

THE "DIGITAL HOUSE RULES" ARE TAKING SHAPE

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Legal Briefings

With the Facebook procedure, the German Federal Cartel Office provides a glimpse of the future.

The Federal Cartel Office's proceedings against Facebook is part of a wide scaled and – as, in particular, the 9th amendment of the Act against Restraints of Competition shows – politically intended strategy: the creation of house rules for the digital world. This becomes clear in the interim report on the proceedings issued by the Federal Cartel in December 2017, simultaneously with sending a statement of objections to Facebook. The previous findings of the Federal Cartel Office are not yet binding but a clear indication.

The Facebook-case, initiated in March 2016, deals with possible market abuse by Facebook in relation to the handling of user data. It is considered a pilot process for the digital economy – not only in Germany, but throughout Europe. The Federal Cartel Office points out that it is "in close contact with the European Commission" due to the cross-border significance of the case.

The authority assumes a "national social network market" which does not comprise, for instance, professional networks or messaging services as competitors of Facebook. If this narrow approach is also applied in relation to other digital business models, many companies are likely to be regarded as quasi-monopolists and thus addressees of the prohibition of abuse. Hence, for digital companies it becomes even more important to understand what theory of harm the Federal Cartel Office is investigating in the Facebook case..

Infringement of data protection principles not rules

Essentially, the Federal Cartel Office alleges a breach against the "data protection principles" by Facebook. This allegation is not new, however, the authority accused Facebook in the opening of the procedure of breaches of data protection "rules". The modified standard of review may be due to criticism that data protection authorities are responsible for prosecuting genuine breaches of data protection law. It seems more obvious that a breach against the indeterminate term "principles" can be assumed more easily. This is supported by the fact that only the data collection of third-party sources, whose lack of transparency is emphasized, is examined. This approach could dispel any conflict regarding the question of whether users have valid data usage consents.

Companies' room to maneuver is further limited by the fact that the Federal Cartel Office does not consider it necessary that there is a causal link between the market power and the (allegedly) abusive behaviour. According to the authority, in other cases, the knowledge of market dominating companies of their market power was enough. If this opinion should be confirmed by the Federal Court of Justice, any breach of legislation (even of rules not being meant to protect competition) could be abusive, regardless of whether the company's market power enabled the company to commit the infringement. Thus, abusive behavior of market-leading companies would be prohibited per se.

Looking for cooperation

From other areas it is known that the Federal Cartel Office is very strategic in the implementation of objectives. It carefully observes, collects information (e.g. by means of sector inquiries) and then, it selectively initiates procedures.

It seems that the Federal Cartel Office follows a similar approach in creating "digital house rules". The Facebook procedure is just a step in that direction. Further stops along that route are, *inter alia*, the sector inquiry into smart TVs, initiated in December 2017, which also focuses on the lack of transparency in data collection, and, just recently, the sector inquiry into online advertising market conditions.

Digital companies should therefore closely monitor the activities of the Federal Cartel Office. If there are any possibilities, an exchange with the authority should be sought and assistance in understanding the markets should be offered. This will not only help to understand the digital house rules at an early stage, it will also allow participating in designing them.

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