

Facebook, will you ever give up?

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Facebook Data

1. It is often said that data is replacing oil as the world's most valuable resource and is the commodity of trade in the new world order.^[1] The basic premise is that in this new digital economy, data and what you extract from that data is similar to oil a century ago. Depending on how you extract and use data, it can be an invaluable asset with enormous potential. It's simple – for oil, it's the energy extracted and for data, it's the knowledge extracted.^[2]
2. Competition Authorities globally are increasingly recognising the role data plays in the digital economy, particularly in data driven industries. The European Commission ("EU Commission") has previously recognised that data privacy constitutes a key parameter of non-price competition in the market for consumer communications and professional social networks.^[3]
3. This is precisely the *modus operandi* adopted by the EU Commission when on 4 June 2021, it announced that it had started an investigation into possible anti-competitive conduct by social networking giant Facebook concerning its use of data gathered from advertisers to see whether it gives Facebook an unfair advantage in the online classifieds market.
4. What is apt and properly contextualises the investigation are the remarks of the Executive Vice-President Margrethe Vestager, in charge of competition policy at the EU Commission, who stated that –

*"Facebook is used by almost 3 billion people on a monthly basis and almost 7 million firms advertise on Facebook in total. **Facebook collects vast troves of data on the activities of users** of its social network and beyond... **We will look in detail at whether this data gives Facebook an undue competitive advantage** in particular on the online classified ads sector...where **Facebook also competes with companies from which it collects data**. In today's digital economy, **data should not be used in ways that distort competition**."*^[4] [Emphasis added]

5. Facebook is ubiquitous. It is a social networking service that allows registered users to create profiles, upload photos and videos, send messages and, generally connect with other people online. Facebook also offers an online classified ads service, called Facebook Marketplace where users can buy and sell goods from each other. When companies advertise their services on Facebook, they also compete directly with Facebook. Where Facebook gains access to these competing companies' commercially valuable data for instance consumer data, it could present concerns from a competition law perspective. The EU Commission aims to investigate, amongst others, where Facebook might then use this data in order to compete against companies that provided it with data.^[5]
6. As an example, this will apply where online classified ads providers advertise their services on Facebook's social network and, at the same time, they compete with Facebook's own online classified ads service – Facebook Marketplace. The EU Commission will now endeavour to examine certain specific competition concerns^[6] –

*6.1 misuse **of data** – whether Facebook may distort competition in the market for online classified ads services by making use of data obtained by competing ad providers to better target their own advertising on Facebook Marketplace; and*

6.2 anti-competitive **tying** – whether the way Facebook Marketplace is embedded in the social network constitutes a form of anti-competitive tying giving Facebook an advantage in reaching customers and foreclosing competitor online ad providers.

7. If the above allegations are proven, the practices of Facebook will be found to contravene the EU Commission competition rules on anticompetitive agreements between companies (Article 101 of the Treaty on the Functioning of the European Union (TFEU)) and/or on the abuse of a dominant position (Articles 102 TFEU).

8. What exacerbated Facebook's woes is that shortly after the EU Commission's announcement, the UK's Competition and Markets Authority ("**UK CMA**") also launched its own investigation into Facebook's use of data. The CMA further indicated that it will work with the EU Commission in the investigations.

9. Facebook is no stranger to adversity, particularly to investigations and probes into its business. One can recall how CEO, Mark Zuckerberg, was required to appear before the US Congress for hearings probing Facebook's competitive behaviour and liability shield that protects its business model.^[7] Since its inception, Facebook has seen many wins and losses and whether this investigation will be a win or loss remains to be seen.

10. Interestingly, on 28 June 2021, a federal judge in the US dismissed an antitrust lawsuit brought by the Federal Trade Commission ("**FTC**") concluding that the FTC failed to establish that Facebook had a monopoly on social media networks.^[8] The federal judge found that the lawsuits were "legally insufficient" and did not provide enough evidence to prove that Facebook was a monopoly and to this end found that –

*"These allegations — which do not even provide an estimated actual figure or range for Facebook's market share at any point over the past ten years — **ultimately fall short of plausibly establishing that Facebook holds market power.**" [Emphasis added]*

11. In addition to the above, the federal judge found fault in the way in which the government claimed that Facebook violated antitrust law by refusing **interoperability permissions with competing apps** finding that, duly emphasised, "*all such revocations of access occurred in 2013, **seven years before this suit was filed**, and the FTC lacks statutory authority to seek an injunction 'based on [such] long-past conduct.'*"

12. The above decision presents a significant blow by regulators to rein in on the tech giant, Facebook. The findings of the federal judge in this case are particularly important given that the EU Commission is also making similar allegations against Facebook specifically on the issue of abuse of dominance and interoperability. This may potentially affect the outcome of the investigations initiated by the EU Commission against them.

13. Be that as it may, the outcome of the investigation by the EU Commission will no doubt be instrumental towards understanding (and taking seriously) the important role played by data in the digital economy and how data driven companies can potentially abuse their dominance solely based on their usage of data. Furthermore, considering the focus by the Competition Commission in South Africa on data markets, one can rest assure that the outcome in terms of the EU Commission's and UK CMA's investigations would be a clear indication on what one can expect in the local market.

by Ahmore Burger-Smidt, Director and Head of Data Privacy and Cybercrime Practice and member of Competition Law Practice; and Dale Adams, Associate

[1] See P Silva "Oil vs. Data – Which is more valuable?" available at <https://www.f5.com/company/blog/oil-vs-data-which-is-more-valuable>, accessed on 23 June 2021. Also see A Burger-Smidt and D Adams "Data, a commodity of trade in the new world order? or not..." available at <https://werksmans.com/legal-updates-and-opinions/data-a-commodity-of-trade-in-the-new-world-order-or-not/>, accessed on 23 June 2021.

[2] *Ibid.*

[3] See the merger decisions of *Facebook/WhatsApp* and *Microsoft/LinkedIn*.

[4] See the European Commission press release "Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook" available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848, accessed on 23 June 2021.

[5] *Ibid.*

[6] See R Bell "EU Commission Opens Up Competition Investigation Over Facebook's Use of Advertiser Data", available at <https://www.jdsupra.com/legalnews/eu-commission-opens-up-competition-8562322/>, accessed on 24 June 2021.

[7] See L Feiner "Facebook, Google and Twitter CEOs will make another appearance before Congress in March" available at <https://www.cnn.com/2021/02/18/facebook-google-twitter-ceos-to-testify-before-congress-in-march.html>, accessed on 23 June 2021.

[8] See CPI "Judge dismissed FTC's antitrust lawsuit against Facebook" available at [Judge Dismisses FTC's Antitrust Lawsuit Against Facebook \(competitionpolicyinternational.com\)](https://www.competitionpolicyinternational.com/judge-dismisses-ftcs-antitrust-lawsuit-against-facebook/), accessed on 29 June 2021.



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