

Facebook Germany – is the competition authority overstepping its remit?



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*Partner **Thomas Schürle** and associate **Andrea Pomana** at Debevoise & Plimpton in Frankfurt discuss whether the German competition authority was right to penalise Facebook's data practices, and whether the decision will have an impact outside the country*

On 7 February, the German Federal Cartel Office (FCO) issued two orders essentially prohibiting Facebook from merging personal user data from other Facebook-owned services such as WhatsApp and Instagram or from third-party websites without specific user consent. The FCO found that Facebook misused its market power by granting access to its social network only if a user consented to the data merging.

The FCO did not fine Facebook, opting instead to issue prohibition orders. The prohibition orders rely heavily on decisions by the German Federal Court of Justice (FCJ) regarding abuse of market power through illegal terms and conditions, and it is not clear to what extent this case serves as an example for other EU member states or even EU

authorities. The true novelty of the decision lies in the fact that a competition authority dealt with a specific data protection law issue, and not the data protection authorities who could have addressed the issue themselves.

At issue: personal data generated outside of Facebook

The decision concerns Facebook's collection of user data generated by services outside of its social network, both by Facebook-owned services like WhatsApp and Instagram, and by third-party websites and apps that integrate Facebook application programming interfaces such as the 'like', 'share' or 'login' buttons.

The FCO found that Facebook collects data even if users don't actually use these buttons, but merely visit a website or install an app that uses Facebook interfaces. Indeed, collection occurs even if a user has vetoed web-tracking in their settings, and even when the Facebook buttons are not visible on websites but the sites invisibly run Facebook Analytics in the background.

The amount of data collected is large and, in the eyes of the FCO, contributes to Facebook's dominant market position.

Two prohibition orders

According to the FCO's order, Facebook is banned from merging personal data derived from its other group services like WhatsApp and Instagram with a user's Facebook account without specific user consent.

Facebook must also refrain from collecting data from third-party websites and apps and merging them with a user's Facebook account without specific user consent.

Facebook, as well as its group services WhatsApp and Instagram, may continue to collect personal data in connection with their respective services, but it may not exclude users from its social network, if it does not get consent to transfer data from the services to Facebook.

Facebook has 12 months from the date the decision comes into force to implement the orders. If it intends to continue merging data with Facebook user accounts without voluntary consent, it must substantially restrict its collection and merging of data, and

within four months develop proposals for solutions in this respect (eg restricting the amount of data, the purpose of use and the type of data processing, introducing additional control options for users, providing limitations on data storage etc).

Compliance with the prohibition orders can be enforced with a penalty of up to 10% of the company's turnover (which in 2018 was around \$55.8 billion) or periodic penalty payments, each of up to €10 million.

Relevant market

When it studied the German market for social networks, the FCO found only a few smaller providers that directly compete with Facebook. Google+ announced it would cease operations in April 2019, and there are a few alternative providers in Germany such as studiVZ and meinVZ, but they are very small.

In line with the European Commission's decision in Microsoft/LinkedIn, the FCO concluded that professional networks like LinkedIn and Xing do not directly compete with Facebook's social network. Messaging services like Snapchat and other social platforms such as YouTube and Twitter also do not form part of the same market, according to the FCO.

The FCO found that the geographic market is restricted to Germany, as Facebook users mainly use the network to stay in contact with other German users. This is a different outcome than in the European Commission's Facebook/WhatsApp decision from 2014, in which it concluded that the market for social networking services is at least EEA-wide, if not worldwide.

Market dominance

The FCO took the view that Facebook is a dominant company in the market for social networks in Germany, having a market share of more than 95% in terms of daily active users, and 80% in terms of monthly active users.

Several additional factors establish Facebook's market dominance: its access to a large and competitively relevant dataset has enabled it to build a "unique" database for each individual user. Moreover, direct and indirect network effects have strengthened its

dominant position because Facebook's attractiveness for users and advertising companies increases as more users are active on Facebook. Users are also "locked in" because they cannot simply change to other social networks without losing their existing friends base. Other social networks are less attractive because they have fewer users.

Data protection law violations and abusive behavior

The FCO established that Facebook abuses its market dominant position by imposing general terms and conditions which allow it to collect an "almost unlimited amount of any type of user data" and merge the data with a user's Facebook account without specific and voluntary user consent.

The FCO did not conclude whether Facebook would have been able to impose the same terms and conditions were it subject to serious competition, probably due to the lack of a comparative market. However, the FCO found that Facebook's terms and conditions are as such exploitatively abusive, taking the view that the general terms and conditions imposed by Facebook seriously violate EU data protection rules: users lose control of their personal data and "cannot perceive which data from which sources are combined for which purposes with data from Facebook accounts and used e.g. for creating user profiles".

In its legal analysis, the FCO used a concept well established in Germany that the use of improper general terms and conditions may constitute abuse of market power. In its decision in *VBL-Gegenwert I*, the FCJ decided that illegal terms and conditions imposed by market dominant companies can generally be regarded as abusive.

Later on, in *VBL-Gegenwert II*, the FCJ observed that the imposition of illegal terms and conditions does not always entail an abuse of a dominant position. However, an organisation's conduct is still defined as abusive if it imposes illegal terms or conditions as a result of its market power or great market superiority.

The FCO also carried out a balancing of interest test. It concluded that Facebook's practices violate the user's constitutional right to informational self-determination, and that Facebook's business interests in collecting and merging data do not supersede this right in the present situation if the company does not obtain proper consent. Such

balancing of interests is again no new concept. In its *Pechstein* decision, the FCJ weighed the fundamental rights against other interests at stake.

Competitive harm

The FCO's decision seems to suggest that Facebook's conduct committed two types of harm. First, it says that the user's loss of control over their personal data constitutes competitive harm. However, the FCO did not say to what extent this harm has an economic effect. The user may indeed suffer from not being able to control the data collected and merged with a user's Facebook account. The question is, however, whether such harm leads to adverse effects on the market. The reasoned decision of the FCO, once public, will hopefully shed more light on this issue.

Second, Facebook's advertising customers and Facebook's competitors suffer additional harm in the advertising market for social networks because they both face a dominant supplier of advertising space. In the authors' opinion, this seems to be the most plausible theory of harm. Online advertisement in Germany is an important economic sector, worth over €9 billion. In view of its 23 million daily active users and 32 million monthly active users in Germany along with the sheer amount of data Facebook collects on them, the social media platform is indispensable for advertisers. These customers do not have a viable alternative in terms of other social networks, for the same reason that users would not be willing to change to alternative social networks: they are simply too small. This results in the customers accepting Facebook's prices for advertisement space and for other competitors not being able to enter the market because they do not have access to such a vast user database as Facebook's.

The decision and its context

Naturally, there is a question as to whether data protection authorities would have been better placed to carry out the investigation. The case against Facebook's practices aims at the reach, specification and adequacy of the user consent which involves a pretty complex analysis of EU data protection law. The FCO claimed to have spoken to "leading data protection authorities", but the published statements so far are not overly detailed on the data protection aspects.

However, it is worth acknowledging that the FCO's views do not appear to be out of sync with those of data protection authorities, as evidenced by the recent decision by France's watchdog, CNIL, to fine Google in part for failing to obtain valid consent for processing data for the purpose of targeted advertising.

While Facebook Germany has been under the watchful eye of the Hamburg data protection authority for some time, one should keep in mind that the FCO's investigation started three years ago when the GDPR was still some way away, and at that time data protection agencies were pretty toothless in terms of the fines they could levy.

To get a handle on the matter, the FCO needed to pursue the case as one of abuse of a dominant market position, which in Germany means assessing whether a company's use of general terms and conditions counts as abuse of market power. The international reach of this legal concept is, however, not clear, and the geographical reach of the decision is confined to Germany.

Even within Germany, another issue is whether abusive behavior by exploitation must by its nature negatively affect the market. The FCO does not discuss this question in its official statements so far, but it appears relevant under the jurisprudence of the European Court of Justice in cases of exclusionary conduct (*Deutsche Telekom*) and exclusivity rebates (*Intel*). It remains to be seen if the appellate court in the Facebook case will pick up on this issue.