

FACEBOOK'S ABUSE INVESTIGATION IN GERMANY AND SOME THOUGHTS ON COOPERATION BETWEEN ANTITRUST AND DATA PROTECTION AUTHORITIES



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I. INTRODUCTION

Antitrust law and data protection have rarely been mentioned in the same breath. It is true that antitrust issues arising from Big Data have been on everyone's mind for quite some time. However, the data-related debate in antitrust law focused primarily on how data-driven business models may change the market and create new possibilities for restricting competition. Just three years ago, the Monopolies Commission, a think-tank of the German Federal Government, noticed that the collection of vast datasets has been assessed only from the viewpoint of market concentration on (online) advertising markets, while the importance of data for the development of new products and particularly data protection issues were not considered in any significant detail.²

Change came quickly. In March 2016, the German Federal Cartel Office ("FCO") initiated proceedings against Facebook for the alleged abuse of its dominant position on the market for social networks by requiring users consenting to very wide data collection practices.³ Now, almost three years later, the FCO finished its investigation. With its decision of February 6, 2019, the FCO ordered significant changes to Facebook's data collection and usage practices.⁴ If upheld on appeal,⁵ the decision promises to establish new standards for data collection and data usage at least for market-dominant undertakings. Further, the FCO's *Facebook* investigation can be considered one of the first practical examples for close cooperation between a competition authority and data protection authorities in an investigation. Until now, data protection authorities were considered as being solely responsible for enforcing data protection regulations. One consequence of the *Facebook* investigation may thus be the emergence of parallel oversight by both data protection and antitrust authorities. This will raise – also from a constitutional point of view – questions on how to properly delimit the authorities' jurisdiction.

II. THE FACEBOOK INVESTIGATION AND THE FCO'S PROHIBITION DECISION

The FCO's investigation into Facebook concerned the potential abuse of its dominant position in the German market for social networks by applying unfair terms and conditions on the collection and use of Facebook users'

² See Monopolies Commission, Special Report 68: Competition policy: Challenges of Digital Markets, June 1, 2015, para. 110.

³ FCO, press release of March 2, 2016, English version available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

⁴ FCO, case summary of February 15, English version available at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf>.

⁵ According to the case summary published by the FCO, Facebook has already appealed against the decision; cf. FCO, *supra* note 4, p. 12.

personal data.⁶ At the end of 2017, the FCO informed the public that it has submitted its preliminary findings to Facebook for their comments. Although these preliminary findings have not been made public, the press release⁷ and an accompanying “Background information paper”⁸ described the scope of the investigation and the (preliminary) competition concerns of the FCO in more detail than had been known before. Simultaneously with adopting its decision, of which a public, non-confidential version will be published within the coming months, the FCO published an updated “Background information paper” that provides more details.⁹ On February 15, 2019, the FCO also published a case summary on the *Facebook* decision.¹⁰

The currently known contents of the FCO’s decision provide interesting insights on the interaction between antitrust and data protection law as well as some surprising viewpoints, in particular in connection with the market definition.

A. Summary of the FCO’s Order

With its decision, the FCO prohibits Facebook from applying terms of service according to which Facebook users, in order to use the social network Facebook, have to grant their consent to the collection of their personal data not only on this social network itself, but also on Facebook-related applications (Instagram, WhatsApp, Oculus, and Masquerade), and on third party websites and apps that use Facebook Business Tools (“Like” and “Share” buttons), or analytical services from Facebook Analytics. In particular, Facebook is prohibited from combining personal user data collected on these “off-Facebook” websites and applications unless the users gave their voluntary consent. Users must be allowed to deny (or withdraw) their consent at any time without such denial/withdrawal affecting their possibility of using the Facebook social network. In order to comply with the order, Facebook is obliged to present the FCO within four months with its proposal for changes to Facebook’s terms of service, explanatory data, and cookie policies. The prohibition will take effect within twelve months after the date of the decision. Given the FCO’s restricted jurisdiction, its order applies only with regard to the data collection practices applied to private users residing in Germany.

B. Relevant Market and Facebook’s Market Position

European¹¹ and German law¹² prohibit a market-dominant undertaking to abuse its market position. Thus, any assessment of an allegedly abusive market conduct requires identifying the affected market and establishing the market position of the undertaking under investigation.

1. Relevant Product Market

The *relevant product market* is usually defined as encompassing all products which are regarded by the consumer as interchangeable or substitutable in terms of their characteristics, prices, and intended use.¹³ As a result of its assessment of various social media offerings, the FCO established the existence of a market for social networks¹⁴ which is a distinct and separate market segment of the overall social media market. In this respect, the FCO took note that Google+ has essentially left this market¹⁵ and thus, only some smaller German social network providers

6 FCO, press release of March 2, 2016, English version available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

7 FCO, press release of December 19, 2017, English version available at https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2017/19_12_2017_Facebook.html.

8 FCO, Background information paper on the Facebook proceeding, December 19, 2017, English version available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html.

9 FCO, Background information paper on the Facebook proceeding, February 7, 2019, English version available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf.

10 FCO, *supra* note 4.

11 Art. 102 TFEU.

12 Sec. 19(1) ARC.

13 European Commission, Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372, p. 3, 5.

14 Cf. FCO, *supra* note 4, p. 3 et seq.

15 As of February 4, 2019, it is no longer possible to open a Google+ account. On December 10, 2018 Google announced that due to serious bugs in Google+ APIs the consumer version of Google+ will be shut down in April 2019; cf. <https://www.blog.google/technology/safety-security/expediting-changes-google-plus/>.

(studiVZ, meinVZ) were acknowledged as operators of competing social networks in this market.¹⁶

The FCO further ruled that professional social networks (LinkedIn, Xing), messaging services (WhatsApp, Facebook Messenger, Snapchat, etc.), or other media services such as YouTube and Twitter are not part of the relevant market. Although these services can (partly) substitute Facebook's functionalities, they serve different, complementary needs and thus, may not be considered as full substitutes.¹⁷

This reasoning concerning the boundaries of the relevant market were to be expected since they have already been considered by the European Commission in the merger control review of the *Facebook/WhatsApp* transaction.¹⁸ While the Commission left open how to exactly define the affected market, the FCO had to take a decision – and it apparently opted for the narrower definition. This is hardly surprising, albeit some question marks remain since for some time Facebook appears to have lost popularity within the younger generations who instead prefer using Instagram, Snapchat, and similar services.¹⁹ Further, in light of recent news that Facebook plans integrating its messaging services WhatsApp, Instagram, and Facebook Messenger,²⁰ one wonders how long the FCO's narrow market definition will be supported by the usage realities.

2. Relevant Geographic Market

Perhaps more surprisingly, the FCO seems to take the stand that the market for social networks is (only) national in scope.²¹ In contrast, the European Commission held in its *Facebook/WhatsApp* decision that the geographic scope of the market for social networking services is EEA-wide “in line with a more conservative approach.”²² According to the case summary, this narrow scope of the geographically relevant market resulted from its main use to connect with people in the user's own country, special national user habits, and the lack of opportunities for supply-side substitution.²³

This reasoning is somewhat perplexing. Usually, the *relevant geographic market* is defined by the area in which the relevant products or services are offered and in which the conditions of competition are sufficiently homogeneous.²⁴ It appears safe to assume that Facebook is accessible worldwide. Moreover, users can choose between at least 100 languages²⁵ for using Facebook without a reduction in the available functionalities. If the purpose of using a social network for staying in touch with friends in Germany were that decisive, one would expect that German-language focused social networks such as meinVZ/studiVZ had remained as relevant as in the mid-2000's. The counter-factual of the reality, i.e. Facebook's rise to become the most important social network in the EU and in Germany, in particular, may thus point to the importance of an at least EEA-wide, if not worldwide user base. Interestingly, the FCO uses the “size and the possibility to find the persons they want to be in contact with” in its reasoning for defining the scope of the product/service market. In light of this, it appears inconsequential to disregard the size of a social network's non-German user base as a relevant factor for choosing between rival social networks.

3. Facebook's Market Position

Under German law, an undertaking is considered to have a market-dominant position if it does not have competitors, is not exposed to any substantial competition, or has a paramount market position in relation to its competitors.²⁶ In assessing an undertaking's market position, the

¹⁶ Rather “were” since the operator of the social networks studiVZ/meinVZ declared its insolvency in September 2017.

¹⁷ Cf. FCO, *supra* note 4, p. 5.

¹⁸ European Commission, decision of October 3, 2014, COMP/M.7217 paras. 51 et seq. – *Facebook/WhatsApp*.

¹⁹ Pew Research Center, Social Media Use in 2018, March 1, 2018, <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/>.

²⁰ New York Times, January 25, 2019, “Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger,” <https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html>.

²¹ Cf. FCO, *supra* note 4, p. 5.

²² European Commission, decision of October 3, 2014, COMP/M.7217 para. 67 – *Facebook/WhatsApp*.

²³ FCO, *supra* note 4, p. 5.

²⁴ European Commission, Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372, p. 3, 5.

²⁵ Information on this point varies, some sources state “over 100” available languages, others claim 142, cf. <https://www.quora.com/How-many-languages-can-Facebook-support>.

²⁶ Sec. 18(1) ARC.

statute lists its market share as the first aspect to consider, and its financial strength as second.²⁷ In case that an undertaking has a market share exceeding 40 percent, German law provides for a (rebuttable) statutory presumption of market dominance.²⁸

According to its case summary, the FCO's investigation established that Facebook, especially among daily active users, has a market share in Germany in excess of 95 percent and thus considers it being a "quasi-monopolist."²⁹ High market shares were also found when looking at monthly active users (> 80 percent) and registered users (> 50 percent), respectively.³⁰ In the opinion of the FCO, the amount of time spent by users on a social network is an important indicator of the network's success and thus the number of daily active users is considered as the decisive indicator for its market power.

In this connection, the FCO states that due to direct network effects, Facebook users are "locked in" and have extreme difficulties in switching to competing services. This appears to be an exaggeration. Indeed, it is very simple setting up an account at another social network (Google+, Reddit, etc.). The "difficulty" might thus better relate to the difficulty in finding a similar level of user activity, for example on Google+, or re-connecting with friends and acquaintances on a network that does not require users to reveal their true identity (e.g. Reddit, Tumblr). However, as the "boom and bust" of studiVZ, once the market-leading social network in Germany, and the parallel ascent of Facebook shows, the switching of a large user base from one network to the other is possible. However, such migratory movements do not happen frequently. According to the case summary, the possibility of a trend to withdraw from Facebook was also investigated. The FCO found that innovations on the internet are able to have disruptive effects, but in the case of Facebook any innovations of competitors only addressed certain functionalities and moreover, these competitive threats have been successfully addressed by Facebook.³¹

In summary, the FCO's position that Facebook enjoys a dominant position on the German market for social networks is not surprising, and it appears to be well reasoned. Even if the FCO adopted the Commission's viewpoint of an EEA-wide market for social networks, it does not appear far-fetched to assume that the FCO had arrived at the same result of establishing Facebook's market dominance.

C. Abusive Conduct

First, it appears important to note that the scope of the FCO's investigation was limited to the collection and use of user data collected "off Facebook," i.e. via "Like" and "Share" buttons embedded on third-party websites and apps, and by means of analytical services such as "Facebook Analytics."³² For the time being, the FCO explicitly excluded from its investigation the examination of data collection practices on Facebook itself as well as the data collection policies of other Facebook-owned services, e.g. Instagram and WhatsApp.

As far as the use of "off Facebook" user data is concerned, the FCO ruled that Facebook's current terms and conditions are exploitative since they require that users consent to the collection, combination, and use of their personal data also on other Facebook-owned applications and on third party websites and applications even if the user has disabled web tracking.³³ In the opinion of the FCO, this wide scope of user consent requested from Facebook for the collection and use of their personal data violates data protection principles and in particular, Facebook's practices lack "*effective justification* [...] *since it] is neither required in order to fulfil contractual obligations nor does a balancing of interests result in the conclusion that Facebook's interests in data processing outweigh the users' interests.*"³⁴ In this respect, the consent granted by users by accepting Facebook's current terms of service are considered ineffective since users had no choice than to consent to the "off Facebook" data collection in order to be able to use Facebook itself.³⁵

²⁷ Sec. 18(3) no. 1, 2 ARC.

²⁸ Sec. 18(4) ARC.

²⁹ FCO, *supra* note 4, p. 6.

³⁰ *Ibid.*

³¹ FCO, *supra* note 4, p. 7.

³² FCO, *supra* note 4, p. 12.

³³ FCO, *supra* note 4, p. 7, 11 et seq.

³⁴ FCO, *supra* note 4, p. 10.

³⁵ FCO, *supra* note 4, p. 10. See also Art. 4 no. 11 GDPR.

Pursuant to German case law, the use of unfair general terms and conditions by a market-dominant undertaking may be qualified as abusive business conduct if, and to the extent, the legitimate interests of the dominant undertaking do not outweigh the legitimate interests of the counterparty,³⁶ i.e. the user of the social network Facebook. With regard to the latter, the FCO argues that both data protection law, as well as antitrust law, aim to protect individuals from the exploitation of their personal data by the opposite market side by safeguarding the users' right to choose freely when, by whom, and how their personal data may be collected and used. The FCO's reasoning mirrors the opinion of the Monopolies Commission, an independent think-tank of the German Federal government, that has advocated for an increased relevance of data protection law in antitrust assessments and called for sanctioning the "abuse of power through the breach of law."³⁷

However, the purpose of antitrust law is to protect against restraints of competition and abusive behavior, but not supporting the enforcement of other legal norms, e.g. data protection rules. Otherwise there would be a risk that antitrust law is used to compensate for deficiencies in other laws and, respectively, for unsatisfactory enforcement by other authorities (e.g. data protection agencies). Accordingly, the European Commission held in its *Facebook/WhatsApp* decision that data protection concerns do not fall within the scope of European competition law.³⁸ Although the Commission's statement sounds rather clear, the more "inclusive" approach of the FCO appears to be more correct.

The assessment whether a given market conduct may qualify as abusive requires weighing the countervailing interests of the opposing parties. On Facebook's side, it appears obvious to consider their interest to gather as much user data as possible that allows for more tailor-made services for users and, obviously, also possibilities for more targeted advertisements. Thus, if Facebook's interests in obtaining personal data is (and should) be considered for its benefit, then it would be counterintuitive – and probably also wrong – not to consider the users' interests in having some right to choose which data they want to hand over to whom and for which purpose. The FCO's focus on the collection and use of "off Facebook" user data thus appears to be not only plausible, but consequential since it leads to the question of whether Facebook's interest in collecting data on its users that are generated on third parties' platforms is similarly justified by Facebook's interest in generating tailor-made services and ads on Facebook. According to the FCO, the answer appears to be a clear "No." Only once a non-confidential version of the decision is published, it will be possible to review whether the FCO's standpoint might be more nuanced, allowing for exemptions, for example.

D. What comes next after the Facebook Decision

The FCO's decision requires Facebook to change its terms of service for users based in Germany within the next 12 months. Prior to that, within four months after the decision date, Facebook is obliged to present the FCO with an implementation plan setting out in detail the technical implementation of the obligations.³⁹

However, Facebook has the possibility to appeal the FCO's decision and, according to the FCO's case summary, has already done so.⁴⁰ The appeal does not have a suspensory effect and thus Facebook would have to abide by the order unless it files an emergency appeal requesting a suspension of the order's effects for the duration of the proceedings.⁴¹ Since Facebook indeed filed such an emergency appeal already,⁴² a court decision containing at least a cursory review of the FCO's reasoning can be expected relatively soon within the next three months.

III. INTERACTION BETWEEN DATA PROTECTION AND ANTITRUST AUTHORITIES

If access to data is an essential factor for the competitive position of the company – as is the case with data-driven products such as social networks – the handling of personal data by a company is not only a case for data protection authorities, but also for antitrust authorities. If

36 Cf. Federal Court of Justice, decision of November 6, 2013 – KZR 58/11, NVwZ-RR 2014, 515, 520 – *VBL-Gegenwert I*; decision of June 7, 2016 – KZR 6/15, NZKart 2016, 328, 331 – *Pechstein*.

37 Monopolies Commission, Special Report 68: Competition policy: Challenges of Digital Markets, June 1, 2015, para. 110.

38 European Commission, decision of October 3, 2014, COMP/M.7217 para. 164 – *Facebook/WhatsApp*: "Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules."

39 FCO, *supra* note 4, p. 12.

40 *Ibid.*

41 Cf. Sec. 64(1), 65(3) 1st sentence no. 2, 3, 3rd sentence ARC.

42 FCO, *supra* note 4, p. 12.

the question raised above of the inclusion of data protection assessments within the scope of abuse control is answered in the affirmative, the follow-up question on the relationship between data protection and antitrust authorities arises.

As already stated above, the FCO's Facebook investigation was conducted within the framework of an administrative proceeding.⁴³ As mentioned further, however, the FCO may switch to and, respectively, initiate administrative fine proceedings if it has sufficient reasons to believe that the seriousness of the abusive behavior requires a financial penalty as a proper sanction. Given that compliance with data protection provisions is at stake, data protection authorities may also become active and try initiating their own investigations. Accordingly, the following topics might become important for the affected undertakings.

First, fines for infringing data protection provisions may no longer be qualified as “small change,” but rather as the (slightly) younger sibling of antitrust fines. Second, cooperation and information exchange between the FCO and data protection authorities will become more important, in particular since the latter will have significantly more experience in interpreting and applying the provisions of the GDPR. Lastly, and perhaps most importantly, if infringements of data protection rules may also qualify as market abuse within the meaning of Art. 102 TFEU, Sec. 18 et seq. ARC, this leads to the question whether undertakings are protected from parallel investigations and penalties by the *ne bis in idem* principle, i.e. a fine decision of one authority prevents the other authority from also imposing a fine.

A. Antitrust and Data Protection Fines

Through the GDPR, that entered into force on May 25, 2018, the provisions on financial sanctions for infringements of the GDPR were largely modeled after the respective antitrust rules. Previously, German data protection authorities could only sanction an undertaking with a fine of up to 2 million Euro. Based on the GDPR, the maximum fine now amounts to 20 million Euro. Moreover, undertakings may be sanctioned by a fine of up to 4 percent of worldwide turnover in the last business year. The similarity to the level of antitrust fines under European and German law are manifest: Under European law, the Commission may fine undertakings up to 10 percent of their worldwide turnover.⁴⁴ German law provides for the same maximum fine for undertakings, while it also allows for sanctioning individuals with a fine of up to 1 million Euro.⁴⁵

B. Cooperation Between Authorities in Investigations

The 9th Amendment to the Act against Restraints of Competition, which entered into force in June 2017, established the legal basis for the cooperation between competition authorities and data protection authorities. Pursuant to Sec. 50c(1) ARC, Federal and state competition authorities and Federal and state data protection authorities may exchange information, including personal data, business, and trade secrets, insofar as necessary for fulfilling their duties, and use the information in their respective investigations and proceedings. The information exchange is not restricted by the type of investigation pursued by either authority, i.e. a data protection authority may make information that has been gathered in the course of administrative proceedings available to the FCO, and the FCO may use it for evidentiary purposes in administrative fine proceedings and *vice versa*.

It appears noteworthy in this respect that the provision not only does not require the authorities to inform the affected individuals and undertakings prior to, but neither after information has been exchanged. This might be seen as concerning. However, the receiving authority may not use information against individuals or undertakings if the information has been gathered by the supplying authority on the basis of seizure privileges unavailable to the receiving authority.⁴⁶

C. Parallel Investigations and the “ne bis in idem” Principle

The possibility of parallel investigations by competition and data protection authorities raises the question of whether both authorities may adopt a fine decision against the affected undertakings.

⁴³ FCO, *supra* note 9, p. 1.

⁴⁴ Art. 23(1), (2) 2nd sentence Regulation (EC) No. 1/2003.

⁴⁵ Sec. 81(4) 1st sentence ARC.

⁴⁶ Sec. 50c(1) 2nd sentence ARC.

Pursuant to the *ne bis in idem* principle, which is enshrined in the German constitution,⁴⁷ the Charter of Fundamental Rights of the European Union,⁴⁸ and the 7th Protocol to the European Convention of Human Rights,⁴⁹ a natural or legal person must not be penalized twice for one and the same cause of action.⁵⁰ According to the decision practice of the European Court of Human Rights, the *ne bis in idem* principle prohibits any prosecution resulting from a second offense where that offense is based on identical or substantially similar facts to the ones which were the basis for another offense.⁵¹ The ECJ generally shares this approach. Accordingly, the *ne bis in idem* principle may be infringed if two investigations are pursued for the same acts, i.e. a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.⁵² On the other hand, the ECJ applies a slightly different standard in competition cases, i.e. the principle only applies if the facts and the offender are identical, and the legal interests protected are the same.⁵³

If a competition authority may establish that a market dominant undertaking has abused its position by infringing data protection rules, the question arises whether a data protection authority may still investigate and sanction solely the data protection violation or whether it is barred due to the competition authority's decision. Based on the standard applied by the ECHR and the ECJ in non-competition cases, the answer should be "No" since the data protection authority's decision would be based on facts – as far as the data protection violation is concerned – that are identical to those underlying the competition authority's decision.

On the other hand, if the ECJ's stance for competition-related cases is followed, not only parallel investigations seem admissible, but also fine decisions by both the competition authority and the data protection authority. The prohibition to abuse a market-dominant position shall ensure that competition is not distorted and, more precisely, shall protect market participants on the opposite side of the market, the dominant undertaking's competitors (if any), consumer welfare, and the Common Market.⁵⁴ In contrast, data protection rules protect fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.⁵⁵ Thus, one may argue that the two areas of law serve different legal interests, and therefore parallel sanctions by a competition authority and a data protection authority may not violate the *ne bis in idem* principle. Even though this appears plausible, both fine decisions would still have the infringement of data protection laws as their (sole) substantive basis.

German law solves such situations by a "first come first served" general rule which determines the authority that shall be competent for conducting administrative fine proceedings if the subject matter could be investigated and sanctioned by several authorities. More precisely, the first authority having interviewed the person concerned and, respectively, to whom the police have sent the file after an interview led by the police shall be competent for proceeding with the investigation.⁵⁶ Accordingly, if an alleged infringement of data protection laws is investigated first by a data protection authority with the aim of imposing a fine once the infringement has been established, then this would block a parallel (or subsequent) administrative fine proceeding by the FCO. Nevertheless, the primary authority would still have to consult with the other potentially competent authorities, e.g. the FCO, before concluding its investigation.⁵⁷ Further, the primary authority may also agree with another potentially competent authority for transferring the case to the latter if such a transfer increases efficient case handling or for other justified reasons.⁵⁸

47 Art. 103(3) Basic Law.

48 Art. 50 CFREU.

49 Art. 4 Protocol No. 7 to the ECHR.

50 Also known as double jeopardy doctrine in common law jurisdictions.

51 Cf. ECHR, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECHR 2009, paras. 82 et seq.

52 Court, judgment of November 19, 2010, case C-261/09 para. 39 – *Gaetano Mantello*.

53 ECJ, judgment of January 7, 2004, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P para. 338 – *Aalborg Portland et al. / Commission*.

54 Cf. Fuchs/Möschel in Immenga/Mestmäcker, *European Competition Law*, 5th ed. 201, Art. 102 paras. 4 et seq.

55 Cf. Art. 1(2) GDPR.

56 Sec. 39(1) 1st sentence German Act on Administrative Offenses (AAO).

57 Sec. 39(2) 2nd sentence AAO.

58 Sec. 39(2) 1st sentence AAO.

The aforementioned rules however only apply for administrative *fine* proceedings, i.e. where proceedings are concluded with the imposition of a financial penalty. Accordingly, if one of the competent authorities intends to investigate an infringement with the aim of imposing monetary sanctions, the other authority may still conduct its own investigation within the framework of a purely administrative proceeding. In case of the latter, the authority may then only adopt cease and desist orders or request the infringing party to undertake specific measures. Similarly, the *ne bis in idem* principle is not relevant if neither one of the authorities opts for an administrative fine proceeding. Since this may lead to diverging or even contradictory interpretations of legal provisions, coordination between the authorities will remain necessary.

IV. CONCLUSION

After previous statements by the FCO promising an earlier conclusion of the *Facebook* investigation, the decision day has now come. Although the materials published by the FCO so far concerning its decision are significantly more detailed than usual, a number of questions remain and might be answered only once a non-confidential version of the decision has been published. Regardless, the available information already provides more than a glimpse into the FCO's view on the interaction between data protection rules and antitrust law. Although one could argue that the FCO's opinion is a Germany-specific divergence, a more cautious approach may be well advised. As one of the larger markets in Europe, developments in data protection laws usually also affect other countries and may also influence the viewpoint of data protection and antitrust authorities in other jurisdictions. Companies with data-driven business models may thus be well advised to review their data collection and use policies, in particular if they consider themselves having a significant market position in their respective fields.



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