



ITALIAN CONFERENCE **V** CONVEGNO NAZIONALE

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I PRINCIPALI SVILUPPI
NEL DIRITTO DELLA
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EUROPEA E NAZIONALE

*MAIN DEVELOPMENTS
IN EUROPEAN
AND ITALIAN
COMPETITION LAW*

Cristoforo Osti

The German Facebook Case

A First Reaction

The Facts

FB retrieves data:

- From its own service (BKartA has no issue with that)
- From controlled services (Instagram and Whatsapp)
- From Third Sites - what triggers it:
 - Share, Like, and even visiting alone
 - Facebook Analytics

The Facts (II)

- Customers have no clue
- Customers just give a general acceptance to FB privacy policy
- FB doesn't give you an option: you either accept FB's privacy policy or ... you don't use FB

Relevant Market and Dominant Position

Market for German Social Networks

FB has a monopoly

Issues:

- If it's for free is it still a market? §18(2)(a)
- SnapChat, LinkedIn, Twitter, Instagram, Youtube ...?
- How do you measure market shares (minutes ... attention; daily use, monthly use ...)? §18(2)(a)

Abuse

«T&C» Abuse [§19 (2).1., similar to 102 (a)]:
clausula generalis

Case-law of BGH (*VBL*; *Pechstein*):
infringement of principles of law or
constitutional values may be a § 19 (2).1
abuse

Abuse (II)

Here, customer accepts as s/he has no choice →

Not a valid consent under GDPR (Preamble 43) →

Violates the GDPR (and German Constitution) →

If carried out by a firm in DP it violates the
VBL/Pechstein doctrine

(Unresolved) Issues

Is there a casual link b/w dominance & abuse (after all many non-dominant companies do the same)?

BkArt: 'normative' causality: it would not have violated w/o DP & it reinforces its DP (same: Con'l Can? AZ?)

(Unresolved) Issues (II)

- Shouldn't this be controlled by the Privacy Agency?
 - El sueño del Regulator produce monstruos (CNIL on Google?)
- Should there exist an actual violation of Privacy Law or is 'principles' enough?
- Not 'on the merits'?

Unresolved Issues (III)

- Is this antitrust or consumer law (information asymmetry)?
- Is this antitrust or contract law (the issue being lack of acceptance)?

(Unresolved) Issues (IV)

- What is the harm to competition?
 - Barriers to entry?
 - Reinforcing DP *via* NW effects?
 - Degrading quality?

(Unresolved) Issues (V)

- What is the harm to consumers (FB: «no real world harm»)?
 - Cambridge Analytics?
 - Reduction in quality?
 - The fact you didn't know (lack of consent)?
 - The fact that you have been misled? (do you really care?)
 - The fact that your data is worth something and you are not sharing such value? (aren't you?)

And now for the moment of truth ...

(Unresolved) Issues (VI)

- **Do you care if FB makes money with your data and gives you a free service in exchange?**
- **If so, why do you give them away?**
- **Would be willing to pay in exchange for more privacy?**

Unresolved Issues (VII)

Unless:

**It's more about advertisers
than consumers**

Smallfry

- Remedy

BKartA: FB doesn't care about money since they have so much *but*

If you prevent them from going on without your consent *that* hurts *but*

Is this (silos) going to be more effective than the MS/GS remed(ies)? (the flashlight app fallacy)

Do we rather need regulation?

Smallfry (II)

- Commission

Decision sort of criticized by Ms Vestager

Is this the evidence of a EU/NCAs divide? Is hipster antitrust more national than European?

BkartA: 3(2) 1/2003: 102 couldn't apply here?
(SABAM; DSD)

See You in Düsseldorf

(OLG of)