Facebook ./. Bundeskartellamt
The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V)

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The official German version of this decision can be found here:
http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-_V_.pdf
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HIGHER REGIONAL COURT DÜSSELDORF

COURT ORDER

Case VI-Kart 1/19 (V)

In the antitrust case
1. Facebook Inc.,
2. Facebook Ireland Ltd.,
3. Facebook Deutschland GmbH,
(…)

./.

Bundeskartellamt [Federal Cartel Office]

(…)

Further party to the proceedings:

Verbraucherzentrale Bundesverband e.V. (…) [a consumer organisation]

the 1st Cartel Senate of the Düsseldorf Higher Regional Court represented by the presiding judge Prof. Dr. Kühnen, the judge Lingrün and the judge Prof. Dr. Lohse decided on 26 August 2019

I. At the request of the applicants, the suspensive effect of their appeals against the statements in Sections 1 to 3 of the Bundeskartellamt's decision of 6 February 2019 (B6-22/16) is ordered.

II. The appeal shall be admissible.

Reasoning

I.

The Facebook Group develops and operates various digital products, Internet services and applications for smartphones ("apps"). The parent company is the first applicant; the second and third applicants are 100 % subsidiaries of the first applicant (all applicants together hereinafter also referred to as "*Facebook*").

Facebook's core product is the social network *Facebook.com*, which has been available in Germany since 2008 and was used daily by around 23 million users and monthly by around 32 million users in 2018. The network can be used by private users at *www.facebook.com* or *facebook.de* or via a mobile app. It offers private users a range of functions that enable them to network with friends and acquaintances and "share" content with them. When registering for the network, the user creates a "user profile" under his or her clear name, which he or she can use to provide personal information and a variety of other personal circumstances and to upload a profile photo. On this basis, the user receives his or her own Facebook page, which is subdivided into further sub-pages; reference is made to the Bundeskartellamt's decision with regard to further details, e.g. the display of reports by other private or commercial users or functions relating to communication with third parties in real time.

Facebook.com is not only usable for private users, but also for companies, associations or individuals who can post their own content to the social network in order to increase their reach. These "content providers" can set up their own sites, distribute their content on these sites and connect with private users via "subscriptions" or a "like" function.

The *Facebook*-group also offers a variety of free tools and products under the term *„Facebook Business Tools“* , which are aimed at website operators and other companies who can

integrate the "tools" into their own websites, apps and online offerings via programming interfaces predefined by *Facebook*. These include so-called "social plug-ins" such as the function buttons "Like" and "Share" as well as other functionalities and analysis services.

Facebook offers additional services beyond and independent of the social network. These include the product *Instagram*, which provides a medium for "sharing" photos and short video clips, and the *WhatsApp* service, which supports sending and receiving a variety of media such as text messages, pictures, videos, contacts, documents, locations, voice messages and calls. *Facebook* also offers the *Masquerade* service for editing and "sharing" photos and the *Oculus* product for selling "virtual reality" glasses and software.

Facebook finances its social network *Facebook.com* through online advertising, which is offered to content providers and other companies. This advertising is tailored to the individual user of the social network and aims to show the user the advertising that might be of interest to him based on his personal consumer behaviour, interests, purchasing power and life situation.

Private users do not have to pay a fee to use the social network. For these users, however, participation in the network depends on their acceptance of *Facebook's* Terms of Use when registering for the service. The consent serves the conclusion of the contract of use under inclusion of the terms of use. According to the terms of use, *Facebook* processes personal data, for the explanation of which reference is made in particular to the data or cookie guidelines provided by *Facebook*. According to these guidelines, *Facebook* collects user- and device-related data about user activities within and outside the social network. The user activities taking place outside the social network involve, on the one hand, visiting websites or using mobile apps from third-party providers that are connected to *Facebook* via programming interfaces (*Facebook Business Tools*) and, on the other hand, using other services belonging to the *Facebook*- Group, such as the above-mentioned services in particular, in relation to which data processing takes place "across the other *Facebook* companies and products".

In its decision of 6 February 2019, the Bundeskartellamt prohibited the data processing provided for in the Terms of Use and its implementation pursuant to Sections 19 (1) and 32 of the German Act against Restraints of Competition [Gesetz gegen Wettbewerbsbeschränkungen, GWB; for an English version see here] and imposed measures to stop it. The prohibition covers the conditions for the processing of personal data expressly stipulated in the Terms of Use and explained in detail in the Data and Cookie Directive, insofar as they concern the collection of user- and device-related data from the other Group-owned services and the *Facebook Business*

Tools and their combination with *Facebook*-data for the purposes of the social network (hereinafter also: additional data) without the consent of the users (resolution 1) [this refers to the Bundeskartellamt's decision to be found here in German and here in English]. In addition, the Bundeskartellamt has prohibited the implementation of these conditions with the actual data processing operations carried out by *Facebook* on the basis of the Data and Cookie Directive (resolution 2) and granted Facebook a twelve-month implementation period in order to adapt the conditions of use and their implementation and to clarify the Data and Cookie Directive accordingly (resolution 3). In addition, it requested an implementation plan for the adaptation within four months (resolution 3). Furthermore, the Office has ordered that the deadlines for implementation mentioned in the statement under No. 3 be suspended for the duration of the interim proceedings at first instance (resolution 5). Finally, in No. 4 of its decision, the Office clarified that there is no consent of the user if the provision of *Facebook.com* is made dependent on the granting of consent.

The Bundeskartellamt essentially stated the following reasons for its decision to discontinue the proceedings: *Facebook* is a dominant company on the market for social networks for private users in Germany and thus a norm addressee of the antitrust prohibition of abuse. In any event, the company infringed the prohibition of abuse under competition law (Section 19 (1) GWB) to the extent that, when registering for its network, it required private users to agree to contractual conditions which were inappropriate in view of the assessments of data protection law under the General Data Protection Regulation (GDPR) and which allowed *Facebook* to collect, link and use additional data generated outside the network. In this connection, *Facebook* is to be accused of abusing conditions to the detriment of private network users, who suffer damage in the form of a loss of control, since they can no longer dispose of their personal data in a self-determined manner with regard to the data conditions. In addition, the abuse had exclusionary effects to the detriment of competitors on the market for social networks and on third markets.

The applicants filed an appeal against the Bundeskartellamt's decision in due time and form; the appeal proceedings are pending before the Senate under case number *VI-Kart 2/19 (V)*.

In the present case, the applicants assert and apply for interim relief,

> to order the suspensive effect of the appeal,
>
> in the alternative:
>
> to order the suspensive effect of the appeal until the end of a possible summary procedure before the Federal Court of Justice in the context of a legal complaint

against the rejection of the aforementioned application or a non-admission complaint if the legal complaint has not been admitted.

The Bundeskartellamt requests

that the above applications of the applicants be rejected.

The content of the file, including the statements made in the contested decision, shall be referred to for further details of the facts and of the dispute.

II.

The applicants are successful with their main request.

Pursuant to Section 65 (3) sentence 3, sentence 1 no. 2 GWB, it is to be ordered in accordance with the application that the appeals of the applicants have suspensive effect, insofar as the appeals are directed against the - in this respect only relevant – resolutions of the Bundeskartellamt in Sections 1 to 3 of the contested decision. There are serious doubts as to the legality of these resolutions by the antitrust agency.

A. As is apparent from a reverse conclusion from Section 64 (1) GWB, the appeal against a termination order based on Section 32 (1) GWB has no suspensory effect. However, pursuant to Section 65 (3) sentence 1 and sentence 3 GWB, the Court may, upon request, order the suspensive effect of the appeal if there are serious doubts as to the legality of the contested decision (Section 65 (3) sentence 1 no. 2 GWB) or if enforcement would result in unreasonable hardship for the person concerned which would not be required by overriding public interests (Section 65 (3) sentence 1 no. 3 GWB). In any case, from the first-mentioned point of view, the expedited motion proves to be well-founded.

According to the settled case law of the Senate (cf. OLG Düsseldorf, Decision of 12 July 2016 - VI-Kart 3/16 (V), NZKart 2016, 380 = WuW 2016, 372, para 42 juris - *Ministererlaubnis EDEKA/Kaiser´s Tengelmann*; Decision of 4 May 2016, VI-Kart 1/16 (V), NZKart 2016, 291 = WuW 2016, 378, para 39 juris – *Enge Bestpreisklausel*; Decision of 25 October 2006 - VI-Kart 14/06 (V), WuW/E DE-R 2081, para 6 for juris - *Kalksandsteinwerk*; resolution of 8 May 2007 - VI-Kart 5/07 (V), WuW/E DE-R 1993, 1994 - *Außenwerbeflächen*; resolution of 5 March 2007 - VI-Kart 3/07 (V), WuW/E DE-R 1931, 1932, para 12 juris - *Sulzer/Kelmix*; resolution of October 23, 2006 - VI-Kart 15/06 (V), WuW/E DE-R 1869, 1871, para 41 for juris - *Deutscher Lotto- und Totoblock*; resolution of April 13, 2005 - VI-Kart 3/05 (V), WuW/E DE-

R 1473, para 16 juris - *Konsolidierer*; resolution of December 8, 2003 - VI-Kart 35/03 (V), WuW/E DE-R 1246, 1247 para 7 juris - *GETEC net*; resolution of 27 March 2002 - VI-Kart 7/02 (V), WuW/E DE-R 867, 868 para 12 juris - *Germania*; resolution of 11 April 2001 - VI-Kart 22/01 (V), WuW/E DE-R 665, 666 - *Net Cologne I*), there are serious doubts as to the legality within the meaning of Section 65 (3) sentence 1 no. 2 GWB if, in a summary review, the annulment of the contested decision is predominantly probable. It is irrelevant whether the concerns regarding the legality of the decision arise from factual reasons (e.g. insufficient fact-finding) or from legal (procedural or substantive) considerations. On the other hand, it is not sufficient if the factual and legal situation is open at the time of the required preliminary assessment.

B. Measured against this, there are serious doubts in this dispute regarding the legality. Even a summary examination of the factual and legal situation leads to the conclusion that the contested order to discontinue the proceedings must in any event be revoked for the reasons set out below. Contrary to the Bundeskartellamt's view, the data processing by Facebook which it complained about does not give rise to any relevant competitive damage or any undesirable development in competition. This applies both with regard to an exploitative abuse to the detriment of consumers participating in the social network of *Facebook* (see 1. below) and with regard to an exclusionary abuse to the detriment of an actual or potential competitor of *Facebook* (see 2. below).

1. Already after summary examination, the assumption of an abuse of exploitation in the form of an abuse of conditions to the detriment of the users of the social network of Facebook encounters far-reaching legal concerns.

a) There is no exploitative abuse in the sense of the example set out in Section 19 (2) no. 2 GWB. According to the aforementioned provision, abuse of market power occurs in particular when a dominant undertaking demands fees or other terms and conditions that deviate from those that would be highly likely to result from effective competition. It can be assumed that the Bundeskartellamt has correctly defined the relevant product and geographic market and that *Facebook* is the norm addressee of the abuse prohibition pursuant to Section 19 GWB on that market for social networks for private users in Germany. Furthermore, it can also be assumed as correct that the Office's assessment that the "Terms of Use" provided by *Facebook*, including the "Data Directive" and the "Cookie Directive", are conditions or terms of business within the meaning of Section 19 (2) no. 2 of the GWB. Nevertheless, *Facebook* cannot be found to have

violated the abuse prohibition in Section 19 Paragraph 2 No. 2 GWB. This is because the Office has not carried out sufficient investigations into an "as-if" competition and, as a result, has not made any meaningful findings on the question of which terms of use would have been formed under circumstances of competition.

b) On the basis of the findings made by the Office, Facebook cannot be accused of having abused its dominant market position within the meaning of Section 19 (1) GWB either. According to this general clause, the abuse of a dominant market position is prohibited.

aa. Admittedly, it is not excluded from the outset that damage to consumer protection may be regarded as a norm-relevant damage to competition within the meaning of Section 19 (1) of the GWB. This is based on the one hand on the desired alignment of national competition law with that of the European Union (see BGH [Bundesgerichtshof, Federal Supreme Court], judgment of 7 December 2010 - KZR 5/10, WuW/E DE-R 3145, para 55 - *Entega II*) and the implementation of that the thought of consumer protection in Art. 102 TFEU (see, for example, ECJ judgment of 13 February 1979 - C-85/76 [1979] ECR 461, paragraph 125 - *Hoffmann-La Roche* (on Article 86 of the former EEC Treaty)). On the other hand, the examples of the national prohibition of abuse also have a consumer-protecting function, such as the abuse of price levels and conditions pursuant to Section 19 (2) no. 2 GWB and the prohibition of price discrimination pursuant to Section 19 (2) no. 3 GWB (cf. BGH, judgment of 7 December 2010 - KZR 5/10, WuW/E DE-R 3145, paragraphs 24 and 55 - *Entega II*). There is no decision required in the current case on the conditions under which an abuse of price levels or conditions can exceptionally be recorded under Section 19 (1) GWB and assessed deviating from the standard of "as-if competition" prescribed by law in Section 19 (2) no. 2 GWB.

bb. In this matter, the conduct prohibited by the Office does not give rise to an anti-competitive result. This needs to be assessed with regard to the collection of user and device-related data from the company's other services (*Instagram*, *WhatsApp*, *Masquerade* and *Oculus*) as well as the *Facebook Business Tools* and the combination of these additional data with the *Facebook* data for the purposes of the social network. This is because only these additional data are the subject of the order of the competition agency.

(1) The input of additional data does not lead to any exploitation of private network users. The data in question - unlike a paid fee - can be duplicated without further ado, which is why their submission to *Facebook* does not weaken the consumer economically. They are also free

to make the data in question available to any third party, including Facebook competitors on the social networking market, as often as they like.

(2) From the point of view of an "excessive" disclosure of data, each of which can be assigned a certain market value (cf. in this respect *Körber*, NZKart 2019, 187 [191]), there is no exploitation of the Facebook user either. This is already the case because the decision does not contain any meaningful findings in this respect regarding the type, origin and quantity of the additional data in question.

In any way, the consideration of "excessive" data disclosure could not support the contested decision because it prohibits, without any differentiation whatsoever, the collection, linking and use of any additional data from the Group's other services (*Instagram*, *WhatsApp*, *Masquerade* and *Oculus*) and the websites or mobile apps connected to *Facebook.com* via programming interfaces, also insofar as the private users' participation in the social network provided by *Facebook* may be dependent on such data processing. Such a far-reaching prohibition could at best be justified if all the additional data mentioned without exception fall under the verdict of excessiveness. The Office has not established anything in this regard. In addition, for the negative judgment associated with an abuse of a dominant position it is necessary to find a considerable gap between the terms and conditions demanded and those in conformity with competition (cf. BGH, resolution of May 15, 2012 - KVR 51/11, NZKart 2013, 34 = WuW/E DE-R 3632 para 26 wfr – *Wasserpreise Calw I*; Decision of 14 July 2015 - KVR 77/13, BGHZ 206, 229 = NZKart 2015, 448 = WuW/E DE-R 4871 para 63 wfr – *Wasserpreise Calw II*), which is why not every excess of what is still permissible according to competitive standards leads to the assumption of abuse of market power. In this respect, there are even fewer findings by the competition authority.

(3) Instead, the Bundeskartellamt sees the user damage as a "loss of control" (see BKartA, Background information on the Facebook procedure of the Bundeskartellamt of 19 December 2017, p. 4 and of 7 February 2019, p. 5; reply of 29 May 2019, p. 35) and in this context focuses on the collection and processing of additional data - in violation of privacy laws - and the associated violation of the fundamental right of Facebook users to decide for oneself what to do with personal data ["right to informational self-determination"]. This consideration is not convincing.

(3.1) With the challenged decision, the Bundeskartellamt accuses *Facebook*, to have violated antitrust law, by exclusively of making the provision of its network service dependent on the fact that the additional data from the Group's own services or from third-party pages with programming interfaces (*Facebook Business Tools*) may be combined and used with the *Facebook* data. However, this additional data is collected and processed on the basis of Facebook's terms of use, i.e. with the consent of the *Facebook* user. In this situation, there can be no question of the user "losing control" over his or her data. Rather, data processing is carried out with the user's knowledge and will and is thus very much under his "control". The Office itself does not claim that *Facebook's* terms of use (including data and cookie guidelines) do not completely, understandably and accurately inform users about the content, scope and intended use of the data processing in question. There is also no evidence to support the assumption that *Facebook* obtains the users' consent through coercion, pressure, exploitation of a weakness of will or other unfair means, or that the company uses the additional data contrary to the agreement beyond the agreed scope. The fact that the use of the *Facebook* network is linked to the consent to the use of additional data does not mean a loss of control on the part of the user and does not constitute a predicament for the user. It merely makes it necessary to balance the advantages resulting from the use of an advertising-financed (and thus free) social network against the consequences associated with the use of the additional data by *Facebook.* The user can make this assessment uninfluenced and completely autonomously according to his personal preferences and values. The fact that it can turn out differently - as the considerable number of Facebook users (around 32 million per month) and non-*Facebook*-users (around 50 million) shows - does not even begin to prove that the user is being exploited. It is certainly no proof of a loss of control over the data.

(3.2) The Bundeskartellamt's argument does also not stand the test that the collection of data could threaten the material and immaterial goods of the users of the network, e.g. with regard to possible property offences ("identity theft", fraud, extortion) or from the point of view of the disclosure of income, whereabouts, diseases, political views or sexual orientation (cf. decision para 910). Apart from the fact that this point of view misses the orders of the contested decision, since they cover all additional data without consideration of the mentioned aspects, the remarks on this matter are insubstantial and meaningless. On the one hand the resolution of the Office does not show comprehensibly which dangers for users of the social network are caused directly and only by the collection and the processing of the additional data that are of interest here. On

the other hand, in this context the Office is discussing exclusively a data protection problem and not a competition problem.

(3.3) Finally, the Office's blanket assertion that private *Facebook* users, when submitting and passing on personal data, have difficulty in gaining an overview of which data are collected by which companies, to what extent and where they are passed on, and what the scope of consent to data processing is, is inadequate (cf. decision para 384; replyof 29.5.2019, p. 34). This is for two reasons. On the one hand, it is neither stated nor otherwise recognizable that and in which parts the disputed terms of use of *Facebook* should have any information deficits in this regard. The Office's argument that the customer is uninformed because he does not read the terms of use (decision para 385) is not valid in this context, because - as will be explained below - the failure to take notice is not based on *Facebook's* market power, but on the indifference or convenience of the *Facebook* user in the case of a realistic appraisal. On the other hand, the viewpoint of the "lack of overview and control over the processing of personal data" misses the resolutions of the contested decision. They do not prohibit *Facebook* from processing and linking the additional data because and to the extent that it is done without sufficient information for the *Facebook* user and without the user being able to control the processing of the data, but solely because it is done without the separate consent of the *Facebook* customer.

(4) According to all this, an abuse of market power by *Facebook* can be based solely on the assumption of the Office that the conditions of use at issue and the collection, linking and further processing of the additional data that take place in their implementation violate mandatory provisions of data protection law. In this respect, the Office derives from the case-law of the Federal Court of Justice in the decisions *VBL Gegenwert I* and *VBL Gegenwert II* that the inadmissibility of contractual conditions, after a balancing of interests carried out in the legal system (e.g. in the laws on Unfair Contract Terms) with sufficient reference to market power, also implies an abuse according to the balancing of interests to be carried out in the GWB (decision para 528), and that this approach is to be applied to all valuations of the legal system in so far as they concern the appropriateness of conditions in an unbalanced bargaining situation, if there is sufficient reference to market power (para 529). This view is not correct.

(4.1) It remains to be seen whether the terms of use used by *Facebook* and the data processing based on them comply with the requirements of the GDPR.

(4.2) At any rate, the Bundeskartellamt's view that the collection, linking and further processing of user data generated from other Group-owned services or the use of *Facebook Business Tools* - which is presumed to be contrary to data protection law - represents an exploitation of consumers participating in the *Facebook* social network that is relevant to antitrust law meets with serious reservations.

(a) The verdict of an abuse of market dominance presupposes a behavior that damages competition. This also applies within the scope of application of the general clause of Section 19 (1) of the GWB, in very general terms and therefore also in the relevant case of an abuse of exploitation to the detriment of the consumer.

(aa) The necessity of conduct that damages competition is already laid down in the wording of Section 19 (1) GWB ("abusive exploitation of a dominant market position") and, moreover, follows from the objective of the entire Cartel Act which is directed towards the freedom of competition, namely the safeguarding competition on the merits and the openness of market access (see BGH, judgment of 24 October 2011 - KZR 7/10, WuW/E DE-R 3446 para 37 - *Grossistenkündigung*). In the area of abuse of conditions, the findings are confirmed by the standard of "as-if competition" standardized in Section 19 (2) no. 2 GWB (see Monopolies Commission, XXII. Hauptgutachten 2018, para. 675; Körber, NZKart 2019, 187 (190 f.)). In addition, the case of abuse covered by the general clause of Section 19 (1) of the GWB also presupposes verdict which - as in the standard example cases of Section 19 (1) of the GWB - is based on a comprehensive balancing of interests (see BGH, judgment of 7 June 2016 - KZR 6/15, BGHZ 210, 292 = NZKart 2016, 328 = WuW 2016, 364 para 48 - *Pechstein/International Skating Union*). Since this balancing of interests is to be carried out according to the constant case law of the highest court, taking into account the objective of the GWB directed towards the freedom of competition (see, for example, BGH, resolution of 23 January 2018 - KVR 3/17, NZKart 2018, 136 = WuW 2018, 209 no. 92 – *Hochzeitsrabatte*; judgment of 7 June 2016 - KZR 6/15, BGHZ 210, 292 = NZKart 2016, 328 = WuW 2016, 364 para 47 – *Pechstein/International Skating Union*; judgment of 24 October 2011 - KZR 7/10, WuW/E DE-R 3446 para 37 - *Grossistenkündigung*), the abuse of market power in the entire scope of application of section 19 GWB presupposes conduct that damages competition by the dominant undertaking. An infringement of a law as such cannot be sufficient to constitute an offence.

(bb) Nothing else results from the *VBL Gegenwert* rulings of the Federal Supreme Court.

In the opinion of the Federal Supreme Court, *not every* use of an ineffective provision in general terms and conditions by a norm addressee constitutes an abuse of market power (BGH, judgment of 24 January 2017 - KZR 47/14, NZKart 2017, 242 = WuW 2017, 283 para 35 – *VBL Gegenwert II*). Even regarding the open wording in this respect, it cannot be inferred from this passage of judgment that any contractual condition contrary to unfair contract terms law imposed by a dominant undertaking is inevitably also an abusive contractual condition within the meaning of Section 19 (1) of the GWB. It can also not be inferred that an abuse of conditions pursuant to Section 19 GWB can only be denied - in the case of unlawful Terms and Conditions of the dominant undertaking - on the basis of defects of causality and not also on the basis of a factual lack of exploitation of other market participants. This applies because the market leader has a special responsibility only for competition, not beyond that for compliance with the legal system by avoiding any violation of the law (see Körber, NZKart 2019, 187 (190 f.)). Moreover, it is far-fetched to assume that the Federal Supreme Court intended to abandon its established case-law on the necessity of damages to competition as set out above by means of the cited open wording ("not every") and without further legal explanations. This is all the more true since the case in question did not give rise to any such action. In both *VBL Gegenwert* cases, the damage to competition by the market conduct practised by the dominant company was obvious. The clause on which the decisions were based made it inappropriately difficult for the other market side to terminate the contractual relationship with the norm addressee and thus led to a considerable impairment of the end consumers' freedom of economic disposition (exploitation). In addition, the clause impaired horizontal competition because it made it unfairly difficult for alternative providers of insurance services to establish their own contractual relationships with the customers concerned (exclusion). Against this background, the guiding principle of the BGH decision *VBL Gegenwert II*, namely that inappropriate business conditions, which make it more difficult to terminate a long-term contractual relationship with a norm addressee of Section 19 (1) GWB, regularly lead to an abuse of market power, obviously does not support the assumption that the Federal Court of Justice has abandoned the requirement of conduct that adversely affects competition within the framework of Section 19 (1) GWB. Such a requirement can certainly not be derived from the earlier decision *VBL Gegenwert* (BGH, judgment of 6 November 2013 - KZR 58/11, NZKart 2014, 31 = WuW/ DE-R 4037 Para 65 - *VBL Gegenwert I*).

(b) Exploitation of the users of the *Facebook* network by the conditions for the collection, combination and further processing of the additional data, which is detrimental to competition, does not result from the breach of data protection laws assumed by the Office.

(aa) The use of contractual conditions that are inadmissible according to the legal system does not in itself indicate a threat to the protected interests of the Cartel Act (freedom of competition and openness of market access). In this respect, nothing different can apply than to charges levied in trade in goods or services which are (wholly or partially) invalid for reasons laid down in the legal system. Section 138 of the German Civil Code (BGB) invalidates a fee agreement from the point of morals if it has a content disapproved of by the legal order (Section 138 (1) BGB) or if it has been concluded by exploiting a structural inferiority of the business partner (Section 138 (2) BGB). Such excessive fees or fees agreed under disproportionate conditions do not in themselves reveal any competition problem against which the Cartel Act intends to protect. This also applies if the fee agreement has been set by a dominant company. In view of the competition-related objective of the GWB, fees agreed in violation of moral standards are abusive only if they are agreed by a dominant company and it is certain that they would not have been formed in a hypothetical competitive scenario (arg. Section 19 (2) no. 2 GWB). This standard claims validity not only for fee agreements, but for all contractual terms and conditions. According to the legal concept of Section 19 GWB, fee agreements are nothing other than (main) cases of application of the terms and conditions of business. Accordingly, Section 19 (2) no. 2 GWB, according to its wording, already subjects fees and *other* terms and conditions of business to the same antitrust law test standard of " as-if competition". Contractual conditions incompatible with the legal system (such as § 138 (2) BGB or the law of general terms and conditions) as such only point to a *bilateral* imbalance between contractual partners (see Körber, NZKart 2019, 187 (191)), but not without further ado to a market already weakened by market dominance in its competitive structure, which with regard to these conditions takes or threatens to be further deteriorated (cf. ECJ, Judgment of 13 February 1979 - C-85/76, ECR 1979, 461 para 123 - *Hoffmann-La Roche*; Judgment of 6 December 2012 - C-457/10 P, NZKart 2013, 113, paras 98 and 150 - *Astra Zeneca v Commission*).

The fact that the illegality of a contractual condition alone cannot justify the allegation of abuse of market power within the meaning of Section 19 GWB follows from a further consideration. There is no objectively justified reason to leave unlawful contractual conditions not only to the relevant private prosecution or - as in the case of a breach of data protection law - to the respective supervisory authority, but also to the anti-trust authority's supervision of abuse if the contractual conditions have been provided or agreed by a dominant company. The con-

tractual partner affected by the legal violation is no less worthy of protection if the illegal contractual condition is used by a non-market-dominant company or a private third party (Körber, NZKart 2019, 187 [191/193]; cf. in this sense also Franck, ZWeR 2016, 137 [152 f.]).

(bb) The Bundeskartellamt's endeavours to obtain a different understanding are not reflected in the decisions of the Bundesgerichtshof. In the case of all judicatures, the infringements of the law discussed by the Federal Supreme Court are associated with anti-competitive effects that become apparent.

In the VBL Gegenwert case, the anti-competitive effect of the contract clause submitted for review was obvious. As explained above, the termination clause in question made it unreasonably difficult for the norm addressee's competitors to gain access to his customers; in addition, the market leader's customers were abusively restricted in their freedom to terminate a long-term contractual relationship.

In the *Pechstein* case, the Federal Supreme Court measured the arbitration agreement submitted for review against Section 19 (1) GWB and examined it for a possible contradiction to the plaintiff's fundamental rights as part of the weighing of interests. This does not mean, however, that a disregard of fundamental rights-relevant positions of the contracting party of a dominant undertaking is per se harmful to competition, favours an undesirable development in competition and therefore, via Section 19 GWB as a general clause under civil law (cf. in this respect: BGH, judgment of 7 June 2016 - KZR 6/15, BGHZ 210, 292 = NZKart 2016, 328 = WuW 2016, 364 Para 57 Pech-stein/International Skating Union) (see in this sense also Körber, NZKart 2019, 187 [193]). It should be borne in mind that the reviewed arbitration agreement affected the freedom to exercise a profession protected by fundamental rights under Article 12.1 of the Basic Law because the plaintiff was engaged in speed skating as a professional sportswoman. The competitive reference of the arbitration agreement concluded by the plaintiff with the Mono-polverband was thus obvious, because the conclusion of the arbitration agreement was a prerequisite for the plaintiff's freedom of economic activity as a professional sportswoman. herefore, it cannot be inferred from the *Pechstein*-uling of the Federal Court of Justice in the case at issue that an - assumed: existing - breach of data protection law by *Facebook* and an associated violation of the constitutionally protected informational self-determination right of *Facebook* users bears the accusation of abuse of market power.

(cc) Nor is there any justification for subjecting legal infringements committed by a market-controlling company to the detriment of consumers to the prohibition of abuse under Section 19 (1) GWB solely because the legal infringement was committed by a norm addressee of the prohibition of abuse, without taking into account any anti-competitive effect. The reasons given for this, namely that in such cases there is "normative" damage to competition, are guided by the results and are not covered by the objective of the Cartel Act to ensure freedom of competition.

(c) A question to be distinguished from this is whether an abuse of exploitation attributable to Section 19 (1) GWB can be assumed to be caused by a loss of competition and an abuse of exploitation if the infringement is causally attributable to the dominant market position of the company acting (cf. Franck, ZWeR 2016, 137 [153 et seq.]). This question may be based on itself, but does not lead to the legality of the contested official decision in the event of a dispute. For the necessary causal connection between *Facebook's* market-dominating position as affirmed by the Office and the breach of data protection law assumed by the antitrust authorities cannot be established.

(aa) Both in European law (Art. 102 TFEU) and in German law (Section 19 GWB), the implementation of the abuse presupposes a causal link between abusive conduct and market power.

(1) This necessarily follows from the wording of the abusive norms mentioned above (e.g. also Monopolies Commission, XXII. Hauptgutachten 2018, para. 677). § Section 19 (1) GWB prohibits the "missbräuchliche Ausnutzung einer marktbeherrschenden Stel-lung"; Art. 102 TFEU reads "Any abuse ... of a dominant position ..." in the English version). Thus, it is not generally prohibited under antitrust law to engage in abusive conduct by dominant companies, but only to engage in conduct of the norm address attributable to the dominant market position (Eilmansberger/Bien in Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht [MüKoWettbR], Vol. 1, 2nd ed. 2015], Art. 102 TFEU Para 135; see also Franck, ZWeR 2016, 137 [144]).

(2) Moreover, the causality requirement corresponds to the sense and purpose of the prohibitions of misuse (so applicable MüKoWettbR-Eilmansberger/Bien, Art. 102 TFEU no. 137). Market dominance is problematic in terms of competition because and to the extent that it enables the dominant undertaking to shape its market behaviour essentially independently of its

competitors and customers and in this way to prevent or disrupt the maintenance of effective competition on the relevant market (see in this sense ECJ, judgment of 13 February 1979 - C-85/76, ECR 1979, 461 para. 38 - Hoffmann-La Roche). The prohibition of abuse is intended to prevent a dominant undertaking from using means outside competition to impair existing competition or hinder the development of competition on a market whose competitive structure has already been weakened (see ECJ, judgment of 13 February 1979 - C-85/76, ECR 1979, 461 para. 91 - Hoffmann-La Roche; judgment of 6 December 2012 - C-457/10 P, NZKart 2013, 113, para. 74 and 150 - Astra Zeneca v Commission). In contrast, it is not the aim of abuse control to pursue any violations of the law without a competitive connection under antitrust law (cf. in this Sinne Monopolkommission, XXII. Hauptgutachten 2018, para. 676; thus also Körber, NZKart 2019, 187 [193]). Against this background, a causal relationship between the market power of the dominant undertaking and its abusive conduct, but at least the anti-competitive effects of its conduct, is absolutely necessary (see Monopolies Commission, XXII. Hauptgutachten 2018, para. 677 aE).

Nothing else can apply to the national prohibition of abuse because of the deliberate and deliberate link to Union law (BGH, judgment of 7 December 2010 - KZR 5/10, WuW/E DE-R 3145, paragraph 55 - Entega II). The necessity of a causal link between market dominance and the disapproved conduct or its anti-competitive effect has already been pronounced by the Federal Court of Justice in its case-law (see BGH, judgment of 4 November 2003 - KZR 16/02, BGHZ 156, 379 = WuW/E DE-R 1206, paragraph 21 in juris - *Strom und Telefon I*).

(bb) If - as is the case here - the first issue is the accusation of an abuse of exploitation, a behavioural causality is necessary. Only market power may have enabled the dominant company to enforce the terms and conditions of business, which are to be assessed as abusive, against its contractual partner (see also Franck, ZWeR 2016, 137 [151 et seq.]).MüKoWettbR-Eilmansberger/Bien, Art. 102 TFEU, Paras 139, 150 f.; Körber, NZKart 2019, 187 [193]; Schröter/Bartl in Schröter/Jakob/Klotz/Mederer, European Competition Law, 2nd ed. [2014], Art. 102 TFEU ref. 26 and 168; see also ECJ, judgment of 14 February 1978 - Case 27/76 [1978] ECR 207, ref. 248 = NJW 1978, 2439 [2443] - United Brands; BGH, decision of 16 December 1976 - KVR 2/76, BGHZ 68, 23 = WuW/E BGH 1445, ref. 51 for juris - Valium). This applies to the entire scope of application of Section 19 GWB and consequently also to the scope of application of the general clause of Section 19 (1) GWB. Contrary to the opinion of the Federal Cartel Office (Decision, para 873), no exception can be recognised for the area of

consumer exploitation. In particular, a causality of results ("normative causality") is not sufficient in such cases.

(1) 4 November 2003 - KZR 16/02, BGHZ 156, 379 = WuW/E DE-R 1206, paragraph 21 in juris - Strom und Telefon I; Monopolkommission, XXII. Hauptgutachten 2018, paragraph 677; Wiedemann in Wiedemann, Kartellrecht, 3rd ed. 2016], § 23 Para 55; Fuchs in Immenga/Mestmäcker, Competition Law, Volume 2, GWB, 5th ed. (2014), § 19 GWB Para 82b; MüKo-Eilmansberger/Bien, Art. 102 TFEU Paras 131 ff.) it is acknowledged that an abuse of a dominant position can also be assumed if the market leader does not instrumentalise its market power to enforce certain behaviour of other market participants (behavioural causality), but its abusive behaviour, precisely because of its already existing market power, leads to a strengthening of its market position or (further) weakening of the competitive structure (causality of results). According to EU case law in particular, the structural weakening of competition refers to abusive behaviour which leads to a strengthening of the market position of the dominant company at the expense of current or potential competitors. To the extent that in such cases a connection between abuse and market power is regarded as sufficient in the sense of causality of results, this assessment is typically tailored to the constellation of exclusionary abuse (cf. Franck, ZWeR 2016, 137 [148 f.]; also Monopolies Commission, XXII. Hauptgutachten 2018, para. 678). On the other hand, behaviour suspected of exploitative abuse typically does not influence the market structure (Franck, loc. cit.).

(2) This also applies in cases of abusive exploitation of consumers. This is fundamentally different from the structural weakening of competition to the detriment of companies competing with the dominant undertaking. The exploitation of a consumer does not lead to an unfavourable market outcome for the consumer because the abusive behaviour is practised by a dominant company. The reason for an exploitation is rather that the agreed conditions are disadvantageous for the consumer because of their content. Whether the conditions in such a case are set by a dominant company or by a company not dominating the relevant market is irrelevant for the burden on the consumer. This finding leads to the conclusion that the necessary causal link between abuse and market dominance in the field of exploitative abuse cannot be justified by the instrument of result causality. The only appropriate yardstick is the behavioural causality (see in this sense already ECJ, judgment of 14 February 1978 - Rs 27/76, ECR 1978, 207 Rz 248 = NJW 1978, 2439 [2443] - United Brands; BGH, decision of 16 December 1976 - KVR 2/76, BGHZ 68, 23 = WuW/E BGH 1445, Rz 51 for juris - *Valium*).

The test of whether market power is used to impose unfavourable trading conditions on the opposite side of the market is also appropriate. This applies in particular to the scope of application of Section 19 (1) GWB. If a causality is to be affirmed, an undesirable development harmful to competition is shown, because the market leader succeeds in using his market power and consequently with means outside of performance-based competition (see ECJ, judgment v. 13. February 1979 - C-85/76, ECR 1979, 461 Para 91 - *Hoffmann-La Roche*) to assert its market intentions and to behave to a considerable extent not only independently of its competitors but also of its customers (consumers) (see ECJ, loc. cit.) This corresponds to the sense and purpose of the prohibition of abuse, which is to prevent a market operator on a bequeathed market from using means outside the competitive bidding to impair existing competition or hinder the development of competition. In contrast, causality of results does not provide meaningful results in cases of abuse of exploitation. This applies in particular to consumer exploitation. The fact that a company that dominates the market imposes illegal or inappropriate contractual conditions on the consumer does not mean that its conduct also leads to a strengthening of its own market position or a weakening of the competitive structure. Adverse effects on the competitive structure only arise if the exploitation of the consumer at the same time negatively influences the competitive options on the market dominated by the norm addressee. They do not apply if the measure under assessment is limited to an impairment of the consumer. .

In addition, the use of illegal or inappropriate terms may be considered abusive irrespective of whether it results in anti-competitive market effects. In this case, however, the requirement of causality cannot be waived. Only with their help can an application of cartel law that goes beyond the regulatory purpose of abuse control be avoided and it be prevented that the cartel authority prosecutes infringements that are not relevant to competition only because they are committed by a dominant undertaking (as Franck, ZWeR 2016, 137 [151 et seq.] rightly does). In addition, without a causality of behaviour there is no legitimate reason for intervention. Unfairly disadvantageous conditions can also be agreed on markets with "fierce price competition", whereby the exploitation does not have to be attributable to the exercise of market power, but can also be based on an "informational market failure" and a "systematic asymmetry of information" to the detriment of the customers brought about as a result, which in turn justifies the illegality or unreasonableness and legitimises the right to control general terms and conditions as well as large parts of consumer protection law (so applicable Franck, ZWeR 2016, 137 [151 et seq.]).

(3) The decisions of the Federal Court of Justice in the VBL Gegenwert case (BGH, judgment of 6 November 2013 - KZR 58/11, BGHZ 199, 1 = NZKart 2014, 31 = WuW/E DE-R 4037 Para 65 - VBL Gegenwert I; judgment of 24 November 2013 - KZR 58/11, BGHZ 199, 1 = NZKart 2014, 31 = WuW/E DE-R 4037 Para 65 - VBL Gegenwert I). January 2017 - KZR 47/14, NZKart 2017, 242 = WuW 2017, 283 margin 35 - VBL equivalent II) and wedding discounts (BGH, decision of 23 January 2018 - KVR 3/17, NZKart 2018, 136 = WuW 2018, 209 margin 83-86 - wedding discounts) do not lead to any other assessment. In contrast to the Bundeskartellamt's view (decision, paras 872 et seq.), neither a waiver of the requirement of causality of conduct nor a complete waiver of causality between market power and abuse of market power can be inferred from the above-mentioned judgments (in this sense also Körber, NZKart 2019, 187 [193] for the VBL Gegenwert judgments) with regard to the abuse of exploitation.

(3.1) In the judgment in VBL Gegenwert I, the Federal Court of Justice, in connection with the use of inadmissible general terms and conditions of business, states the prerequisites for abuse pursuant to Section 19 GWB as follows:

> *„The use of inadmissible general terms and conditions by dominant undertakings may in principle constitute abuse within the meaning of Section 19 GWB. This applies in particular if the agreement of the ineffective clause is the result of the market power or the great power superiority of the user. An unreasonable counterclaim under Section 23 (2) VBLS 2001 could be regarded as an exploitation abuse in the form of an abuse of conditions which falls under the general clause of Section 19 (1) GWB. In the examination of this fact, the statutory decision on values, which is subject to content control pursuant to Sections 307 et seq. of the German Securities Trading Act, must be taken into account. BGB (see Möschel in Immenga/Mestmäcker, GWB, 4th edition, § 19 marginal 174; left open in BGH, resolution of 6 November 1984 - KVR 13/83, WuW/E BGH 2103, 2107 - Favorit).“*

The fact that the Federal Court of Justice considers it possible to qualify the use of inadmissible general terms and conditions by dominant companies as an abuse of market power within the meaning of Section 19 GWB, especially if the agreement of the ineffective clause is "*outflow of market power or a great superiority of power of the user*", does not allow conclusions to be drawn about the dispensability of a causality or a behavioural causality. On a more reasonable basis, everything suggests that (1) the terms "*market power*" and „*great power superiority*“are a linguistic description of the dominant market position, (2) die Formulierung „*Ausfluss von…..*“ addresses the required causality between the dominant market position and the agreement of the terms and conditions at issue and (3) at any rate under this premise ("*in particular*

then") a violation of the prohibition of abuse in the form of abuse of terms pursuant to Section 19 (1) GWB can be considered even if the conduct of the dominant market player cannot also be objected to from other points of view (e.g. obstruction of competitors).

The statements of the Federal Court of Justice in its decision VBL-Gegenwert II do not contradict such an understanding. There the Federal Court of Justice first repeats the passage quoted above and then comes to the conclusion that "the use of terms and conditions which make it unreasonably difficult to terminate or withdraw from a contractual relationship with the norm addressee" must be assessed as a case in which the agreement of an ineffective clause is an outflow of market power or the great superiority of the user and for this reason constitutes an abuse of market power. The dispensability of causality or behavioural causality cannot be inferred from this. What speaks against the interpretation of the Office is that the Federal Court of Justice would have answered the central question of the causal connection necessary for an abuse of exploitation without any legal explanations in this regard and without any discussion of the views expressed in case law and literature on this subject, as it were, between the lines. Such a procedure would be unusual to such an extent that it can be excluded on reasonable consideration. Much more obvious is the assumption that the abuse of market power established by the Federal Court of Justice is based on the consideration that such disadvantageous terms and conditions as those which were at the time the subject of the dispute are usually only accepted by the other side of the market because of the strong market position of the other side of the contract. This would also explain why the Federal Supreme Court did not examine whether competitors would use a similar clause despite existing competitors of the VBL (cf. AE no. 874). The VBL Gegenwert II decision thus describes the causality between the market power of the user and the agreement of the inappropriate contractual conditions.

Whether the Federal Court of Justice - as the Office believes - has ascribed to the Gegenwert clause an inherent danger of strengthening the market power of VBL by erecting an additional market entry barrier (decision, no. 874) can be based on itself in the present context. This aspect does not describe an abuse of exploitation but an obstacle to competition. There can be no doubt that an abuse of restraint of competition can only be brought about by a causality between abuse and market power. With this finding, however, nothing is gained for the question relevant here, which causal connection is necessary for the determination of an abuse of conditions.

(3.2) The decision of the Federal Court of Justice Wedding discounts (BGH, decision of 23 January 2018 - KVR 3/17, NZKart 2018, 136 = WuW 2018, 209 Paras 83-86 - *Wedding discounts*) also does not justify the assumption that in the case of abuse of exploitation a causality or a behavioural causality is dispensable from the position dominating the market..

The starting point for the legal statements in that decision was Section 19 (2) No. 5 GWB 2013, which reads as follows: "An abuse exists in particular if a dominant undertaking ... exploits its market position to request or induce other undertakings to grant it advantages without an objectively justified reason". With regard to this provision, the Federal Court of Justice has ruled that the concept of exploitation has no independent meaning, that the connection between superior market power and the conduct complained of in Section 19 (2) No. 5 GWB 2013 is already ensured by restricting the norm addressees to market-strong companies, and that the legal provisions of Section 19 (2) No. 5 GWB 2013 do not apply. The reference made in Section 2 No. 5 GWB 2013 to the exploitation of the market position was limited to making it clear that this example was a manifestation of the general clause of Section 19 (1) GWB. It can remain to be seen whether this view is to be approved. The decision does not give rise to any legal consequences for the abuse of conditions under Section 19 (1) GWB simply because both standards concern fundamentally different market situations. The "tapping ban" in Section 19 (2) no. 5 ARC serves the purpose of curbing the *unreasonable exercise of buyer power*; the ban on the abuse of conditions under Section 19 (1) GWB aims to limit the *inadmissible exercise of supply power*.

The following is added: The prohibition on tapping introduced by the 4th GWB amendment in 1980 had primarily a horizontal protective purpose; the prevention of distortions of competition through the undue exercise of buyer power was in the foreground (see BGH, loc. cit. no. 55). In addition, the "request" alternative introduced in Section 20 (2) GWB in the 7th amendment to the ARC in 2005 was intended to counteract an increase in the buyer power of the trade vis-à-vis manufacturers, so that the tapping ban has since served to protect competition both horizontally and vertically (see BGH, loc. cit. ref. no. 56 et seq.). The vertical direction of protection should protect companies regardless of their size against demands for preferential conditions if they are dependent on the demanding company (see BGH, loc. cit. ref. no. 56). Against this background, the Federal Supreme Court already allowed the demand for unjustified preferential conditions to suffice for the factual realisation of Section 19 (2) No. 5 GWB 2013 in the decision Wedding Discounts and stated that this demand expresses the market power of the norm addressee vis-à-vis the supplier *dependent* on him (see BGH, loc. cit. ref. no. 85).

The principles of the decision shall not be applied to the dispute. On the one hand, it is not a question here of exploiting buyer power, but supply power. On the other hand (and above all), there is nothing apparent about the private users of the *Facebook*- network being dependent on *Facebook*. This is based on the time at which *Facebook*. makes the network available. This is because the company already links access to its social network to the private user's consent to the controversial terms of use. There is nothing to suggest that users are dependent on *Facebook* at the time they agree to the terms of use. It has already been shown that data processing is carried out with the knowledge and will of *Facebook* users and that consent is based on a free and autonomous user decision. There is no point in *Facebook* obtaining the user's consent through coercion, pressure, exploitation of a weakness of will or other unfair means or the company using the additional data contrary to the agreement beyond the agreed scope. The fact that the use of the *Facebook* network is linked to the consent to the use of additional data does not imply any compulsion and does not constitute a predicament for the user (Körber, NZKart 2019, 187 [191], for example, who describes the assumption of a "compulsive situation" as "quite far-fetched"). It merely makes it necessary to weigh the advantages resulting from the use of an advertising-financed (and thus free) social network against the consequences associated with the use of the additional data by *Facebook* The user can make this assessment uninfluenced and completely autonomously according to his personal preferences and values. As the considerable number of *Facebook* users (around 32 million per month) and the significantly larger number of *Facebook* non-users (around 50 million) show, the result of this assessment can vary. The fact that far more people decide not to use *Facebook* than to do so is not an indication of an involuntary transfer of data, but on the contrary proves the voluntariness of the user's decision.

(cc) The behaviour causality necessary for the assumption of an abuse of exploitation between the data processing in question and the market power of *Facebook* does not exist.

(1) The causality check is exclusively subject to the processing of additional data on the basis of the terms of use provided by *Facebook*, because only this data is subject to the contested shutdown order. Any other data processing that may take place is therefore excluded from consideration from the outset. Moreover, such lawsuits would represent nothing other than "covert" violations of data protection law, for the commission of which *Facebook's* market position - as is obvious - cannot be the cause anyway (in this sense Franck, ZWeR 2016, 137 [160].

(2) The necessary causality test should not be based on the provisions of the data protection law, but on the principles of the Cartel Act (e.g. rightly Monopolies Commission, XXII. Hauptgutachten 2018, Paras 681-683). *Facebook* is not only charged with an infringement of data protection law, but also with an infringement of antitrust law, and in this respect it is a matter of assessing a conduct suspected of abuse of conditions within the meaning of Section 19 (1) GWB. Contrary to the Bundeskartellamt's view, it is therefore irrelevant whether (1.) the consent required of users when re-registering for the social network of *Facebook* fulfils the requirements for voluntary consent to the processing of personal data within the meaning of Art. 4 No. 11, 6 para. 1 sentence 1 letter a DSGVO, (2.) a voluntary consent in the sense of data protection law of the network users is opposed by a violation by *Facebook* of the coupling prohibition in the sense of Art. 7 para. 4 DSGVO (making the fulfilment of the contract dependent on the consent to the processing of such data, which are actually not necessary for the fulfilment of the contract), (3.) the infringement of the aforementioned prohibition of coupling with regard to recital 43 of the DSGVO presupposes a "clear unequal weight" between the persons involved, (4.) a "clear unequal weight" within the meaning of the aforementioned recital can only be assumed if the person responsible for processing the data is a dominant company and (5.) the data subject is not a market participant in the processing of the data.), an infringement of the prohibition of tying can only be committed by a dominant undertaking, although such an understanding is in any case not suggested by the wording of this provision.

The Bundeskartellamt does not have to follow its conclusion that *Facebook* 's breach of data protection law cannot be committed *„in such a way“* by competitors without a dominant market position, which is why the "market power reference" revealed by the disregard of the prohibition of tying also satisfies the requirement of strict causality (see marginal no. 880). The approach is too short-sighted. For behavioural causality, only the question can be decisive as to whether the allegedly implying *violation of the law* – here: the collection, linking and use of the additional data provided for in the terms of use requiring consent - is causally attributable to market dominance. On the other hand, the question as to whether a justification for data processing which excludes abusiveness - here: the consent of the user pursuant to Art. 6 para. 1 sentence 1 letter a DSGVO - is correctly not relevant because of a fact which can possibly only be realised by a dominant company - here: the infringement of the prohibition of coupling pursuant to Art. 7 para. 4 DSGVO - is excluded in the sense of a withdrawal. Because these considerations do not concern the causality between the market power of *Facebook* and the acceptance of the controversial terms of use by the *Facebook* user. The prohibition of coupling in Art. 7 (4) DSGVO also does not allow the derivation of a normatively ordered causality of

conduct in the sense of antitrust law. The aforementioned provision is a purely data protection provision, not an antitrust provision. There is no evidence to suggest that the Union legislator, in Art. 7 (4) DSGVO, nevertheless wanted to regulate the causal relationship between market power and the user's consent under Art. 6 (1) sentence 1 letter a DSGVO, which is necessary under antitrust law.

(3) From the point of view of competition, the only decisive factor is whether the consent required of consumers when registering for the social network to process and link the additional data is so determined by third parties due to *Facebook's* dominant market position that the declaration of consent can no longer be regarded as based on an autonomous decision by the user. The Bundeskartellamt, which bears the burden of assessment in this respect, has not proved that this is the case.

(3.1) As explained above, the private interested parties of the social network are not in any way dependent on the provider *Facebook*. at the relevant time of registration. The functions of the network represent an offer that can be accepted autonomously and self-determined under the conditions set by *Facebook* in connection with user registration or - like the majority of the population in Germany - rejected. Every user can make this decision uninfluenced and freely according to his/her own values and circumstances. The decision for or against *Facebook* will primarily take into account the expected quality and the hoped-for personal benefit of the network as well as the personal view of the importance and importance of keeping the required personal data secret and the personal willingness to allow *Facebook* to process and use the additional data in a controversial manner in order to be able to use the social network free of charge but financed by advertising. It is always a matter of highly personal consideration on the basis of one's own exclusive preferences and desires, which is not classified as right or wrong at the outset. Any legal, economic or other disadvantages are not connected for the individual with the decision for or against a participation in the social network. Those who agree to *Facebook's* terms of use will not lose any data either. Rather, users can leave their data in question to any other third party without restriction even after registering with *Facebook.* In this respect, the facts are fundamentally different from the facts on which the Bundeskartellamt's Federal Supreme Court rulings on the VBL Gegenwert (demand for a Gegenwert payment in the event of termination) and *Pechstein* (no admission of the professional athlete to competitions without consent to the arbitration clause) were based. The network prospective customers also do not ask *Facebook* for any goods necessary for the determination of their general living needs. It is all about the possibility to communicate with friends or other third persons via *Facebook*. The

very fact that 50 million inhabitants of Germany do not use the *Facebook* network shows that it is neither about satisfying a basic need nor about the only way to communicate with others. Under these circumstances, the consent given by a *Facebook* prospect to the terms of use is not a result of *Facebook's* market power, but the result of an individual assessment of the advantages and disadvantages associated with Facebook registration.

(3.2) This cannot be successfully countered by the fact that users of the *Facebook* network accept the use and processing of their additional data only because there are no network providers who offer a fee-based social network that is not advertising-based and therefore do not make participation dependent on the user providing data. A prerequisite for the Office's conclusion would be that the average network user prefers a paid network to a free network financed by advertising and therefore based on the provision of personal data. The Office has not made any reliable or meaningful findings in this regard. On the contrary, it itself assumes that users of a private network have a "*rather low willingness to pay*", which is why most social networks can be used free of charge by the user and are financed by advertising (cf. note 270). The Office's investigations and findings regarding the processing and linking of the multiple data which are the sole object of the dispute are all the more lacking.

Likewise, the Office has not made any findings on the question of whether and how many people consider *Facebook's* network offer interesting, but reject it because of the processing and linking of the *additional* data. Such refusals would, with an increasing number, also speak against the market power determination of those interested who decide to register with *Facebook*.

(3.3) The phenomenon of the so-called "privacy paradox" (cf. Decision, para 384), which the Bundeskartellamt endeavours to address, does not alter the above assessment (doubtfully also Körber, NZKart 2019, 187 [192])..

The phenomenon describes a postulated contradiction between the concern of Internet users about inadequate protection of their privacy on the Internet and a genuinely careless handling of their own personal data on the Internet. The Office complains that the private users of the social network provided by *Facebook* are also highly data-sensitive and states that, according to the results of a consumer survey commissioned by it, around three-quarters of users of social media consider the (responsible) handling of data (data processing conditions) to be (very) important for the choice of a social network (decision, paras 427 [Fn. 415], 883). Nevertheless,

the user survey had shown that four-fifths of users did not read the General Terms and Conditions because they would have to accept them anyway (Decision, para 385 [Fn. 382]).

Contrary to what the Bundeskartellamt believes, the survey results which it endeavoured to obtain do not provide any viable indication of a causal connection between *Facebook's* consent to the terms of use and its market position on the market for social networks.

(3.3.1) The above considerations, with which it has been justified that every user can decide about the use or non-use of *Facebook* completely freely, uninfluenced and autonomously according to his/her own preferences, speak against such a reference. These considerations are not affected by the Office's statements on the so-called "privacy paradox".

(3.3.2) Apart from that, the conclusions of the Office as such are also not valid.

The fact that 80% of *Facebook* users do not read the controversial terms of use because they would have to accept them anyway only describes the fact that *Facebook* offers an advertising-financed network and accordingly makes network access in the sense of a fee dependent on the user's consent to the processing and linking of his or her additional data. In this respect, it is solely a question of the chargeability of the network access and the resulting synallag-ma between performance and consideration. This does not indicate the use of market power by *Facebook.* This is all the more true as the unread acceptance of the terms of use for the additional data can be explained in the same way - and with lifelike appreciation even predominantly probably - simply by a lack of interest on the part of the user in the fact that *Facebook* also processes and links additional data in connection with the advertising financing of the social network. It does not matter whether the users act out of indifference or because they do not want to spend the necessary time and effort to grasp the content of the data conditions and their meaning (Franck, ZWeR 2016, 137 [157]). In one case or another, the unread acceptance of the conditions of use for the additional data is not an expression of user dependence or of the network operator's market power, but the result of an individual assessment of the users with the result that participation in the social network is more important to them than the question of whether and which additional data is processed and linked to *Facebook* data. No single statement by the Office excludes the possibility that for this reason - and not because of *Facebook's* market power - users agree unread to the terms of use for the additional data.

The fact that almost 75% of users of social media consider responsible data handling to be a very important issue for the choice of the social network does not support the conclusion drawn by the Office either. It misses the problem of the "privacy paradox" because the responsible *handling* of data and data processing conditions does not concern the data collection for the social network Facebook in question, but the processing and use of collected data in accordance with the agreement. In this respect, the Office does not accuse *Facebook* of any misconduct at all. Apart from that, the question of "data handling" is formulated far too openly for the answers in the case of a decision to allow reliable conclusions to be drawn. It is unclear whether those consumers surveyed who described the "handling of data" as an important criterion in the selection of the social network even understood the term "data" to mean the multiple data that were the sole source of controversy. This is questionable because, in any case, as far as the user and device-related data from Facebook 's other proprietary services (*Instagram*, *WhatsApp*, *Masquerade* and *Oculus*) are concerned, the additional data is data that *Facebook* may already use as part of the other service with the consent of the *Facebook* user, and is exclusively about additional use for the purposes of the social network *Facebook*. It is also unclear what "handling" of the data is considered critical by the consumers concerned. Since neither the question nor the contested official decision provide any information on this, it can at best be assumed that, from the consumer's point of view, the *agreed* use of data by the network operator is an important selection criterion. Under no circumstances can it be further concluded from the survey result that the use of data in accordance with the agreement already contradicts the will of the respondents and that the consent to the *Facebook* terms of use for the additional data must be traced back to the market power of the network operator.

2. Nor can the contested order for discontinuance be based on the allegation of abuse of restraint to the detriment of Facebook's competitors (Section 19 (1), (2) no. 1 GWB). According to the aforementioned provision, abuse of market power exists in particular if another company is directly or indirectly unfairly obstructed.

a) From the point of view of an unreasonable obstruction, the official decision does not stand up to an examination of legality simply because its legal consequence statements are not suitable for putting an end to the abuse of obstruction assumed by the office (Section 32 (1) and (2) GWB). This is due to the fact that the official decision does not prohibit *Facebook* from collecting, linking and using the additional data in dispute, but only in the event that the private user of the *Facebook* Network does not separately consent to this processing and linking of the additional data for the purposes of the *Facebook* Network. It is obvious that the obstruction of

competition in the horizontal relationship to *Facebook* - assuming the processing and connection of the additional data - cannot depend on whether the private *Facebook* customers agree to this data processing or not. Nor can an obstruction of *Facebook's* competitors caused by the data processing of the additional data be eliminated by the private Facebook users agreeing to this market obstruction. The bidding order of the Office is therefore an unsuitable remedy. As such, it disproportionately interferes with *Facebook*'s rights and for this reason alone proves to be unlawful.

b) In addition, the Bundeskartellamt's statements are not sufficient in any way to substantiate the admissibility and viability of a *Facebook* obstructionary abuse which is a burden.

aa) An obstacle within the meaning of Section 19 (2) no. 1 GWB is any objective impairment of the competitive opportunities of another undertaking. Not every economic disadvantage inflicted on another company constitutes an obstacle in the sense of antitrust law. What is required is rather an impairment of the competitive and entrepreneurial possibilities for action and decision-making. However, the mere suitability of a measure to prevent or the unsuccessful attempt of an obstruction is not sufficient for the realisation of the facts; the impairment must actually have occurred (Senate, judgment of 30 March 2016, VI-U (Kart) 10/15, paragraph 150 at juris m.w.N.). There is broad agreement on this in jurisprudence and literature.

Insofar as the Bundeskartellamt apparently intends to allow the mere suitability to impair a competitor to suffice (insofar unclear: reply of 29.5.2019, p. 35 f.), this is not to be followed. The very wording of Section 19 (2) no. 1 GWB ("*obstructed*") makes it clear that competition must be impaired. The judgments of the Federal Court of Justice and the Senate cited by the Office in this context do not give rise to a contrary legal opinion. It can only be inferred from those decisions that the abuse of restraint does not require not only the impairment of competitors but also the determination of noticeable or considerable effects on the competitive structure, but that the suitability to impair market conditions is sufficient (see BGH, Beschluss v. 6. November 2012 - KVR 54/11, WuW/E DE-R 3879 Paras 38-41 - *Gasversorgung Ahrensburg*; Senate, Resolution of 6 April 2016 - VI-Kart 9/15 (V), N&R 2016, 313, paragraph 103 for juris).

bb) It cannot be established that the terms of use for the additional data on one of the markets defined by the Bundeskartellamt lead to an obstruction of current or potential competitors of *Facebook*. Neither the relevant statements in the official decision (ref. no. 885 et seq.) nor the

supplementary statements in the reply to the application (ref. no. 35 et seq.) are plausible and comprehensible evidence of a hindrance to competitors.

(1) The Office's view that the processing of the contested additional data increases the barriers to entry on the market for social networks for *Facebook's* competitors is incomprehensible. It cannot be ruled out from the outset that the processing of additional data may additionally secure *Facebook's* market position because the network is financed by advertising and the scope and quality of the user data are relevant for the generation of advertising revenue. Whether a market entry barrier actually arises or is reinforced in a concrete decision, however, requires closer examination and detailed explanation. This applies not least because, in the view of the Office, *Facebook's* market position is also significantly shaped by direct network effects on the part of private users (for example, the Monopolies Commission, XXII. Main Report 2018, ref. no. 678, which rightly recommends a "noticeability limit" in this context; Körber, NZKart 2019, 187 [192], doubting an increase in market entry barriers). The concept of direct network effects describes the fact that the increase or decrease in the number of users has a direct (positive or negative) impact on the usefulness of the product or its performance for the individual user. It is also relevant in decision-making. The benefits of the *Facebook* network for its users increase with the total number of people connected to the network, because the more users there are, the greater the communication opportunities for each individual user. As a result, *Facebook's* market position as a provider of a social network can only be successfully attacked if the competitor succeeds in attracting a sufficient number of users in the foreseeable future to make its network attractive. This is the decisive market entry hurdle, and in this respect *Facebook* has an enormous lead with around 32 million users per month. It is not self-evident that and to what extent the processing and linking of the controversial additional data should also make it difficult or impede the market entry of *Facebook* competitors, but requires examination and conclusive presentation by the antitrust authorities. That is lacking. In the contested decision, the Office has already failed to substantiate and explain in a comprehensible manner which concrete additional data - going beyond *Facebook* data - should be involved and what influence the processing and linking of these additional data for the purposes of the social network should have on the possibility of competing network providers entering the market. There is also a lack of reliable information on the extent to which the use of the controversial additional data should enable *Facebook* to noticeably increase advertising revenues to finance the social network and the extent to which *Facebook's* market position will be protected against future market entry. Such findings are indispensable because the key to a successful market entry is not to generate

advertising revenues that are as high as possible, but undisputedly to win a sufficient number of users for the competing social network within a short period of time. They are all the more necessary since the amount of data is obviously not decisive for successfully operating a social network. This is proven by the investigations of the European Commission (see European Commission, Decision of 3 October 2014 - M.7217 Para 188 - *Facebook/WhatsApp*), according to which in the reference period Ja-nuar-March 2013 the company *Google*, which operated the competing social network *Google+* and ultimately had to withdraw from the market, had a share of 33 % of the data collection on the Internet, whereas *Facebook* only 6.39 %. After all, they are also necessary because the Office sees the advantage of a large amount of data not in the accumulation of individual data, but in deriving the consumer's interests and future behavior with the help of algorithms (Decision, para 496). This makes it indispensable for the proof of a practically effective entry barrier on the market for social networks to ascertain (1) which additional data is at stake - at least in terms of the type - that *Facebook* is able to access through the conditions of use at issue in the dispute, (2) whether and to what extent this additional data noticeably increases the quality of Facebook's already existing database with regard to its algorithm-based evaluation, and (3) to what extent *Facebook* can thereby secure its market position against potential competitors.

(2) Nor does the Office believe that there is a "*risk of the transfer of market power*" from the market for social networks to a third market for online advertising for social media. A transfer of market power is already opposed by the fact that the Office itself has not defined and established a market for online advertising for social media, but merely considers it conceivable ("*for which ... there is some evidence*") (cf. AE ref. no. 451). With regard to this third market for online advertising, the contested decision therefore already shows a serious lack of reasoning. At the same time, the applicants' right to a fair hearing has been violated because they are unable to defend themselves adequately against the accusation of misuse of barriers on the market for online advertising in the field of social media by encouraging a comprehensible market definition.

(3) Similarly, the Office's findings do not support the assumption that competition will be impaired in other third markets in which *Facebook* participates with its proprietary services *WhatsApp* (messenger services) or *Instagram* (photo services). In this respect, the Office has not plausibly and comprehensibly demonstrated the "*danger of the transfer of market power*". Although it admits that the market position of *WhatsApp* and *Instagram* is decisively determined by direct network effects, there is a lack of reliable and comprehensible explanations as

to the extent to which the controversial multi-data processing is nevertheless intended to hinder market entry in these markets. In this respect, reference can be made to the above remarks on the barriers to entry on the market for social networks. The Office's statements in the response (p. 37) "*In particular, the user data of WhatsApp and Instagram, in combination with the data generated on Facebook.com, provide the basis for a control of use and traffic by using the functionalities in Facebook.com that refer to the use of WhatsApp or Instagram (e.g. Facebook's suggestions that the user is now on Instagram) and the integration of functionality (such as a planned direct sending of messages from WhatsApp to Facebook Messenger), a "coupling effect at the expense of competitors - such as Snapchat as a competitor of WhatsApp and Instagram - is brought about*" does not provide the necessary information to be able to determine a relevant effect of the controversial processing and linking of the additional data to the market position of *WhatsApp* and *Instagram*.

(4) A transfer of market power to the supply market for online advertising can also be ruled out. Although the Office has defined such a market (decision, paras 352 ff.), Facebook itself has not assumed a dominant position on this market.

III.

A separate cost decision is not required. It is made with the decision to award costs in accordance with the provisions of Section 78 of the ARC (see Senate, Resolution of 2 November 2018 - *VI-Kart 3/16 (V)*, reprint p. 5).

Prof. Dr. Kühnen Lingrün Prof. Dr. Lohse

legal remedy instruction

The decision may be appealed against on appeal. The legal complaint must be lodged in writing with the Düsseldorf Higher Regional Court, Cecilienallee 3, 40474 Düsseldorf, within a period of one month. The period begins with the service of this complaint decision. The right complaint is to be justified by a written statement within two months which is to be submitted at the complaint court or right complaint court (Federal High Court/Bundesgerichtshof). This period begins with the service of the contested order and may be extended at the request of the chairman of the appellate court. The statement of grounds for the appeal must contain a statement of the extent to which the appeal decision has been challenged and its amendment or revocation has been requested. The notice of appeal and the grounds of appeal must be signed by a lawyer admitted to practice before a German court; this does not apply to an appeal lodged by the competition authority.