

German Federal Court of Justice Provisionally Finds Facebook’s Data Collection Practices Abusive

June 29, 2020

On June 23, 2020, the Federal Court of Justice (“FCJ”) overturned the Düsseldorf Court of Appeals’ (“DCA”) interim decision and rejected Facebook Inc.’s (“Facebook”) request to suspend the enforceability of the Federal Cartel Office’s (“FCO”) prohibition decision.¹ The FCJ disagreed with the FCO’s determination of an abuse based on a violation of data protection law, but instead examined Facebook’s data usage exclusively under competition law.

Although the FCJ implicitly rejected the FCO’s reasoning, the decision amounts to a major victory for the German authority whose order was reviewed quite critically by the DCA in the first instance. As a direct consequence, Facebook must end its practice of combining user data from different sources without the users’ explicit consent. It must also change its terms and conditions in Germany within 12 months. The FCJ’s ruling was rendered in summary proceedings and the court has yet to publish the full judgment. Facebook’s appeal in the main proceedings is still pending before the DCA. The FCJ’s ruling may, nevertheless, have significant implications for data-driven businesses.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

COLOGNE

Romina Polley
+49 221 80040 257
rpolley@cgsh.com

Laura Melusine Baudenbacher
+49 221 80040 202
lbaudenbacher@cgsh.com

Rieke Kaup
+49 221 80040 155
rkaup@cgsh.com

Friedrich Andreas Konrad
+49 221 80040 136
fkonrad@cgsh.com

¹ FCJ press release of June 23, 2020, only available in German [here](#). The full judgment has not yet been published.



Background

Under the current terms of service, users must agree to Facebook’s practice of combining data collected on the Facebook social media platform with data collected from sources outside of facebook.com. This includes other Facebook-owned services (*e.g.*, WhatsApp and Instagram) as well as third-party websites with embedded Facebook software (*e.g.*, the “Like” button and the “Facebook Pixel”).

The FCO’s Decision

On February 6, 2019, the FCO found that Facebook had abused its dominant position on the German market for private social networks through its data collection practices, because Facebook was combining user data from its social network with data from its other services as well as data from third-party websites. The FCO prohibited this form of data consolidation and ordered Facebook to change its terms of service in Germany within 12 months.² Relying on earlier FCJ case law, the FCO argued that the illegality of general terms and conditions under German civil or constitutional law could also constitute an exploitative abuse under German antitrust law. Specifically, the FCO alleged that Facebook infringed the EU General Data Protection Regulation (“GDPR”) by making users consent to the collection and combination of their data across different services a prerequisite for using Facebook’s social network. According to the FCO, this practice also constitutes an exploitative abuse under competition law.

Facebook appealed the FCO’s decision to the DCA and also filed a request to restore the suspensory effect of its appeal.

The DCA’s Interim Decision

On August 26, 2019, the DCA granted Facebook’s request and suspended the FCO’s prohibition decision.³ While the DCA did not criticize the FCO’s conclusion that Facebook is dominant, it voiced serious doubts regarding the finding of an abuse for lack of competitive harm—regardless of

whether Facebook’s terms of service infringed data protection law.

Doubts Regarding Proof of an Exploitative Abuse of Facebook’s Users

First, the DCA noted the FCO failed to show that Facebook had required the disclosure of an excessive amount of data or had employed unfair terms and conditions, because the FCO did not establish what terms and conditions would be offered in a hypothetical competitive market.

Second, the DCA found that the use of unlawful terms and conditions by a dominant company was insufficient to conclude that there was an exploitative abuse. The FCO would have had to demonstrate that Facebook’s market power enabled it to use unlawful terms and conditions (so-called strict causality)—which it failed to do.

No Proof of an Exclusionary Abuse

According to the DCA, the FCO did not show that the combination of user data from different sources enabled Facebook to hinder its actual or potential competitors on the market for private social networks by raising barriers to entry. Specifically, the DCA rejected adverse effects on the online advertisement market because of a lack of Facebook’s dominance on that market.

The FCJ’s Interim Decision

Following an appeal by the FCO, the FCJ overturned the DCA’s interim decision on June 23, 2020 and rejected Facebook’s request to suspend the enforceability of the FCO’s decision. The FCJ noted that it had no serious doubts regarding the legality of the FCO’s decision both with regard to the finding of a dominant position on the German market for private social networks as well as to the determination of an abuse of said dominant position through the use of terms and conditions. In interim proceedings, such a finding is particularly surprising when the legal review is limited to a mere plausibility check of the authority’s decision. Most

² *Facebook* (B6-22/16), FCO decision of February 6, 2019, available in English [here](#). See also our article in the German Competition Law Newsletter January – February 2019, p. 1 *et seq.*, available [here](#).

³ *Facebook* (VI-Kart 1/19 (V)), HRDC decision of August 26, 2019, only available in German [here](#). See also our article in the German Competition Law Newsletter July – August 2019, p. 1 *et seq.*, available [here](#).

notably, the FCJ considered the compliance of Facebook's terms and conditions with data protection law to be irrelevant, while at the same time underlining the economic importance of access to data and its relevance for the competition law assessment.

Exploitative Abuse Regardless of Data Protection Issues

The FCO's analysis indicated that a considerable number of Facebook users would like to disclose less personal data on Facebook. According to the FCJ, in a competitive market for social networks, competing offers that allowed users to disclose less data would also exist. Users for whom the disclosure of data is a relevant factor would then have the option to switch to these service providers. Against this backdrop, the FCJ found Facebook's data collection practices to be abusive, particularly because Facebook did not leave users a choice between a more personalized user experience based on the combination of data from different sources or an experience based solely on the data disclosed on facebook.com. Choice for all economic operators is a prerequisite for a competitive process and therefore in line with the overarching goal of German competition law to protect competition. However, the FCJ's reasoning appears not to be based on an established abuse of dominance doctrine.

This finding seems to hint at a strict causality requirement. However, this remains unclear, particularly in light of the fact that the FCJ also found a hindrance of competitors where a normative causality standard applies. Under the latter standard, it suffices that the relevant conduct increases the dominant company's market power. Moreover, there are doubts regarding the strict causality of the dominance for the abuse as non-dominant companies also apply far-reaching terms and conditions for the processing of user data.

In addition, the DCA had criticized the FCO for not having properly investigated the counterfactual scenario of data collection under competitive conditions.

Exclusionary Abuse Vis-à-Vis Facebook's Competitors

The FCJ noted that Facebook's position in the market is primarily based on direct network effects, since the total number of users increases the usefulness of the network for each user. The access to data from different sources was found to reinforce these lock-in effects. Furthermore, access to more data was held to improve Facebook's ability to monetize and further invest into its platform through online advertising. The FCJ concluded that Facebook's data collection thus raises the barriers to entry for its competitors.

Interestingly, the FCJ rejected the DCA's conclusion regarding the absence of an abuse of a dominant position on the market for online advertising. According to the FCJ, there is no need to establish Facebook's dominance on a separate market for online advertising, because a restriction of competition does not have to occur on the dominated market (in this case the market of social networks), but can also occur on a non-dominated third market (*in casu* the market for online advertising).

Conclusion

The FCJ's decision clearly dismisses the FCO's attempt to enforce data protection law through antitrust law. The FCJ instead focuses on an innovative theory of harm rooted in competition law which emphasizes consumer choice as a prerequisite for the competitive process. However, it also raises the question of how the hypothetical counterfactual scenario of data collection under competitive conditions is determined. It will be interesting to see the full reasoning of the decision on this point.

Implications

10th Amendment of the ARC

Against the backdrop of the draft proposal for the 10th amendment of the German Act against Restraints of Competition ("Draft Proposal"), the long-term impact of the FCJ's decision remains to be seen. The decision could influence the Draft Proposal, which has still not been introduced into parliament and is unlikely to enter into force before 2021. The FCJ's ruling suggests that the existing rules on abuse of dominance are flexible enough to

address new types of conduct on multi-sided markets, particularly because effects on markets without dominance can also be taken into account.

Next Steps

The ball now lies in the DCA's court for the decision in the main proceedings. The FCJ's interim decision is non-binding on the DCA in the main proceedings. In light of the significant implications for Facebook's business model and the FCO's enforcement, the case may likely return to the FCJ, and even be referred to the European Court of Justice to clarify what the appropriate legal test for data related exploitative abuses is.

...

CLEARY GOTTLIB