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Abstract

Big data is becoming the center of attention of many competition authorities in recent times, and the Hungarian Competition Authority is no exception to that. The paper takes a closer look at the Hungarian Competition Authority's competition supervision procedure the subject of which was the social media platform provider Facebook and whether its communication regarding its services being "free" constitute in any way an unfair commercial practice. The paper proposes an alternative approach as regards the legal basis that the Hungarian Competition Authority could have taken when bringing its decision.

I. Introduction

Personal data, and data itself, is gaining crucial importance in today's business world. Many aspects of our life are somehow generating data (including personal data), which might seem for us as having no value at all. By analogy, let's think of a drop of water. What importance does that one drop have in itself? Now: let's think about what happens if we gather many drops of water, let's say 3.3 billion of them. This is the number of monthly active users that Facebook claimed to have in connection with its different products in the fourth quarter of 2020.[1] Now that many drops would make a difference. Make no mistake, this is not a paper on mathematical calculations, so everyone can do the math for themselves.[2] My intention was only to demonstrate the amount of data that, among others, Facebook disposes of based on the number of its active users. I'm not saying that this is blameworthy, as having a dominant position isn't either. What I'm saying is that it is an **important asset**, and it was only a matter of time that authorities and legislators start taking into consideration this asset-like nature of data as well. The goal of this paper is not to conclude whether or not data can be used as a payment for certain services, but to highlight the most important findings as regards the communication on the "free" nature of Facebook's services and to analyze whether the Hungarian Competition Authority (hereinafter "HCA") took the right approach as regards the legal basis it chose for its competition supervision procedure against Facebook.[3]

II. Since when provision of personal data equals payment of a price?

[1] https://www.statista.com/statistics/947869/facebook-product-mau/
[2] One litre of water contains approximatively 20 thousand drops, which brings us to 165 thousand litres.
[3] Decision nr. VJ/85-189/2016, Facebook Ireland Ltd. (hereinafter the „Facebook Decision").

First, I would like to draw some attention to the legal possibilities in considering the provision of personal data as consideration in return of services provided by a company. The Directive – referred to by the HCA as well – on the supply of **digital content and digital services**[4] to be transposed by July 2021, will apply *„to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price.*"[5] However, the Digital Content and Digital Services Directive will also apply in case if no price is paid by the consumer, but the consumer provides or undertakes to provide personal data to the trader. There are some exceptions to the above. When the personal data of the consumer is exclusively processed by the trader for the provision of digital content or digital service or when the processing is necessary to comply with legal requirements and the trader does not process the data for any other purpose. In these cases, the Directive is not applicable.

Moreover, there is another reference of the HCA which is worth mentioning here. It refers to the European Parliament legislative resolution of 17 April 2019 on the proposal for a directive of the European Parliament and of the Council amending certain directives as regards better enforcement and modernisation of EU consumer protection rules (see paragraph 45 of the Facebook Decision). Since then, the legislative proposal became a directive: the Directive on the better enforcement and modernisation of Union consumer protection rules[6]. It establishes similar rules as the one referred above.

It amends Directive 2011/83/EU of the European Parliament and of the Council on consumer rights (hereinafter Directive on Consumer Rights) by replacing paragraph 1 and adding paragraph 1a. to its Article 3. According to the modified paragraph 1, Directive on Consumer Rights will be applicable to cases when the consumer pays or undertakes to pay a price. Based on the recital (33) of the Better Enforcement Directive, the rules of Directive on Consumer Rights have already applied to cases where the consumer provided its personal data as payment, but **not to cases when the consumer did not undertake to pay a price** (either in money or by provision of personal data) as part of the service contract, but did provide it anyway, i.e. paying unknowingly for the service.

According to the newly added paragraph 1a., the Directive on Consumer Rights should also apply if the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and **the consumer, in exchange, undertakes to provide or provides personal data.**[7]

[4] Directive (EU) 2019/770 of the European Parliament and of the Council of May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. (Hereinafter the Digital Content and Digital Services Directive)

[5] Article 3 of the Digital Content and Digital Services Directive.

[6] Directive (EU) 2019/2161 of the European Parliament and of the Council amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. (Hereinafter the Better Enforcement Directive).

[7] There is an exception here as well, if the personal data is only processed for the provision of the digital content.

The transposition of this legal act shall be done by Member States by 28 November 2021, and the rules should be applied by 28 May 2022. However, even though the Better Enforcement Directive had already been published on 27 November 2019 – 9 days before the HCA's Facebook Decision – the authority did not refer to it, only to the legislative proposal.

The main difference between the two acts is that the first applies to digital content and digital services specifically, and the second one applies to contracts between traders and consumers in general.[8]

Thus, the provision of personal data could already equal payment in cases when the consumer entered into a contract for the supply of e.g. **online digital content** (i.e. not provided on a tangible medium) regardless of whether the consumer paid a price in money or provided personal data instead. However, the Directive on Consumer Rights did not cover cases in which the consumer did not actually pay (with money or personal data) for the content or the service. With the changes entering into force as regards the Directive on Consumer Rights, its rules and wording will be consistent with the Digital Content and Digital Services Directive. This entails that in case of digital content (supplied either on tangible or non-tangible medium) and digital service, the provision of personal data will be regarded as consideration where **the consumer provides or undertakes to provide personal data to the trader.**

At the level of the European Union, the approach has shifted from a more *"liberal economic perspective"* to a *"constitutional-based"* one in the field of digital technologies.[9] The described changes might be the part of this shifting. However, the newly introduced and modified rules governing cases where the consumer provides or undertakes to provide personal data for digital content or digital services will only be applicable by 1 January 2022 and by 28 May 2022 respectively. Even though, there are already at least two cases in the European Union in which the national competition authorities of the EU Member States stated that Facebook users are "paying" by providing their personal data to the tech giant in exchange of its "free" services. These Member States are Italy and Hungary. In that regard, the author of this paper is of the opinion that a shifting of approach and newly established rules applicable only in the future do not necessarily justify the decision of the HCA.

On the one hand, the HCA, even when it is conducting unfair commercial practices cases, is not entitled to apply other acts than the Hungarian transposition of the UCPD (see below) On the other hand, the authority evaluated the conduct of Facebook from 2010 to 2019. In that period, as the above described rules are only becoming applicable in the future, were not in place and the shifting of EU approach was still very much in motion as well.

III. The Hungarian Competition Authority's Facebook case

[8] Moreover, the second one includes a stipulation as regards the supply of the digital content: namely that it applies to such content not supplied on a tangible medium.

[9] Giovanni de Gregorio: *The Rise of Digital Constitutionalism in the European Union.* International Journal of Constitutional Law, 2020. p. 1.

The HCA imposed on Facebook Ireland Ltd. (hereinafter "Facebook") on the 6th of December 2019 a competition supervision fine of HUF 1,2 billion. According to the HCA's decision, the company's claim directed to Hungarian users from January 2010 until 12th August 2019 on its homepage (and until 23 October 2019 in its Help Centre) *"relating to its service being free",* breached Article 3(1) with the conduct described in Article 6(1)(c) of the Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices (hereinafter "UCPA").

Article 3(1) of the UCPA establishes that unfair commercial practices shall be prohibited. According to Article 6(1)(c) of the UCPA, a certain commercial practice is misleading if the information it contains is false (i.e. untruthful) or deceives (or able to deceive) the consumer in relation to the price or to the manner in which the price is determined, or to the discount available or the existence thereof and based on this false or deceiving information the consumer makes a transactional decision that the consumer would not have taken.

The HCA arrived to this conclusion by using the so-called pyramid structure of unfair commercial practices investigations, meaning that the authority had started from the most severe, black-listed infringement of Paragraph 20 of the Annex of the UCPA, and then went a step lower to the less-severe option of Articles 6 of the UCPA. In the Facebook Decision, the HCA stopped at the second step, but if not even the requirements of the articles of this second step of the pyramid are met, it applies, if there is an infringement in its opinion, Article 3(2), the so-called general clause of the UCPA.

III.1. Nulla poena sine lege, or?

We saw that in case if the consumer pays for a certain online digital content or service, the payment can be made either with money or with personal data. However, it was not clear what happens when the consumer is using a service advertised "free" but at the same time providing personal data for it.

The question arises: what was before, the proposal of the above mentioned modifications and newly established rules or the initiation of the Hungarian Competition Authority's procedure?

The European Commission proposed wording for the Digital Content and Digital Services Directive in 2015.[10] The HCA initiated its competition supervision proceeding on 10 October 2016 against Facebook Ireland Ltd. However, at that time, the investigation did not cover the objection to Facebook claiming that it provides its services free of charge. This only became the center of attention of the HCA from the 10th of March 2017, when it extended the scope of its investigation to the said claims of the company. Accordingly, the HCA did refer to the Directive directly in its Facebook Decision (see 243.) As regards the Better Enforcement

[10] https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en

Directive including the modifications of the Directive on Consumer Rights, the proposal of the European Commission dates back to 11 April 2018.

Thus, we can say that the HCA carried out in advance what still is not applicable to this day and fined a practice which took place from 2010 to 2019 that was not and still is not regulated by any applicable legal rules if we do not consider the UCPA.

The HCA, however, is not the alone in this. The Italian Competition Authority (hereinafter "ICA") also fined Facebook objecting the same communication regarding the services being "free". The Italian authority started its investigations in April 2018, and imposed its fine in November 2018.[11] The ICA established that the tech company Facebook misled consumers into registering to the platform but did not *"adequately and immediately"* informed them when creating their accounts that the provided by them will be used by Facebook for commercial practices.[12] The two authorities were thus concluding their investigations in parallel, but it was the Hungarian Competition Authority who first centered its already on-going investigation onto Facebook's practices around the communication of the "free" service.

The HCA basically objected that Facebook had been communicating that its services were free but at the same time generated revenues related to the data collected on its users. According to the HCA, this communication was an unfair commercial practice as it was false in saying that the service provided by Facebook is free of charge and thus the company violated Article 3(1) of the UCPA by misleading its consumers with committing the conduct specified in Article 6(1)(c) of the UCPA.

III.2. The relevant product and the relevant market

The HCA defined the relevant product as the service provided by Facebook on its social network site, the Facebook platform (see paragraph 35 of the Facebook Decision). The authority described the platform as two-sided, with consumers on one side (so-called subsidy side) and undertakings (so-called money side). Consumers are users: they use the services *"without any pecuniary charge".* Undertakings can be of any kind using the different data-driven marketing options of Facebook. However, contrary to consumers, these undertakings are paying for the services of the platform.

Both as regards the supply side and the demand side of the relevant product market, the HCA refers to several sources as regards online platforms and zero pricing, the reader has the feeling that the HCA is giving a collection and a recension of the available academic literature and specialist reports on the subject.

[11] Press realease of Autorità Garante Della Concorrenza e Del Mercato: Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' data for commercial purposes. Rome, 7 December 2018. https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes

[12] Ibid.

IV. The HCA's take on the promise of "free": right or wrong approach?

Unfortunately, the defense of Facebook included in the public version of the HCA's decision does not say much because of the protection of the company's business secret. What we can derive from it seems obvious for a company under proceedings in an unfair commercial practices case. Facebook argued that its services are *"effectively free"* and that *"users do not need to make any pecuniary contribution for the use of the platform, and in the course of the registration required for the use of the service, users need to provide only four types of data."*[13] In the company's opinion, the authority is mistaken about the business model of Facebook. The company emphasized that an average Hungarian consumer understands free as there is no monetary payment obligation on their part.[14] Facebook argued that the HCA should take into account the *"obvious benefits that the public derives from the availability of services that do not require monetary payment"* and it also referred to the fact that in another case the Berlin Court established that the *"free nature of the service […] do not constitute an infringement"*.[15]

As regards the HCA's arguments on Facebook services being free, it concluded that the conduct of Facebook did not amount to a *per se* infringement based on paragraph 20 of the Annex of the UCPA, because this paragraph includes the notion of unavoidable cost, the meaning of which would be called into question. Thus, the HCA, in the pyramid structure, went one level lower, and stated that Facebook conduct has to be evaluated rather under Article 6(1)(c) of the UCPA. There are thus two questions that the HCA had to find an answer for: is Facebook's practice misleading in relation to the price of the service and is this practice likely to distort consumer decision?[16]

The authority then goes on to decide whether the company's practice was able to influence consumers' decision, then takes under scrutiny the concept of data as consideration and the use of the word "free" concerning the service provided by Facebook.

As regards whether data can be a consideration, the HCA arrives to some curious conclusions. It says that provision of consideration and remuneration are both synonyms of payment and that in case of Facebook's services, instead of paying with cash, users pay with their data, their consumer activity and all the related (privacy and other) risks that they take.[17] The HCA concludes that Facebook converts these data into cash by receiving payment from advertisers who, in return, publish commercial practices targeted to users deemed to be interested in them.[18] This targeting is, according to the HCA, done based on *"highly precise criteria developed on the basis of the user data provided or collected"*.[19]

[13] Paragraph 133 of the Facebook Decision.
[14] Paragraph 134 of the Facebook Decision.
[15] Paragraph 165 of the Facebook Decision.
[16] Paragraph 234 of the Facebook Decision.
[17] Paragraph 247 of the Facebook Decision.
[18] Paragraph 247 of the Facebook Decision.
[19] Paragraph 247 of the Facebook Decision.

With the use of the word "free", the HCA concluded that Facebook mislead consumers as they did provide consideration, as already highlighted above, with the provision of their data and activity.[20] In its very next paragraph, however, the HCA's decision contradicts itself: it says that *"also claims that present true facts, but which in light of all the circumstances of their presentation, may mislead consumers when they are making transactional decisions".*[21] The HCA goes on when stating that in the business model of Facebook, *"in light of its characteristics, the message "free" diverts consumer attention from the magnitude and added value of the consideration provided for the use of the service and the potential risks associated with its use."*[22] However, **in the opinion of the author of this paper, a certain statement is either false or true but presented as misleading, but it definitely cannot be both:** the services of Facebook are either not free contrary to its communication, as argued all along in the HCA's decision because of the economic value the data provided by consumers have, or it is free but presented in a misleading way by diverting the attention of consumers from the actual value of the consideration.

Another interesting statement is that *"the legitimate version of the claim concerning "free" use is not the claim "not free" but arrangements that clearly and understandably convey a message describing the business model of Facebook."*[23] However, in this regard, the HCA draws attention of the reader to the fact the company did change its commercial practice during the competition supervision proceedings to be in conformity with the above expectation and also without harming its own business model or encountering a detrimental effect on its own operations.[24]

If one visits the Facebook website today, it notices that the claims regarding its services being "free" are gone. Moreover, in its Terms of Service, Section 2 is dedicated to a description of how it funds its services.[25] This section describes the business model of the company which is based on users agreeing to be shown ads that advertisers (business and organizations) pay Facebook for. It is stated that personal data (information on activity and interests) is used in order to target the advertisement better to the personal interest of consumers. However, Facebook emphasizes that it does not sell personal data, it only makes it possible for advertisers to target the relevant audience (e.g. based on interests, age groups etc.). Facebook adds that it provides these advertisers with reports as well on how their ads perform (e.g. what are the interests of the person who clicked on a certain ad, where does this person live etc.) and without specific permission, the company does not provide advertisers information based on which a user might be identified and/or contacted directly.

In the view of the author of this paper, **the HCA was wrong in choosing as the *only* legal basis of its decision Article 6(1)(c) of the UCPA and the reason for that is stated in the**

[20] Paragraph 257 of the Facebook Decision.
[21] Paragraph 258 of the Facebook Decision.
[22] Paragraph 258 of the Facebook Decision.
[23] Paragraph 259 of the Facebook Decision.
[24] Paragraph 259 of the Facebook Decision.
[25] https://www.facebook.com/legal/terms For the wording of Section 2. see Annex 1 of the present paper.

Facebook Decision itself in the above described paragraph 259. It is so because, if the legitimate version of Facebook's services being "free" is not the claim that they are "not free", and if the described adjustment regarding the detailed description provided to consumers as regards the business model of Facebook, it is clear that what the HCA found to be missing in Facebook's communication is that detailed description. This newly added description, however, does not say that there would be any kind of transaction or barter involving the exchange of Facebook's services for users' data and activity. It is only described as part of the business model itself.

Thus, the opinion of the author of this paper is that the **HCA should have – instead of only basing its decision on Article 6(1)(c) of the UCPA** relating to the price to be paid in return for a certain good or service – **on Article 7(1) of the UCPA as well.** This article establishes the prohibition of **misleading omissions**.[26] For the communication of the "free" nature, apply Article 6(1)(c) and require the tech company not to use this promise in its communication in the future (prohibition decision), and for the misleading omission of not informing consumers in general and potential Facebook users of the business model of the company involving the use and commercialization of personal data and other user activity, apply Article 7(1) of the UCPA.

V. Conclusion

As we have seen, the HCA, just as the ICA, took a shot with its unfair commercial practices gun at Facebook instead of going after it because of an antitrust infringement in relation to its data processing policy, as it was done by the German Bundeskartellamt. However, not surprisingly, all roads lead to big data and Facebook's business model based on making use of it. The approaches chosen are nevertheless different, and so far, they either involved consumer protection law considerations (UCPD based cases in Italy and Hungary) or a *mélange* of competition law and data protection law (Bundeskartellamt's case in Germany). The HCA's approach, in the opinion of the author of this paper, as described above, could have been more prudent, because this way, it seems that the authority arrived to a conclusion with leaving one step out from its equation and left a loop in its decision.

[26] UCPA, Article 7(1) A commercial practice shall be regarded as misleading if:
(a) taking into account all of its features and circumstances and the limitations of the communication medium, it omits or conceals material information that the average consumer needs, according to the context, to take an informed transactional decision, or provides such information in an unclear, unintelligible, ambiguous or untimely manner, or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and
(b) thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise (hereinafter referred to as "misleading omission").

Annex 1 – Section 2 of Facebook Legal Terms

"2. How our services are funded

Instead of paying to use Facebook and the other products and services we offer, by using the Facebook Products covered by these Terms you agree that we can show you ads that business and organizations pay us to promote on and off the Facebook Company Products. We use your personal data, such as information about your activity and interests, to show you ads that are more relevant to you.

Protecting people's privacy is central to how we've designed our ad system. This means that we can show you relevant and useful ads without telling advertisers who you are. We don't sell your personal data. We allow advertisers to tell us things like their business goal, and the kind of audience they want to see their ads (for example, people between the age of 18-35 who like cycling). We then show their ad to people who might be interested.

We also provide advertisers with reports about the performance of their ads to help them understand how people are interacting with their content on and off Facebook. For example, we provide general demographic and interest information to advertisers (for example, that an ad was seen by a woman between the ages of 25 and 34 who lives in Madrid and likes software engineering) to help them better understand their audience. We don't share information that directly identifies you (information such as your name or email address that by itself can be used to contact you or identifies who you are) unless you give us specific permission. Learn more about how Facebook ads work here.

We collect and use your personal data in order to provide the services described above to you. You can learn about how we collect and use your data in our Data Policy. You have controls over the types of ads and advertisers you see, and the types of information we use to determine which ads we show you. Learn more."