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# Federal Court of Justice provisionally confirms allegation of Facebook abusing dominant position

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## KVR 69/19 – Decision of 23 June 2020

Facebook uses terms of service that also allow for the processing and use of user data that are collected online outside the *Facebook* platform. The Bundeskartellamt prohibited Facebook from processing such data without additional consent given by private users. The antitrust division of the Federal Court of Justice has today decided that the Bundeskartellamt's prohibition can be enforced.

### Facts of the case:

Facebook Ireland Limited (in the following: Facebook) domiciled in Ireland operates the social network *Facebook* in Europe providing private users an online communication platform. Other affiliates of the Facebook group offer additional internet services such as, in particular, *Instagram*, *WhatsApp*, *Masquerade* and *Oculus*.

Private users do not pay any fees to use the social network. However, before joining the network, users have to agree to Facebook's terms of service when registering. These terms specify that Facebook provides a personalised experience for each user. For this purpose, the company uses personal user data available to Facebook due to the use of other group-owned services such as *Instagram* and the user's other internet activities outside facebook.com. The terms of service refer to a data policy in which the collection and use of personal data is explained in more detail.

Facebook uses online advertising to fund the network. To this end, adverts can be placed on the *Facebook* pages. By using various programming interfaces provided by Facebook ("Facebook Business Tools") companies are also able to link their own websites or mobile phone applications (apps) to the *Facebook* pages in many ways. In this way, *Facebook* users

can express their interest in these pages or specific contents via plug-ins (“Like” button or “Share” button), leave comments or use their registered *Facebook* user data to log into third-party websites via “Facebook Login”. Measuring and analysis functions and programs offered by Facebook allow companies to measure and analyse their advertising success. In this respect, not only the behaviour of private users on the *Facebook* pages is recorded but via corresponding interfaces (Facebook Pixel) visits to third-party websites are also tracked without the user having to do anything. Via the analytical and statistical functions of “Facebook Analytics”, the companies receive aggregated data on how *Facebook* users interact with the services they offer across various devices, platforms and websites.

### **Course of the proceedings to date:**

The Bundeskartellamt deems the use of the terms of service to be a breach of Section 19(1) of the German Competition Act (*GWB*) prohibiting the abuse of a dominant position. The authority holds that Facebook is the dominant company in the national market for the provision of social networks. The company abuses this position by, contrary to the rules of the General Data Protection Regulation (GDPR), making the private use of the network dependent on the authorisation to link the data relating to users and their devices generated outside facebook.com with the personal data generated by the use of *Facebook* itself without additional consent given by users. In its decision of 6 February 2019, the Bundeskartellamt prohibited Facebook and other group companies from using such terms of service and correspondingly processing personal data.

The Düsseldorf Higher Regional Court has not yet decided on the appeal filed against this decision. At Facebook’s request, the court has, however, ordered the suspensive effect of the appeal due to serious doubts as to the legality of the decision pursuant to Section 65(3) *GWB*. The result of such an order is that the decision rendered by the Bundeskartellamt may not be enforced until the court has ruled on the appeal.

### **Decision of the Federal Court of Justice:**

The antitrust division annulled the decision of the Düsseldorf Higher Regional Court and rejected the request to order the suspensive effect of the appeal.

There are no serious doubts as to Facebook’s dominant position in the German market for social networks nor can it be doubted that Facebook abuses this dominant position by using the terms of service prohibited by the Bundeskartellamt.

In this regard, it is – unlike emphasised by the Bundeskartellamt in the contested decision – not decisive whether processing and using personal Facebook user data generated based on their online behaviour outside facebook.com and irrespective of whether they are logged in to *Facebook* complies with the rules of the General Data Protection Regulation.

The key aspect is rather that terms of service are abusive if they deprive private Facebook users of any choice

- as to whether they wish to use the network in a more personalised way linking the user experience to Facebook's potentially unlimited access to characteristics also relating to the users' "off-Facebook" use of the internet; or

- as to whether they want to agree to a level of personalisation which is based on data they themselves share on facebook.com.

The decision on the abuse of market power – which according to established case law based on the purpose of the GWB to ensure free competition requires the determination of anti-competitive effects on the relevant markets and the consideration of the interests of all parties involved – is essentially based on the following deliberations:

By operating a social network, Facebook is active on two markets. Firstly, the company offers private users the platform as a means to express themselves and communicate in the context of their social relations. Secondly, Facebook allows other companies to use the network for advertising purposes and in this way it also funds the user platform for which users do not provide any (monetary) compensation. Since Facebook promises its users a personalised experience and the provision of communication contents that go beyond the mere function of a platform, this, however, results in the fact that the services rendered to users overlap and blend seamlessly with the refinancing of the platform through various forms of online advertising.

As the dominant network operator, Facebook has a special responsibility to maintain the still existing competition in the market for social networks. In this respect, the great economic significance attached to accessing data is to be taken into account.

The lack of options available to *Facebook* users does not only affect their personal autonomy and the exercise of their right to informational self-determination also protected by the GDPR. In light of the considerable barriers existing for network users who would like to switch providers ("lock-in effects"), this lack of options also exploits users in a manner which is relevant under competition law since due to Facebook's dominant position competition is no longer able to effectively exercise its controlling function. According to the Bundeskartellamt's findings, a considerable number of private *Facebook* users wish to disclose less personal data. If competition on the market for social networks were effective, this option could be expected to be available. Users who consider the scope of the data disclosure to be a key criterion in their decision could switch to other alternatives.

The terms of service structured in this way could also impede competition. It is true that Facebook's market position is primarily characterised by direct network effects since the network's benefits for private users and for advertisers increase as the overall number of people connected to the network grows. Facebook's market position can be successfully challenged only if a competitor manages within a reasonable period of time to attract a sufficient number of users for the network to become appealing. However, access to data is an essential competition parameter not only in the advertising market but also in the market for social networks. Facebook's access to a considerably larger data base increases the already distinct "lock-in effects". In addition, this larger data base enhances the possibilities to finance the social network using the profits generated from advertising contracts which also depend on the scope and quality of the data available. Due to the adverse effects on the

competition for advertising contracts, it ultimately cannot be ruled out that the market for online advertising is also affected. Contrary to the opinion of the appellate court, it is not necessary to determine that there is a separate market for online advertising for social media and that Facebook has a dominant position also in this market. The anti-competitive effect does not have to occur in the market dominated by a company; it may also occur in a third market not dominated by this company.

**Court of lower instance:**

Düsseldorf Higher Regional Court – decision of 26 August 2019 – VI-Kart 1/19 (V), WRP 2019, 1333

**The relevant provisions are as follows:**

**Relevant provisions of the German Competition Act (GWB):**

**Section 19 Prohibited Conduct of Dominant Undertakings**

(1) The abuse of a dominant position by one or several undertakings is prohibited.

...

**§ 65 Order of Immediate Enforcement**

...

(3) 1 The appellate court may, upon application, entirely or partly restore the suspensive effect of the appeal, if

1. the conditions for issuing an order under paragraph 1 were not satisfied or are no longer satisfied, or

2. there are serious doubts as to the legality of the appealed decision, or

3. the enforcement would result for the party concerned in undue hardship not justified by prevailing public interests.

2 In cases where the appeal has no suspensive effect, the competition authority may suspend enforcement; such suspension should be made if the conditions of sentence 1 no. 3 are satisfied. 3 The appellate court may, upon application, order the suspensive effect in full or in part if the conditions of sentence 1 nos 2 or 3 are satisfied.

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