of privacy. According to Thomas Tiede and Laura Herzog, it is difficult from an economic perspective, to ascertain whether it is beneficial for customers to disclose personal to the data controllers such as Facebook or Google. Another problem is that what one person perceives as a piece of private information,

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<sup>9</sup> Botta, Marco, and Klaus Wiedemann. "The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey\*." *The Antitrust Bulletin*, vol. 64, no. 3, July 2019, pp. 428–46, <https://doi.org/10.1177/0003603x19863590>.

<sup>10</sup> Kerber, Wolfgang, and Karsten K. Zolna. "The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law." *European Journal of Law and Economics*, vol. 54, no. 2, Mar. 2022, pp. 217–50, <https://doi.org/10.1007/s10657-022-09727-8>.

another may give freely and without shame<sup>11</sup>. The fact that not every user of the digital market cares about privacy and the effects of the excessive gathering of data make it even more difficult to decide which regulations should be applied to data protection. This view is shared by Arletta Górecka, who, in her article "Defining Privacy in the Competition Law Sphere," agrees that the definition of infringement of privacy in competition law is difficult to ascertain<sup>12</sup>.

The argument based on the ACGM vs. Facebook case can be easily rebutted by pointing out that the Members of the European Union have different legal systems. In the case of Germany, only qualified institutions can enforce punishments for unfair commercial practices and only on the basis of rulings of civil courts<sup>13</sup>. The FCO, contrary to ACGM, has different competence and consumer law lies beyond its scope. So in order to protect online users the FCO had to invoke the act of German competition law.

In counterargument to the one concerning the separation of the data protection and competition law, it is crucial to point out that the CJEU judgment in the Asnef-Equifax case was issued over a decade ago when the digital market was in its infancy. Technological progress was not advanced enough to enable companies such as Facebook to gather a tremendous amount of data. This fact should be considered while deciding on the possible branches of law that could be used in the privacy protection of online users.

During legal proceedings, Facebook sought interim relief from the Federal Cartel Office decision, and the case eventually ended before the German Federal Supreme Court - Bundesgerichtshof (BGH).

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<sup>11</sup> Thiede, Thomas, and Laura Herzog. Kluwer Competition Law Blog the German Facebook Antitrust Case -A Legal Opera. 2021.

<sup>12</sup> Gorecka, Arletta. Defining Privacy in the Competition Law Sphere. 11 Oct. 2021.

<sup>13</sup> Botta, Marco, and Klaus Wiedemann. "The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey\*." The Antitrust Bulletin, vol. 64, no. 3, July 2019, pp. 428–46, <https://doi.org/10.1177/0003603x19863590>.

BGH supported the FCO in its ruling stating that Facebook was exploiting its dominant position on the digital market for social media by amassing a wealth of data gained not only from the site itself but also from other websites that may not even appear to be transferring Facebook data. It also added a new argument on why Facebook is breaking the EU competition law.

The German Federal Supreme Court's new argument was that Facebook and other digital market titans deprive users of choice. Those companies provide services for extensive data collection without giving an option for similar services, which would not force the collection of a large amount of personal data. BGH reasoned that the dominant position of such companies as Facebook is denying the creation of such services.

According to Laura Herzog and Thomas Thiede, it was not within the scope of competence of the BGH to draw such conclusions from facts not presented in the previous instances during the procedures. The authors also take issue with the last-minute changes to the German Act Against Restraints of Competition, made by the German parliamentary committee. This amendment granted the BGH right to be not only the court of the first instance, as was before, but also the court of the last instance. As a result, the German Supreme Federal Court was able to ask the CJEU for a preliminary ruling in the dispute<sup>14</sup>.

## Digital Market Act

On March 2022, European Parliament, European Commission, and European Council reached an agreement establishing the Digital Market Act. This legislation expands data protection in the European Union by targeting the most significant data controllers, such as Apple,

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<sup>14</sup> Thiede, Thomas, and Laura Herzog. Kluwer Competition Law Blog the German Facebook Antitrust Case -A Legal Opera. 2021.

Microsoft, and Facebook. Among the many provisions of this legal act is the prohibition of 'data bundling.' The most prominent companies in the digital markets, from now on, according to the DMA, are to be called 'gatekeepers' and burdened with extra responsibilities concerning their users' data and privacy<sup>15</sup>. Article 5(a) is relevant for the discussion about applying the EU competition law in data protection cases. It states that "a gatekeeper shall:

*(a) 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<sup>16</sup>.*

This article prohibits activities prosecuted in FCO vs. Facebook and ACGM vs. Facebook cases. However, according to some academics, it does not solve the problem entirely.

Additionally, it does not answer the question of applying the EU competition law in data privacy cases. According to Arletta Górecka, it is unclear how article 5(a) of the DMA would be applied to Germany vs. Facebook. Wolfgang Kerber and Werner K. Zolna also share this doubt stating that the Art. 5(a) might be effective against 'data bundling' a 'direct prohibition' of it against the user's explicit consent would be much more effective in reducing Facebook's superior position from the competition point of view<sup>17</sup>. They also add, "The remedy of an additional choice does not solve the second market failure of information and behavioral problems"<sup>18</sup>.

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<sup>15</sup> European Parliament. "Deal on Digital Markets Act: Ensuring Fair Competition and More Choice for Users | News | European Parliament." *Www.europarl.europa.eu*, 24 Mar. 2022, [www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users](http://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users).

<sup>16</sup> "EUR-Lex - 52020PC0842 - EN - EUR-Lex." *Europa.eu*, 2020, [eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN](http://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN).

<sup>17</sup> Kerber, Wolfgang, and Karsten K. Zolna. "The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law." *European Journal of Law and Economics*, vol. 54, no. 2, Mar. 2022, pp. 217–50, <https://doi.org/10.1007/s10657-022-09727-8>.

<sup>18</sup> Kerber, Wolfgang, and Karsten K. Zolna. "The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law." *European Journal of Law and Economics*, vol. 54, no. 2, Mar. 2022, pp. 217–50, <https://doi.org/10.1007/s10657-022-09727-8>.

## Conclusion

Thus, reaching an agreement between the European Parliament and the most prominent players in the digital market and establishing Digital Market Act does not necessarily answer the question of the application of competition law in the cases concerning data protection. However, it does expand the basis of the data protection law beyond what is already established in the GDPR. The immediate question for the future is what the CJEU will decide in the Case of The German Federal Cartel Office vs. Facebook. A rather interesting question is posed by Thomas Tiede and Laura Herzog, who points out that at the same time that the FCO vs. Facebook case was passed for a preliminary ruling, the CJEU FCO began proceedings against Facebook concerning Oculus Virtual Reality. It will be interesting to see how the last-minute amendments to the German competition law work in practice and how the BGH will act in its new role as a final Court of appeal in this case<sup>19</sup>.

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<sup>19</sup> Thiede, Thomas, and Laura Herzog. Kluwer Competition Law Blog the German Facebook Antitrust Case -A Legal Opera. 2021.