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Vincenzo Iaia
Luiss "Guido Carli" in Rome, Italy
vincenzo.iaia@luiss.it

The Strengthening Liaison between Data Protection, Antitrust and Consumer Law in the German and Italian Big Data-Driven Economies

Abstract: Nowadays, personal data represent a strategic asset for companies as they can significantly influence their market position. Indeed, the issues arising from the management of large amounts of data (so-called big data) are not only relevant for data protection authorities, since this practice has also induced the intervention of competition and consumer protection authorities. The digital economy has enhanced new forms of abuses of dominant position and unfair practices, which can be performed via the handling of big data. This paper starts by analysing the German antitrust authority vs Facebook decision in which the big-tech platform was sanctioned for having performed an exploitative abuse of dominant position through its data management strategy. Then, it focuses on the Italian antitrust authority vs WhatsApp decision, where WhatsApp was deemed responsible for unfair and aggressive practices aimed at extracting users' consent for data-sharing purposes. These two remarkable cases will be compared and further discussed, outlining the need to rethink the strengthening interplay between data protection, competition and consumer law, as it will entail a closer contact of the respective authorities to ensure the sustainability of digital markets.
Keywords: abuse of dominant position, big data, competition law, consumer law, data protection law, European single market

Introduction

Since the issuance of the General Data Protection Regulation (hereinafter GDPR),[1] privacy matters have gained increasing importance. Indeed, they have given

1 European Parliament and Council Regulation (EU) No. 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free

rise to a cultural shift in people's awareness,[2] as they are becoming more sensitive to the personal data management strategies of companies, especially the ones carried out by the internet giants.[3] Even if big-tech firms – which maintain the largest data portfolios – are incorporated outside the European Economic Area (hereinafter EEA), they do not escape from the scope of the GDPR, since it is also applicable to every company wishing to start or carry on a business in the EEA.[4]

In a nutshell, the main goal of the GDPR is to make people able to control their data, giving them more decision-making power related to what data are stored, where they are stored, and who has access to them.[5] The GDPR has led most companies to work diligently to comply with its core principles[6] through a more transparent handling and protection of individuals' personal data.[7]

Although data management is mainly related to privacy matters, a more in-depth analysis shows that personal data are also relevant under competition law and consumer law, considering that large quantities of data (so-called big data[8]) can be unlawfully managed to perform abuses of dominant position as well as unfair and aggressive practices.[9]

This article aims to explore the interplay between data protection, competition and consumer law by comparing two paradigmatic case studies within the German and Italian experience. It is organised as follows: Section 1 will be dedicated to

movement of such data (O.J. UE L 119/1, 4 May 2016).

2 European Commission, Data Protection Regulation one year on: 73% of Europeans have heard of at least one of their rights, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2956 (16.03.2021).

3 Namely the so-called GAFAM (Google, Amazon, Facebook, Apple and Microsoft).

4 M. Kirsten, Ethical Issues in the Big Data Industry, "MIS Quarterly Executive" 2015, vol. 14, no. 2, pp. 67–85.

5 W. Presthus, H. Sorum, Are Consumers Concerned About Privacy? An Online Survey Emphasizing the General Data Protection Regulation, "Procedia Computer Science" 2018, pp. 603–611. Such control allows further objectives to be pursued, like fairness, and power asymmetries to be addressed.

6 It is also the result of the work carried out by the Data Protection Authorities across different countries to enforce compliance and ensure that the core principles at the heart of the GDPR were met. See P. Breitbarth, The impact of the GDPR one year on, "Network Security" 2019, p. 11.

7 European Data Protection Board, first overview on the implementation of the GDPR and the roles and means of the national supervisory authorities, 2019, p. 7.

8 According to the Oxford Learner's Dictionary, big data are 'sets of information that are too large or too complex to handle, analyse or use with standard methods', https://www.oxfordlearnersdictionaries.com/definition/english/big-data?q=big+data (24.09.2021).

9 The literature on this topic is vast. See, without claim of exhaustiveness, M. L. Montagnani, IP and data (ownership) in the new European strategy on data, "European Intellectual Property Review" 2021, vol. 43, no. 3, pp. 156–163; J. Cannattaci, V. Falce, O. Pollicino (eds.), Legal Challenges of Big Data, Cheltenham 2020; V. Falce, Uses and abuses of database rights: how to protect innovative databases without jeopardizing the Digital Single Market Strategy, (in:) P. Drahos, G. Ghidini, H. Ulrich (eds.), Kritika: Essays on Intellectual Property, vol. IV, Cheltenham 2020, pp. 180–222.

analysing the Bundeskartellamt vs Facebook case, which ended with Facebook Inc. (hereinafter Facebook) convicted for violating German antitrust rules. Section 2 will deal with a similar case in which the Italian Competition Authority applied consumer protection rules against WhatsApp Inc. (hereinafter WhatsApp), a Facebook subsidiary company. In Section 3, these two remarkable cases will be compared and further discussed also in the light of the European proposal for a Digital Markets Act, thus assessing the compatibility of the different measures put in place.

1. Summary and Impact Analysis of the *Bundeskartellamt vs Facebook* Case

In March 2016, the German antitrust authority (the Bundeskartellamt) started an investigation on Facebook's data processing policy. The aim was to assess its legitimacy under the competition law perspective, considering that the extensive data portfolio maintained by the big-tech platform could significantly alter the market balances, to the detriment of its users and smaller digital companies.

The investigation ended with Facebook prohibited from making the use of its social network by private users residing in Germany – including the other corporate services, like WhatsApp, Oculus, Masquerade and Instagram – conditional on the collection of user and device-related data by Facebook and combining that information with the Facebook.com user accounts without users' consent.[10] The decision was based on Sections 19(1), 32 of the German Competition Act (the GWB)[11] and its grounds mainly focused on Facebook's market power and its unfair commercial terms and conditions.

1.1. The Undemanding Assessment of Facebook's Dominant Position

According to the Bundeskartellamt findings, Facebook has a dominant position in the German market for social networks and it should therefore be subject to related control under antitrust rules. In particular, it emerged that Facebook has 2.3 billion monthly active users worldwide, of which 1.5 billion use Facebook daily. In Germany, the number of Facebook users was still increasing at the end of 2018 and amounted to approximately 32 million private monthly active users, of which 23 million were daily active users. The conclusion is that Facebook is the largest social network.[12]

Apart from Facebook, the German market for social networks has been composed of just a few tiny providers that cannot be considered potential competitors since most of them became insolvent or moved to another market. The

10 The Decision of the Bundeskartellamt of 6 February 2019, B6–22/16.

11 The German Act of 26 June 2013 – Against Restraints of Competition (Federal Law Gazette 2018, No. 1, item 1151, as amended).

12 Decision of the Bundeskartellamt, p. 2.

Bundeskartellamt considered that the downward trend in the remaining competitors' user-based market shares is a valid indicator of a market tipping process that will result in Facebook becoming a monopolist.[13] Other companies offering online professional networks or digital services, such as LinkedIn and Xing, likewise some messaging services, such as WhatsApp, cannot be included in the relevant product market since they are not in direct or potential competition with Facebook. The investigations have also shown that although YouTube's business model has some overlaps with those of social networks, its service is not sufficiently comparable to a social network. The same applies to Snapchat, whose core function is a camera automatically opening to take 'snaps' that are deleted after a short while. Even if Twitter, Pinterest and Instagram (a Facebook-owned service) seem to be considered Facebook's rivals, the Bundeskartellamt stated that they are not to be included in the relevant product market either, as they target different users.[14]

Facebook has registered a user-based market share of more than 90% in the German market of social networks. It should be stressed that the Bundeskartellamt assessment of Facebook's market power was not limited to measuring its market share. Other factors were also taken into account, according to Section 18 of the GWB, namely the access to competitively relevant data; the economies of scale based on network effects; the financial strength; the legal or factual barriers to market entry by other undertakings; the behaviour of users who can use several different services or only one service; and the undertaking's access to data relevant for competition. Nevertheless, these indicators confirmed the hypothesis that Facebook maintains a monopolistic position.

1.2. The Enormous Data Combination Power via the Unfair Commercial Terms

From the inquiry conducted by the Bundeskartellamt, it further transpires that individuals had been able to use this social network only by agreeing to Facebook's terms of service; this allows it to collect much data outside of the Facebook website, both on the internet and through other smartphone apps, and to combine them with the respective Facebook user's account. In other words, the data collected on the Facebook website together with those collected on third-party websites and apps[15] could be merged in order to better target Facebook users. Thanks to this combination

13 For further analysis of the tipping process see Ö. Bedre-Defolie, R. Nitsche, When Do Markets Tip? An Overview and Some Insights for Policy, "Journal of European Competition Law & Practice" 2020, vol. 11, no. 10, pp. 610–622.

14 Decision of the Bundeskartellamt, p. 5.

15 The datasets are collected through the application programming interface (API). Notably, if a third-party website has embedded Facebook Business Tools, such as the Like button, Facebook login or Facebook Analytics, data will be transmitted to Facebook in the moment the user has access to that third-party website.

of data, Facebook has been able to build a unique database concerning each individual user that can be exploited (in the best scenario) to profile activities in advertising campaigns. Individuals' data could be collected even if users blocked web tracking in their browser or device settings.

Although it appears that Facebook offers its services free of charge and its users do not suffer a direct financial loss from agreeing to Facebook's commercial terms, the damage lies in a loss of control over their data. They are no longer able to know which data from which sources are combined with data related to their Facebook accounts, or for what purposes. The main problem stems from the fact that a single piece of data is irrelevant in the current data-driven economy, but when combined with other data it gains an economic value that users cannot foresee.[16]

The Bundeskartellamt investigation has also shown that German users tendentially consider the terms and conditions to process data to be crucial, showing awareness of data transfer implications. However, because of Facebook's market power, the only recourse available to users to avoid the combination of their data was to delete their Facebook account.

1.3. The German Antitrust Authority's Milestone Decision

According to the Bundeskartellamt's judgement, the Facebook terms and conditions were not justified under data protection principles or appropriate under competition law standards.

Indeed, suppose a dominant company makes access to its service conditional upon users granting the company extensive permission to process their personal data. This can be taken up by the competition authorities as a case of exploitative business terms, punished under Section 19 (1) of the GWB. These terms also violate the constitutionally protected right to informational self-determination established by Art. 2 of the German Constitution.[17]

As regards the competitive harm caused to the advertising market, the owner of the Menlo Park company, by the combination of third parties' data with Facebook accounts, has gained a competitive edge over its competitors in an unlawful manner. It has increased market entry barriers, which in turn has secured Facebook's market power towards end customers. Consequently, the aggressive data strategy carried out by the dominant supplier of advertising space in social networks has consistently reduced the advertising market's dynamicity.

16 For an explanation of the bizarre internauts' feelings and behaviours about privacy see S. Barth, M.D.T. de Jong, The privacy paradox – Investigating discrepancies between expressed privacy concerns and actual online behaviour – A systematic literature review, "Telematics and Informatics" 2017, vol. 34, no. 7, pp. 1038–1058.

17 The Basic Law for the Federal Republic of Germany ('Grundgesetz') of 23 May 1949 (Federal Law Gazette, No 1, item 404, as amended).

These are the main arguments that led the Bundeskartellamt to prohibit Facebook from combining user data from different sources. After this ruling, Facebook subsidiaries, like WhatsApp or Instagram, have been allowed to keep collecting data for their services. However, Facebook may only combine these data with those of its users if they give voluntary consent to such a practice. This means that if users do not give their consent, Facebook may no longer combine data as described above.

Moreover, the Bundeskartellamt ordered Facebook to adapt its terms of service and data processing accordingly, ceasing the data combination within twelve months from the decision. Facebook was further obliged to develop an implementation roadmap for such adjustments which was to be submitted to the Bundeskartellamt within four months. In the case of inactivity, the Bundeskartellamt has the power to enforce its decisions through certain measures, such as imposing a fine (maximum 10% of annual turnover) or periodic penalty payments (maximum 10 million euros) at specific intervals (for instance, monthly), according to Sections 31, 81 of the GWB.

The Bundeskartellamt has provided a milestone decision, since it was the first authority applying antitrust rules to data handling issues.[18] It has thus consecrated the link between data protection and competition law. In this perspective, the German legislator has highlighted the relevance of this liaison by classifying access to data as a significant factor for market dominance, as established by Section 18(3a) of the GWB. It follows that data processing strategies could be relevant not only for data protection officers, but also for antitrust ones too, especially if the investigated company operates in digital markets.

2. The Similar (but different!) Autorità Garante della Concorrenza e del Mercato vs WhatsApp Case

Before the issuance of the Bundeskartellamt decision, the interplay between data protection, consumer and competition law was already the subject of a different solution by the Italian antitrust and consumer protection authority, the Autorità Garante della Concorrenza e del Mercato (hereinafter the AGCM) when it fined WhatsApp three million euros for unfair and aggressive commercial practices,[19] pursuant to Arts. 20, 24 and 25 of the Italian Consumer Code.[20]

18 R. Pardolesi, R. van den Bergh, F. Weberp, Facebook e i peccati da Konditionenmissbrauch, "Mercato Concorrenza Regole" 2020, no. 3, p. 534, qualifying it as a pioneering decision. This also represents the first case of exploitative conduct sanctioned by a national competition authority in the digital world, as noted by M. Botta, K. Wiedemann, Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision, "Journal of European Competition Law & Practice" 2019, vol. 10, no. 8, p. 465.

19 The Decision of the AGCM of 11 May 2017, PS10601.

20 The Legislative Decree of 6 September 2005 – Consumer Code (consolidated text Journal of Law 2020, as amended) defines an aggressive practice as 'a commercial practice which, in the

The AGCM investigation started when WhatsApp suspiciously updated its terms of service after being acquired by Facebook. The authority took into account that Facebook Messenger and WhatsApp hold two top positions in the market for instant messaging services.

The main concern of the AGCM stems from the fact that after 25 August 2016, all WhatsApp users were asked to entirely accept the new terms of service by means of a huge 'Accept' button. Conversely, in the case of partial acceptance or refusal, users were required to open another page containing the new terms and conditions; there, they had to untick a pre-ticked checkbox related to a clause which allowed WhatsApp to share its information with Facebook in order to 'improve users' experience with the parent company's products and advertising'.[21]

Even if WhatsApp denied any aggressive behaviour, sanctioned under Art. 24 of the Italian Consumer Code, as well as any coercion or undue influence on its users, forbidden by Art. 25 of the aforementioned Code, the AGCM pointed out that the initial screen with the big 'Accept' button and the pre-ticked checkbox rendered the option to refuse the data sharing with Facebook more complex than accepting it. It goes without saying that this complicated and cumbersome procedure pushed ordinary users to give the consent requested on the first page to get immediate access to the service, rather than opening the second page, reading all the terms and conditions, and unticking the specific box to prevent the data sharing between the two leading instant messaging service companies.[22]

Thus, the insidious nature of the extraction of consent affected consumers' freedom of choice, which led the AGCM to sanction WhatsApp for unfair and aggressive commercial practices and undue influence, considering its special responsibility as a dominant firm in the market.

3. Comparison of the Italian and the German Grounds of Decisions

Although this conduct was sanctioned under a different legal basis from that of the Facebook case, they are both connected to the issue of data combination. In

specific case, taking all the characteristics and circumstances of the case into account, through harassment, coercion, including the use of physical force or undue conditioning, restricts or is likely to considerably restrict the freedom of choice or behaviour of the average consumer in relation to the product and therefore induces or is likely to induce him to take a commercial decision that he would not otherwise have taken'.

21 For some interesting comments see N. Zingales, Between a rock and two hard places: WhatsApp at the crossroad of competition, data protection and consumer law, "Computer Law & Security Review" 2017, vol. 33, no. 4, pp. 553–557.

22 For further analysis see O. Linskey, F. Alves, Da Costa Cabral, Family Ties: The Intersection between Data Protection and Competition in EU Law, "Common Market Law Review" 2017, vol. 54, no. 1, pp. 21–22.

this regard, the AGCM, as it is competent for enforcing both antitrust and consumer protection rules, was able to choose the best relevant regime. It seems reasonable to believe that the Italian authority applied the Consumer Code because there was no prior decision allowing the application of legal competition categories to prohibit specific data handling acts. Indeed, WhatsApp's conduct might also be considered as an unlawful exploitative practice, since it indirectly imposed unfair trading conditions, prohibited by Art. 3, let. a) of the Italian Antitrust Law[23] as well as Art. 102, let. a) of the Treaty on the Functioning of the European Union (hereinafter TFEU). In contrast, the Bundeskartellamt could not make this choice due to its lack of jurisdiction in consumer protection law. Therefore, it was obliged to assess Facebook's conduct under competition law,[24] for which it was strongly criticised.[25] However, this should be considered a milestone decision because it reveals the commissioners' awareness of the technological (r)evolution of the market, requiring an evolutionary interpretation of the current legal frameworks that have otherwise left millions of internet users without adequate protection.

Conclusions

As it emerged from the analysis of the two above-mentioned decisions, big data are now essential for companies' market strategies. The Covid-19 pandemic has increased their importance even further, given that the lockdown has fostered digital relationships more than ever.[26] Thus, the question of how companies handle the personal data of their current and potential users is even more legitimate, not only under data protection rules, but also and especially under competition law and consumer protection law.

The German and Italian decisions cited here are remarkable for at least two reasons: firstly, because of the unexpected authorities involved, considering that the competent authority for data-handling questions is typically the national data protection authority (the German Bundesbeauftragte für den Datenschutz und die Informationsfreiheit and the Italian Garante per la protezione dei dati

23 The Italian Act of 10 October 1990 – Competition and market protection rules (consolidated text Journal of Law 2017, as amended).

24 M. Botta, K. 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" 2019, vol. 64, no. 3, pp. 428–446.

25 G. Colangelo, M. Maggiolino, Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S., "International Data Privacy Law" 2018, vol. 8, no. 3, pp. 224–239.

26 For major insights see M. Kenney, J. Zysman, COVID-19 and the Increasing Centrality and Power of Platforms in China, the US, and Beyond, "Management and Organization Review" 2020, vol. 16, no. 4, pp. 747–752.

personali) instead of the antitrust or consumer protection authority (the German Bundeskartellamt, competent for enforcing antitrust rules, and the Italian Autorità Garante della Concorrenza e del Mercato, responsible for enforcing both antitrust and consumer protection rules); secondly, because of the discovery of a strong liaison between data protection, competition and consumer law which would most likely be boosted over the following years. Indeed, the management of big data may be regarded as potential offensive conduct on multiple levels, given that a single act is able to jeopardise various interests, namely privacy, the competitiveness of the market, and consumers' trust.

In the Facebook decision, the Bundeskartellamt followed the reasoning adopted by the Federal Court of Justice in Pechstein vs International Skating Union.[27] This stated that Section 19 of the German Competition Act, aimed at contrasting unfair exploitative business terms, must be applied any time a contractual party is sufficiently powerful to dictate their own terms of the contract, and practically de facto abolishing the contractual autonomy of the other party. This conduct could have also been relevant under Art. 102, let. d) of the TFEU, since Facebook has made the conclusion of the contract (for gaining access to its social network) conditional on the acceptance by the counterparties of the supplementary obligation to agree with the combination of their data with data collected via other channels, having no direct connection with the main subject of the contract. The combination of personal data with personal data from any other services is also prohibited by Art. 5, let. a) of the proposal for a Digital Markets Act,[28] which provides the specific obligations that gatekeepers (including Facebook) must fulfil to ensure the fairness and the contestability of the European digital single market.[29]

Moreover, if Facebook had used the collected data for broader purposes than those ones expressed in its terms and conditions, it would also have been responsible under data protection law; indeed, Art. 5, par. 1, let. b) of the GDPR sets out the purpose limitation principle, according to which personal data must be collected for specified, explicit and legitimate purposes, and they should not be processed further in contradiction of those purposes.

The same multi-perspective reasoning can be applied to the Italian case study, considering that even if the AGCM sanctioned the misleading practice adopted by

27 The Judgement of the German Federal Supreme Court of 7 June 2016, Case KZR 6/15. For further discussion see R. Podszun, The Pechstein Case: International Sports Arbitration Versus Competition Law. How the German Federal Supreme Court Set Standards for Arbitration, "SSRN Electronic Journal" 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3246922 (17.03.2020).

28 European Parliament and Council Proposal of Regulation (EU) COM(2020)842 final of 15 December 2020 on contestable and fair markets in the digital sector.

29 For a primer review of the proposal see A. De Streel (ed.), The European proposal for a Digital Markets Act. A first assessment, Brussels 2021.

WhatsApp under a different legal regime, this practice is pluri-offensive too. Notably, it could be relevant as unlawful exploitative conduct under antitrust rules, bearing in mind that WhatsApp's users were indirectly committed to accepting the new terms of service. It could also have been relevant as a data breach under data protection law, if it turned out that the instant messaging provider had managed such data outside of the objectives initially set.

In sum, it is true that with big data comes big responsibility. Nonetheless, the main concern related to these cases is the risk of a double, or triple, sanction applied for the same conduct: as a matter of fact, companies managing personal data risk being fined by antitrust, consumer protection and data protection authorities, at national and at EU level. Indeed, the corresponding interests protected by each administrative body must also be respected in the digital environment. However, since such interests have become more intertwined than ever before, the intervention of the respective competent authorities must be coordinated to avoid disproportionate sanctions that could likewise affect the market. To fit all these pieces of the puzzle together, there is, certainly more than before, a need for a fruitful horizontal dialogue between competent national authorities as well as a vertical multi-level dialogue between competent EU authorities and national ones. Each regulation has its remedies in the case of violations of the protected values/interests. Otherwise, there could be the risk of overlapping interventions.[30] One of the main issues is the misuse of antitrust law as a 'gap filler'[31] when sector regulations are not enforced. To this purpose, the doctrine has pointed out that under the large umbrella of the abuse of dominant position, the antitrust authority may abuse itself of the antitrust instruments when there is no real harm to the market.[32] It is thus required that competition watchdogs intervene only when there is solid evidence of an effective prejudice of the market.[33] Nonetheless, there is a policy trend in conferring new powers to antitrust authorities to intercept market alterations which are typical of the cyberspace.[34]

30 M. Midiri, Le piattaforme e il potere dei dati (Facebook non passa il Reno), "Il Diritto dell'Informazione e dell'Informatica" 2021, no. 2, p. 111.

31 G. Colangelo, Enforcing copyright through antitrust? The strange case of news publishers against digital platforms, "Journal of Antitrust Enforcement" 2021, referring to the enforcement of the new related right for press publishers introduced by Art. 15 of the Directive 790/2019/UE.

32 R. Pardolesi, R. van den Bergh, F. Weberp, Facebook e i peccati da Konditionenmissbrauch, "Mercato Concorrenza Regole" 2020, no. 3, p. 535.

33 M. Stojanovic, Can competition law protect consumers in cases of a dominant company breach of data protection rules?, "European Competition Journal" 2020, vol. 16, no. 2–3, pp. 531–569.

34 Apart from the Proposal of the DMA, see the Tenth Amendment to the German Competition Act published 18 January 2021 on the Federal Law Gazette which gives new powers to the Bundeskartellamt when dealing with large digital platforms. For an interesting comment of the new tool see J.U. Franck, M. Peitz, Digital Platforms and the New 19a Tool in the German Competition Act, "Journal of European Competition Law & Practice" 2021, vol. 12, no. 7, pp. 513–528.

In conclusion, the sustainability of digital markets[35] in the current data-driven economy requires the strong interplay between data protection, antitrust and consumer law to be rethought, as it entails closer and more coordinated contact amongst the respective authorities to prevent market failures and to ensure a fair European big data-driven market.

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35 According to the definition provided by the Skoll Foundation, Sustainable Markets page, 2015, http://www.skollfoundation.org/issue/sustainable-markets/ (24.09.2021), sustainable markets can be loosely defined as those that contribute to stronger livelihoods and more sustainable environments. Referring to digital markets, sustainability can be intended as the ability to preserve consumers' trust and allow new businesses to flourish.

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