





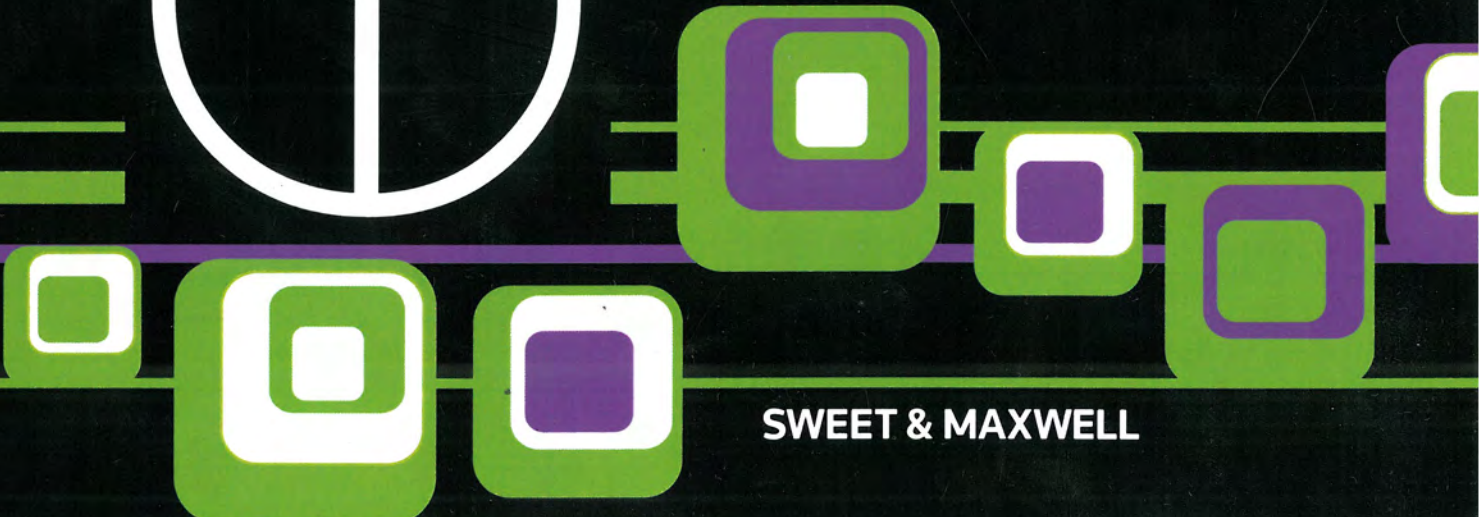
EUROPEAN COMPETITION LAW REVIEW

Volume 40: Issue 8 2019

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SWEET & MAXWELL

European Competition Law Review

2019 Volume 40 Issue 8
ISSN: 0144-3054

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German Facebook Decision: the interplay of competition and data protection law

Konstantina Sideri

☞ Abuse of dominant position; Data collection; Data protection; Germany; Market definition; National competition authorities; Social media

Introduction

On 6 February 2019, the German Federal Cartel Office (“FCO”) issued a decision ordering Facebook Inc, Menlo Park, USA, Facebook Ireland Ltd, Dublin, Ireland, and Facebook Germany GmbH, Hamburg, Germany (“Facebook”) to implement the necessary changes and to adapt its data and cookie policies accordingly within a period of 12 months.¹ The FCO found that Facebook abused its dominant position in the German market of social networks, by violating the European General Data Protection Regulation (“GDPR”).² The FCO did not impose a fine on Facebook, but it obliged Facebook to change its policy of collecting data. Due to the fact that Facebook holds a dominant position in the German market, this case has triggered a big debate on the relationship between competition and data protection law.

Summary of the facts

Facebook is an online social media and social networking service company, the main core product of which is *Facebook.com*, which has operated in Germany since 2008. Its user base has been increasing during the passage of time. The use of *Facebook.com* requires registration by creating a user profile. Using their real names, users can enter information on themselves and their personal situation and set a profile picture. *Facebook.com* can be used not only by private users, but also by businesses, associations or business individuals. Except for *Facebook.com*, Facebook also has other services such as WhatsApp, Oculus, Masquerade and Instagram. Facebook’s terms

and conditions have obliged users so far to use the social network under the condition that Facebook can also collect user data outside of the Facebook website on the internet or on smartphone apps and assign these data to the user’s Facebook account. This way of collecting data from third-party websites (WhatsApp, Oculus, Masquerade and Instagram) and assigning them to a Facebook user’s account does not include voluntary consent of the users.

The investigation proceedings started in March 2016 and, nearly three years later, the FCO found that Facebook’s practice of collecting data amounted to an exploitative abuse of a dominant position based on s.19(1) of the German Competition Act (“GWB”). It was the first time that the FCO had considered compliance with data protection rules in its abuse of dominance analysis.

The legal tensions

Market dominance

According to the investigations, Facebook holds a dominant position in the German market for social networks. It was found that, in December 2018, Facebook had 1.52 billion daily active users and 2.32 billion monthly active users. It has 23 million daily active users and 32 million monthly active users. Those numbers imply that Facebook has a market share of more than 95 per cent (daily active users) and more than 80 per cent (monthly active users). According to the FCO, Facebook is an intermediary on a multi-sided network market connecting private users with advertisers, publishers and developers. The FCO focused on private users as a relevant market and excluded professional social networks such as LinkedIn, and services such as Snapchat, YouTube and Twitter, because they only offer parts of the services of a private social network. The FCO explained that Snapchat, YouTube, and Twitter serve totally different functions from Facebook, and, therefore, cannot be seen as viable alternatives to the service. Andreas Mundt, FCO president, said:

“With regard to Facebook’s future data processing policy, we are carrying out what can be seen as an internal divestiture of Facebook’s data. In future, Facebook will no longer be allowed to force its users to agree to the practically unrestricted collection and assigning of non-Facebook data to their Facebook user accounts. The combination of data sources

¹ FCO Press Release, “Bundeskartellamt prohibits Facebook from combining user data from different sources”, 7 February 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.jssessionid=5A03AF22F242262E3E32523A10C709C5.1_cid371?nn=3591568 [Accessed 24 May 2019].

FCO Case Summary (B6-22/15), “Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing”, 15 February 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 [Accessed 24 May 2019].

FCO Background Paper, “Bundeskartellamt prohibits Facebook from combining user data from different sources – Background information on the Bundeskartellamt’s Facebook proceeding”, 7 February 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5 [Accessed 24 May 2019].

A non-confidential version of the decision is available in German only at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html.jssessionid=15BC5F2673D4068283CFF5B84B52D9A.1_cid371?nn=3591568 [Accessed 24 May 2019].

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

substantially contributed to the fact that Facebook was able to build a unique database for each individual user and thus to gain market power.”

Abuse of market power

According to the FCO, Facebook abused its dominant position by violating the data collection policy, because Facebook did not obtain users’ voluntary consent to merge their data. The FCO based the abuse of market power on the extent of collecting, using and merging data from third-party sources (both Facebook-owned services such as Instagram or WhatsApp as well as third-party websites and apps) in a user account. The FCO, in its decision, declared that, when the sources include interfaces such as “Like” or “Share” buttons, data flow to Facebook once a website is visited and it is not necessary for the button to be clicked on. Even if no Facebook symbol is visible to users of a website, user data may be transmitted to Facebook if the website operator uses Facebook’s “Facebook Analytics” service. FCO president, Andreas Mundt stated that:

“In view of Facebook’s superior market power, an obligatory tick on the box to agree to the company’s terms of use is not an adequate basis for such intensive data processing. The only choice the user has is either to accept the comprehensive combination of data or to refrain from using the social network. In such a difficult situation the user’s choice cannot be referred to as voluntary consent.”

According to the German Competition Law (art.19) a dominant company, such as Facebook, is subject to special obligations. The FCO based its decision on German Federal Court of Justice (“FCJ”) case law and assessed that, under German data protection law, Facebook terms were found to be inappropriate because they exploited Facebook users. According to the case law of the German Federal Court of Justice, civil law principles can also be applied to determine whether business terms are exploitative.³

Vertical theory of harm

German competition and data protection law

In this case appears to be a tension between German competition law and data protection law. The FCO assessed that Facebook’s practice is an exploitative abuse, not in the form of asking for excessive fees, but in the specific form of using exploitative terms and conditions. The harm caused to users from Facebook’s data collection is not in cost, but in “loss of control” of their data use.⁴ To be more specific, data protection law seeks to ensure that users can decide freely on how their personal data are used, and that their personal data are not exploited by the opposite market side. According to the FCO’s decision, this case is subject to the German Competition Authority, because access to data, above all in the case of online platforms and networks, has been classified as a relevant factor for market dominance under s.18(3a) of the German Competition Act (“GWB”).⁵ The data protection authorities in Germany declared that the enforcement of data protection laws must not be the sole response to violations of data protection requirements, and supported the FCO in considering the GDPR in its competitive assessment. The FCO held that the GDPR can be addressed alongside with the competition law provisions, as data protection law can be considered the benchmark for assessment of unfair business terms.⁶

Data processing terms violate the GDPR

The GDPR governs the responsibility of data protection authorities and sets the legal standards for considering whether or not the personal data are being protected. The FCO indicated that Facebook’s collecting policy did not comply with art.6 of the GDPR and this practice violated data protection law.⁷ More specifically, according to the FCO’s decision, there is no effective consent pursuant to art.6(1a) of the GDPR as the users’ consent could not be considered as freely and voluntarily given. Facebook’s practice obliged the potential users either to accept the data collection/processing practice or to refrain from using the entire of Facebook. In addition, Facebook’s practice did not fulfill the conditions of art.6(1b) of the GDPR. The FCO investigation showed that Facebook had no effective justification for collecting data from other company owned services and Facebook Business Tools or for assigning these data to the Facebook user accounts.

³ VBL-Gegenwert (KZR 47/14), FCJ decision of 24 January 2017; and Pechstein (KZR 6/15), FCJ decision of 7 June 2016.

⁴ Bird & Bird News Centre, Dr Jörg Witting, “Facebook - at the cross-roads of data protection and competition law”, February 2019, available at: <https://www.twobirds.com/en/news/articles/2019/germany/facebook-at-the-cross-roads-of-data-protection-and-competition-law> [Accessed 24 May 2019].

⁵ FCO Background Paper, “Bundeskartellamt prohibits Facebook from combining user data from different sources – Background information on the Bundeskartellamt’s Facebook proceeding”, 7 February 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5 [Accessed 24 May 2019].

⁶ FCO Case Summary (B6-22/15), “Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing”, 15 February 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 [Accessed 24 May 2019].

⁷ FCO Case Summary (B6-22/15), “Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing”, 15 February 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 [Accessed 24 May 2019].

Moreover, none of the stipulations of art.6(1c-e) of the GDPR apply to justify data processing for special purposes. The amount of the data collected was neither necessary to perform any contractual obligations to users, nor a justification that Facebook's interest in processing data, according to the terms and conditions it set, outweighs other interests, as per art.6(1f) of the GDPR.⁸

Horizontal theory of harm—manifestation of market power

According to the FCO, Facebook's violation of data protection requirements is considered a manifestation of Facebook's market power.⁹ In the decision at issue, it was stated that it was not necessary to examine whether Facebook's data collecting and processing practices were possible because of its market dominance and that competitors, for this reason, would not be able to behave in a similar way and to compete sufficiently. The important thing is to determine that the two aspects are linked by a causality. This causality exists due to the fact that Facebook's dominance restricted the private users' right to the processing of their personal data. Moreover, the FCO also declared that Facebook acting in this way allowed them to obtain a competitive advantage over its competitors, because they were not in the position to collect and process that same large amount of data. In other words, Facebook's dominant position creates a competitive edge over its competitors in an unlawful way by increasing the existing barriers to entry.

Implications of the decision

The FCO imposed on Facebook far-reaching restrictions in the processing of user data. Facebook has to change its data collecting and processing policy. In particular, Facebook can continue to collect data from the Facebook-owned services like WhatsApp and Instagram, but there has to be the users' voluntary consent, otherwise the data must remain with the respective service and cannot be processed in combination with Facebook data. Moreover, collecting data from third-party websites and assigning them to a Facebook user account will also only be possible if users give their voluntary consent.¹⁰

The voluntary consent is mandatory for collecting and processing users' data, and, if the consent is not given, Facebook has to restrict its collection and combining of data. The FCO set Facebook a deadline period of 12 months in the order to terminate the infringement and to

adopt new data and cookie policies. Moreover, Facebook has to present an implementation road map for the adjustments within a period of four months.

Following the decision, Facebook filed its appeal against the FCO's decision before the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*, "DCA") and, in addition, requested that the Court suspend the decision's effects in the interim. If Facebook wants to abide by the FCO's decision, it must either stop combining data from third-party websites with user profiles, or obtain users' "consent" to do so, by providing a technical solution to allow users to opt out of the data tracking outside the Facebook account. In any case, Facebook cannot tie membership on the platform to people agreeing to unlimited data tracking.¹¹

Critical analysis of the decision

This decision indicates an interplay between competition law and data protection law. The FCO stated that, in cases of market dominance, data collection and processing should be assessed by the competition authority in order to classify whether the terms and conditions for data processing are appropriate. However, the European Commission in the *Facebook/WhatsApp* merger decision¹² stated that

"privacy-related concerns owing from the increased concentration of data [...] do not fall within the scope of the EU competition law rules but within the scope of EU data protection rules",

which implies a distinguishing between the data protection compliance and competition authorities.¹³ So, it is not clear whether a competition authority is capable to examine the data collecting and processing policies.

Another important issue at this case is the applicability of art.102 TFEU. The FCO based its decision only on the German Competition Law stating that only the case law of the highest German court has been established taking into account data protection in assessing abusive practices of a dominant company. The FCO also stressed that it was co-ordinating with the European Commission and other competition authorities in the course of the proceeding due to the cross-border dimension of the case. Taking into account that there is a cross-border dimension of this case, the non-application of EU competition law and its basically similar prohibition of abusive behavior pursuant to art.102 TFEU is not sufficiently justified.

⁸ Cleary Gottlieb, German Competition Law Newsletter, "FCO Orders Facebook To Change Its Data Collection Practices", January–February 2019, available at: <https://www.clearygottlieb.com/~media/files/german-competition-law-newsletters/german-competition-newsletterjanfeb2019-pdf.pdf> [Accessed 24 May 2019].

⁹ FCO Case Summary (B6–22/15), "Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing", 15 February 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 [Accessed 24 May 2019].

¹⁰ FCO Press Release, "Bundeskartellamt prohibits Facebook from combining user data from different sources", 7 February 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html;jsessionid=5A03AF22F242262E3E32523A10C709C5.1_cid371?nn=3591568 [Accessed 24 May 2019].

¹¹ Karin Matussek and Stephanie Bodoni, "Facebook to appeal Germany crackdown", *The Independent*, 8 February 2019, available at: <https://www.independent.ie/business/world/facebook-to-appeal-germany-crackdown-37794625.html> [Accessed 24 May 2019].

¹² Commission Decision of 3 December 2014 pursuant to Article 6(1)(b) of Council Regulation 139/2004 (COMP/M.7217 – *Facebook/WhatsApp*).

¹³ Herbert Smith Freehills LLP data notes, Miriam Everett, "The German FCO/Facebook decision: implications for data privacy regulation", 13 February 2019, available at: <https://hsfnotes.com/data/2019/02/13/the-german-fco-facebook-decision-implications-for-data-privacy-regulation/> [Accessed 24 May 2019].

In addition, the FCO adapted a very narrow market definition which helped it against Facebook. The market definition was limited both in terms of product (social networks) and geographic scope (national—German market). The FCO, in order to identify the relevant market, not only specified the market as of social networks, but also distinguished the social networks between which of them are for private use and which are career-oriented professional (such as LinkedIn), and others (such as YouTube).¹⁴ In addition, and regardless of the cross-border dimension, the FCO decided to identify the market only in German territory. The FCO took an advantage against Facebook with this too-narrow market definition. Indeed, the FCO stated that even if YouTube, Snapchat, Twitter, WhatsApp, and Instagram were included in the relevant market, Facebook would still be dominant, but if the result was the same, why did the FCO not include all kinds of social networks?

Moreover, the FCO considered that Facebook violated the GDPR provisions. According to the decision, Facebook did not comply with the provisions of art.6 of the GDPR which provides a limited number of grounds upon which companies may lawfully process data. These include “user consent” and “necessity for the performance of the underlying contract”.¹⁵ Facebook declared that it provided the option of “take it or leave it”, but FCO stressed that this could not be considered under the

meaning of “consent”, because users cannot opt out of some terms while maintaining access to the Facebook platform. The FCO’s explanation is sufficiently debatable.

Conclusion

The FCO’s decision is of great importance for the dominant data-heavy digital companies, the application of which is going to eliminate the freedom of operating. The FCO highlighted a potential tension building between competition and data protection regulation, as this was the first time when data protection rules had been examined in relation to the abuse of dominance. In the present case, the FCO was trying to implement strictly the provisions of the GDPR, based on the fact that the examined undertaking holds a dominant position in the market, considering data protection law as a benchmark for assessment of unfair business terms. The crucial question is: if Facebook was not in a dominant position, would the decision and the strict application of the GDPR be same?

Facebook has already filed an appeal against the FCO’s decision asking the court to suspend the decision’s effect in the interim. If Facebook loses the appeal, then Facebook’s business in Germany will face important ramifications. The FCO’s decision sets a threat for the future application of the GDPR, because competition authorities will be allowed to assess data protection matters.

¹⁴The separation was based on the *Facebook/WhatsApp* merger decision, that distinguished consumer communication services from social networks, (Commission Decision of 3 December 2014 pursuant to Article 6(1)(b) of Council Regulation 139/2004 (COMP/M.7217 – *Facebook/WhatsApp*) at [15]).

¹⁵Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/I art 6, 1(a) and (b).