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Social Networks and Potential Competition Issues²

Abstract

In addition to search engines, social networks represent an important digital service for many Internet users. Social network services such as Facebook, Xing, or Twitter provide vital platforms for communication and sharing of content as part of a modern, user-friendly Internet. Public criticism of social networks is expressed in particular with regard to processing of personal data. These play a central role in business models of many social networks, with regard to their use e.g. for advertising purposes. A question is, if it can be assumed that market-dominant providers, due to a lock-in effect, can demand a wide-ranging consent for the collection and use of personal data that would be expected in a functioning competition? In the following, social networks, potential competition issues and possible legislative measures due to concentration tendencies in connection with access to user data in the area of social networks will be discussed.

Keywords: Search engines, Social networks, Internet, Competition law, Data protection

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Serwisy społecznościowe a kwestia konkurencji

Streszczenie

Wielu internautów ceni sobie możliwość korzystania nie tylko z wyszukiwarek internetowych, ale i serwisów społecznościowych. Serwisy, takie jak Facebook, Xing, czy Twitter, to platformy służące komunikacji, wymianie informacji czy udostępnianiu treści innym, stanowiące ważny element nowoczesnego, przyjaznego użytkownikowi Internetu. Serwisy społecznościowe spotykają się z powszechną krytyką głównie z uwagi na kwestię przetwarzania danych osobowych. Ma ona kluczowe znaczenie dla modeli biznesowych wielu serwisów społecznościowych – choćby w kontekście korzystania z danych osobowych użytkowników tych serwisów w celach reklamowych. Powstaje zatem pytanie, czy w okolicznościach „zamrożenia” rynku można założyć, że liderzy rynku serwisów społecznościowych będą oczekiwać udzielania zgód na gromadzenie i korzystanie z danych osobowych na szeroką skalę na warunkach takich samych, jak w sytuacji niezachwianej konkurencji. W artykule przedstawiono charakterystykę ważniejszych serwisów społecznościowych, a także omówiono potencjalne problemy na tle konkurencji oraz środki ustawodawcze możliwe do zastosowania w kontekście dostępu do danych osobowych użytkowników wspomnianych serwisów społecznościowych.

Słowa kluczowe: wyszukiwarki internetowe, serwisy społecznościowe, Internet, prawo konkurencji, ochrona danych

Introduction

Social networks such as Facebook, Xing or Twitter offer their users a platform where they can communicate with other users and create and share a wide variety of content with other users. Thus, social networks are a central component of the modern, user-friendly Internet and offer the opportunity to make new contacts (an added value compared to pure communication services such as WhatsApp or Skype, which essentially serve the consumer communication between existing contacts). The popularity of social networks is reflected in the number of users. The world's largest social network with over 2 billion active users is Facebook.³ Other services include e.g. Google (over 1500 million active users), Instagram (over 800 million active users) and Twitter (over 330 million active users).⁴ The range of social networks is diverse. Most social networks typically offer a number of basic functions, such as: a user profile, a list of contacts, and sending messages. In addition, social networks sometimes differ significantly in terms of their target groups, functionalities and purposes. Some networks, such as Facebook, Google+ or Tencent Qzone are aimed at a large group of users, including private individuals as well as public bodies and companies that use social media as part of their public relations or corporate communications. This opens up various possibilities for user interaction. Communication can occur bilaterally between users, in groups or in public, with text messages as well as links to other websites. In comparison, there are a variety of other providers that specialize in specific user groups. For example, networks such as LinkedIn or Xing serve as a platform for professional networking. Other networks such as Instagram or Flickr are especially suited for sharing pictures and videos, while Twitter is used for posting short messages. Public criticism of social networks is expressed in particular with regard to processing of personal data. Competition policy concerns the potential of dominant providers of social networking services to use their position *vis-à-vis* their users in order to gain a competitive advantage by gaining wide access to user data. In the following, therefore, social networks, potential competition issues and possible legislative need for action due

³ V. Pornsakulvanich, *Excessive use of Facebook: The influence of self-monitoring and Facebook usage on social support*, "Kasetsart Journal of Social Sciences" 2017, 1.

⁴ Facebook owns: WhatsApp, Facebook Messenger and Instagram. Google owns: YouTube, and Tencent owns: QQ, WeChat and QZone.

to concentration tendencies in connection with access to user data in the area of social networks will be discussed.

Concentration tendencies

From an economic point of view, social networks are one-sided networks that have a user group with their network members. By opening up for advertising purposes, social networks become two-sided platforms, bringing together, on the one hand, the users of a social networking service and, on the other hand, their advertisers. If social networks offer programming interfaces for developers of software, they can also be understood as three-sided platforms, which bring together users and content providers.

Market definition and market share

If we speak about competitive assessment of the behavior of social networking services, market definition⁵ can be only performed by a separate consideration of the individual platform sides taking into account possible interdependencies between the platform sides. With regard to the geographic market definition, on the one hand, it should be noted that social networks generally offer their services worldwide, so that communication can take place globally. On the other hand, the majority of user interaction and displayed advertising should be assigned to a language and cultural area. For example, Italian Facebook or Twitter users will preferably use the service with Italian language setting, communicate with other Italian users more intensively, and to them will be shown advertisements suited to their location in Italy. For the determination of shares on the user side of social network services, a consideration of the number of registered users has only limited informative value. The majority of registered users are therefore unavailable to other users and potential advertisers. Accordingly, the importance of the network for users and advertisers is likely to be lower. It should be also taken into account that users can be active on more than one social network and therefore, based on the number of members, only conditionally reliable statements can be made about the actual distribution of users. The user shares of individual social networks are to be estimated higher, if there are different products (from the user's point of view) by the assumed services. While typically all social networks provide a number of basic functions, e.g. user profiles, contact lists and communication functions, many servi-

⁵ J.E. Lopatka, *Market Definition?*, "Review of Industrial Organization" 2011, 39(1), pp. 69–93.

ces differ in functionality and user interface, which means that these services are used in different ways and users access multiple services in parallel. While Twitter mainly serves to publish short messages, Instagram is especially designed to publish photos. Facebook, on the other hand, offers a wide range of possibilities for different users to different content. Accordingly, services such as Facebook, Twitter or Instagram cannot be assigned to the same market.

Factors of market concentration and market dominance

Strong direct network effects on the user side favor a strong concentration of users to a few providers. The more users have a social network, the greater the benefit of the network for the individual. There are a number of social networks that permanently show very high numbers of users and continue to grow. Concentration tendencies are favored by a lack of interoperability between different social networks. If users from different networks cannot communicate across platforms, they will have an increased incentive to join the largest network. Especially operators of smaller networks should therefore have an interest in allowing users to communicate with users of other larger networks in order to compensate for possible disadvantages due to insufficient network size. In contrast, large networks have no incentive to operate with other networks because they have an interest in binding users to their network. Without such interoperability, a large user base of an established service presents a market entry barrier to other similar services. For example, in case of search engines, switching costs for users tend to be high due to strong direct network effects and coordination costs. High switching costs result from the user's point of view on the one hand in particular from the contacts, which cannot be transferred with a move to a less popular network.⁶ Lack of data portability can therefore increase the switching costs for users and increase the lock-in effect. Therefore, a social network with a large user base has more space for abusive behavior. Platform differentiation can help mitigate concentration trends as parts of users move to a new platform due to heterogeneous preferences. In many cases, however, it can be assumed that these are specialized services that focus on a specific group of users such as professionals (LinkedIn and Xing) or the emphasis on specific functionality such as sharing of images (Instagram). Similar to the case of ad-supported search engines, indirect network effects between users and advertisers in social networks are likely to be present insofar as a large network with many users is more attractive for advertisers than a smaller network. Since adverti-

⁶ R. Funta, *Privacy policy and the transfer of personal data between the EU and the US*, "Justičná Revue" 2017, 8–9.

sers pay per ad or per click, the benefit of having a larger network is likely to be that it has more information about user interests that allow it to clearly display advertisements. Conversely, it is more unlikely that users would prefer a network with a larger number of advertisers. High investment costs, e.g. for the construction of large server facilities, should play a subordinate role in terms of market entry. Although operators of large social networks have large server systems, computing capacities can also be rented at short notice, so that smaller networks do not have disadvantages due to high fixed costs.

Potential competition problems

Incentives for excessive collection of user data

User data plays a central role in the business model of advertising-financed social networks in many respects. On the one hand, network operators have an interest in users disclosing their personal information to other users in order to increase the attractiveness of the network, since social interaction is only made possible by sharing of personal information. Since the willingness of users to disclose personal information also depends on how secure this information is from unwanted access by third parties, social networks also have an interest in ensuring a high degree of data security. Conflicts of interest between operators and users of social networks may arise with regard to the use of personal data when evaluating user data for promotional purposes. Accordingly, the General Terms and Conditions of many services often provide far-reaching user consent in the processing of the data. Such behavior is favored if the statutory minimum requirements for transparency in the market are not sufficiently implemented. Following minimum requirements have to be in place:

- ❑ Civil law transparency requirement (General Terms and Conditions must be formulated so that the rights and obligations of the contracting party are presented as clearly, simply and precisely);
- ❑ Requirement for the use of data (the creation of user profiles for advertising purpose or market research is only permitted if the user has been informed of the right of objection and has not objected);
- ❑ Prohibition of unfair competition through misleading (providers of Internet services may not carry out any commercial activity that contains misleading

information about essential features of the service or the price or deprives consumers of essential information).⁷

Failure to comply with minimum legal requirements for the design of the collection and use of data may lead to situations in which social network operators (1) enforce decisions on users without their consent (e.g. acceptance of particularly extensive data access); (2) restrict users' decision-making possibilities by the design of the conditions of use or by technical measures (e.g. by aggravating deletions or exclusion of data portability) or (3) collect more commercially exploitable data. The above mentioned behaviors can be problematic from data protection or consumer protection perspective. However, in the event of effective competition, it can be expected that the risk of such behavior will be limited by allowing consumers to choose alternative services. However, strong network effects that are favored by lack of interoperability and high switching costs can lead to a lock-in situation for users who foster market concentration. In general, in the market for social networking services, it can be seen that providers are trying to increase the attractiveness of platforms by integrating new services and functions. Facebook⁸ offers software developers an interface for programs that are integrated into the user profile and can access personal data with the appropriate user permission. These are mainly games and other communication applications. In addition, users have the opportunity to provide content such as text, images and videos from the websites of other providers to other users of the social network. The currently common references to content outside the network via links would decrease accordingly. The goal should be to serve users, especially on mobile devices. From possible cooperation between the social network Facebook and various content providers could benefit stakeholders in a variety of ways. The social network would increase its appeal to users and advertisers by allowing users to see content directly on the network and display additional advertising. For content providers, such collaboration could be attractive as content gets more attention through its prominent placement on the network. In addition content providers may possibly be involved in the additional advertising revenues. Content providers that do not cooperate with Facebook may have a disadvantage compared to other providers if their content is not presented in a similar way on Facebook. How this will (or may) affect the media market in the long term remains to be open.

⁷ M. Petr, Z. Tonarová, *Soutěžní právo, dominance a regulace "příliš vysokých" cen*, "Pravni Rozhledy" 2010, 12.

⁸ R. Funta, *Facebook from competition law point of view*, "Justičná Revue" 2018, 70(1).

Further development of the product portfolio

From competition law perspective it is not easy to estimate current plans of Facebook to expand with the Facebook Messenger. This messenger was originally developed as a communication service (similar to e.g. Microsoft Messenger or WhatsApp). Extension of Facebook Messenger (to turn the service into a platform for mobile applications) takes into account the fact that users' behavior appears to be changing. Users can customize the services they want to use. In principle, they can also choose alternatives to the services offered by Facebook. One example was WhatsApp as an alternative to Facebook Messenger before being acquired by Facebook. Facebook has responded to this evolution by acquisition of some providers of complementary or competing services (e.g. Instagram, WhatsApp). Facebook was like some other providers of large Internet platforms, which have also acquired smaller, often mobile services and integrated them into its portfolio. Other than suspected, Facebook has not integrated all of the acquired services into its social network.⁹ Especially the services Instagram and WhatsApp, which are very popular among users, are marketed separately. Thus, Facebook takes into account the fact that users who use only Instagram or WhatsApp, but not the social network of Facebook, according to their personal preferences have only interest in the aforementioned services. However, Facebook has created an opportunity to use user data by changing its user terms and conditions (T&Cs). This allows data to be merged and evaluated so that the services can be developed in a consistent manner and a unified offer can be made. At the same time, Facebook also has the option of maintaining its own connection to users even if users use the services of other providers that are integrated in Facebook Messenger. Likewise, the user data according to the change in terms and conditions can in principle be evaluated uniformly for advertising purposes and used commercially. With these adjustments, Facebook reduces the entrepreneurial dependence on the success of its social network. The evolution of Facebook Messenger provides the opportunity to further develop the business model of operating a social network based on the collection of user data in such a way that Facebook maintains its connectivity with users and can continue to use the user data collected so far, even if users should use the social network only sporadically or not at all. Facebook's development parallels the evolution of Google's portfolio in terms of mobile usage.¹⁰ Google¹¹ has also taken over YouTube, a popular platform that is

⁹ EU Commission, decision of 3 October 2014, M.7217 – Facebook/WhatsApp, 136 et seq., 159 et seq., 184 et seq.

¹⁰ R. Funta, *The Google case: opportunity or protectionism?*, "EU Law Journal" 2016, 2.

¹¹ Idem, *Google's Android operating system from legal perspective*, "Justičná Revue" 2018, 4.

suitable for mobile use. At the same time, however, Google has also developed additional services with the Android operating system and the Google PlayStore, which are used on a mobile basis and which also allow Google to maintain the connection to users even if these applications have other provider.¹² The expansion of the services offered by mobile platforms and services can be explained by changing user preferences.¹³ However, it may be associated with competition risks where services are bundled by a dominant undertaking or if they are enforced by such a company on the market¹⁴ by other means which hinder competition by other service providers or exploit user loyalty to the services concerned.

Legal assessment of potential abuse

Antitrust-relevant potential of abuse can only be assumed in the case of dominant market services.¹⁵ Abuse of market power¹⁶ is conceivable in market dominating social networks in two ways. First, the operators of social networks could hinder competitors, for example by preventing other services from providing their own services to users, or by expanding their offer in an anticompetitive manner (so-called exclusionary abuse).¹⁷ On the other hand, abuse could result from excessive data collection by the companies concerned and excessive restrictions of users to limit such data collection (so-called exploitative abuse).¹⁸ The anti-competitive expansion of services through bundling of services has not yet been the subject of regulatory action in relation to social networks. By contrast, the question of hindering competitors by refusing to embed third-party content in their own websites has already been subject of a U.S. American lawsuit. One reason for the social network operator's refusal to embed foreign content may be that content providers may be able to participate in the success of the platform by embedding it, without contributing to the up-front investment associated with its deployment.¹⁹ In general, measures which make it difficult to switch users to a competitive service (e.g. data portability

¹² Idem, *Google & Facebook vs. Art. 102 TFEU*, [in:] *"Days of EU Law" Effects of EU law on national legislation*, Győr 2017.

¹³ Idem, *Some remarks on the Google ECJ ruling (C-131/12)*, "Krytyka Prawa" 2014.

¹⁴ Idem, *Binnenmarkt der Europäischen Union: Rechtsgrundlagen*, Brno 2015.

¹⁵ R. Funta, L. Golovko, F. Juriš, *Európa a európske právo*, Bratislava 2016.

¹⁶ K.D. Borchardt, *Die Rechtlichen Grundlagen der Europäischen Union*, 4. ed., Heidelberg 2010.

¹⁷ P. Svoboda, J. Munková, J. Kindl, , *Soutěžní právo*, 2. ed., Praha 2012.

¹⁸ R. Funta, *Abuse of a dominant position in EU and US Law*, 2. ed., Brno 2011.

¹⁹ *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM (Rzx), 2007 WL 6865852 (C.D. Cal. June 4, 2007), confirmed: 304 F. App'x 554 (9th Cir. 2008).

or interoperability restrictions) have to consider the fact that dominant companies are in principle not obliged to facilitate or otherwise help competitors to enter the market. The potential abuse through excessive data collection is not necessarily based on a proven infringement, but on the imbalance of the performance of the Internet service (in this case, for example, the possibility of social interaction) and the return of users (allowing access to personal data, so-called exploitation abuse).²⁰ An abuse in relation of the service provider to the users is also considered, if the service is provided in a multi-sided relationship (for example, because data without concrete context with the service for the users may be commercially exploited).²¹ The evidence of such abuse, however, encounters considerable difficulties.²² On the one hand, this is due to the vague legal standard of assessment (what does “excessive” mean?).²³ On the other hand, the offer of the relevant service provider may also be so complex or user-specific. This creates obstacles, for example because it requires a situation-dependent or user-dependent assessment of the relevance of the service in question.

A need for regulatory measures?

Similar to search engines, there is a question of a legislative (regulatory) need which is discussed also by social networks. From our perspective there is currently no need for amendment in competition law. In several areas, however, it seems necessary to strengthen legal protection on the side of Internet users.

Need to strengthen data protection

As far as there is a risk that operators of social networks bind their users excessively, this risk should be limited above all by a strengthening of user rights. In this respect, measures have already been initiated or at least proposed, of which the “right to be forgotten” established by EU case law²⁴ and outlined in the General Data Protection Regulation (GDPR) should be emphasized in the present context. It has

²⁰ R. Whish, D. Bailey, *Competition Law*, 7. ed., Oxford 2012.

²¹ V. Karas, A. Králik, *Právo Európskej únie*, Bratislava 2012.

²² L. Tichý, R. Arnold, J. Zemánek, R. Král, T. Dumbrovský, *Evropské právo*, 4. ed., Praha 2010.

²³ Judgment of 14 February 1978, Case 27/76, United Brands Co. v. Commission [1978] ECR 207, para. 235 (“Inappropriate prices”).

²⁴ Judgment of 13 May 2014, Case 131/12, Google Spain SL and Google Inc. v. Agencia Española de Protección [2014] ECLI:EU:C:2014:317, para. 92.

been also facilitated the data portability in the framework of the General Data Protection Regulation. This represents an effective way to limit the market power of individual social networks. On the one hand, possible switching costs would be considerably reduced and the simultaneous maintenance of multiple user accounts in different social networks would be facilitated. Also incentives could be created to establish social networks with stricter data protection standards.

Need to further develop consumer protection

Consumer protection problems in social network services give reason to further development of tools for consumer protection on the Internet. In particular, it makes sense to take measures that oblige Internet service providers to better inform users about the effect of their consent and to increase the ability of users to enforce their privacy interests. In addition, the provision of paid services, where it will be refrained from advertising and exploiting data for this purpose, may help to meet users' privacy concerns. For example, Google's video platform YouTube offers an ad-free payment. On the basis of such market solutions, users are given a special legal right to opt for internet services, either deny the use of their data and use the respective service, but with non-user-friendly advertising or to agree on it and obtain user-friendly advertising. Specifically, it would (then) be necessary to determine to what extent the user, if he/she so wishes, should be informed about individual uses of his data before he/she can give effective consent. Such a legal right could help to effectively strengthen data protection beyond the provisions of the General Data Protection Regulation. This solution should be considered, at least in the case of the payment models for ad-free use of services. Nevertheless, the current information-based approach to consumer protection requires review and, if in doubt, should be replaced by a more nuanced approach. In particular, attention should be paid to a clearer terms and conditions provisions. An initiative of the consumer protection authorities to monitor the markets for digital goods and services in order to provide consumers and government regulators with early information on possible undesirable developments has to be welcomed. This will help to improve contract parity between Internet service providers and users.

Concluding remarks

In addition to search engines, a social network is an important digital service for many Internet users. Social network services such as Facebook, Xing, or Twitter provide vital platforms for communicating, creating, and sharing content as part

of a modern, user-driven Internet. Concentration tendencies in the market for social network services result in particular from network effects. The more members have the particular social network, the higher the attractiveness of the network for the individual. Concentration tendencies are also favored by a lack of interoperability between different social networks. If users of different networks cannot communicate beyond platforms, they have greater incentive to look for the largest network. A large user base of an established provider represents a market entry barrier for other services. An antitrust-related potential for abuse²⁵ exists in case of market-dominant social networks in two respects. First, the operators of social networks could hinder competitors, for example by preventing other services from providing their own services to users, or by expanding their offer in an anti-competitive manner (so-called exclusionary abuse).²⁶ On the other hand, abuse could result from the collection of data by the companies concerned and the limitation of users' ability to limit such data collection (so-called exploitative abuse). From our point of view there is no need to change competition law in relation to social networks. However, legal measures would make sense, if they would oblige Internet service providers to better inform users about the effects of their consent, and to increase the ability of users to enforce their privacy interests. On the other hand, the current information-based approach to consumer protection requires review and should be replaced by a more nuanced approach. In particular, attention should be paid to a clearer wording of the companies' terms and conditions. The fundamental relationships and complexity of multi-side platforms need to be considered by competition authorities and courts in the competitive assessment of specific cases.²⁷ It is important to include all sides of a platform in the analysis and to record their economic significance, both direct and indirect. The assessment of the competitive situation on multi-side platforms requires an overall view in which factors other than market shares are to be considered more important, such as network effects, the availability of user data and the dynamism on the market.²⁸ The importance of data for the economic success of companies should be given more consideration in competition law analysis. State control of the search algorithm, if it were technically feasible at all, would require substantial public funding. The proof of an abusive design of the algorithm would also be difficult to achieve. It should be noted in this context that the operator of a search engine is not dependent on

²⁵ P. Svoboda, *Úvod do Evropského práva*, 3. ed., Praha 2010.

²⁶ A. Jones, B. Sufrin, *EU Competition Law: Text, Cases, and Materials*, Oxford 2014.

²⁷ R. Funta, *EU competition policy and online platforms*, "EU Law Journal" 2017, 2(1).

²⁸ V. Šmejkal, *Výzvy pro evropský antitrust ve světě vícestranných online platform* "Antitrust: Revue Soutěžního Práva" 2016, 4.

influencing the algorithm in order to achieve advantages. Also, an obligation to publish the search algorithm is not to be advocated. If the algorithm were publicly known, web site operators would be able to optimize their pages to significantly reduce their relevance for displaying search results. Finally, an obligation to disclose or split the web index with competing search engines is not to be endorsed as it would eliminate incentives to create and constantly update the index.

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