



Gleiss Lutz

BIG DATA – THE GERMAN FACEBOOK CASE

Seminario Concorrenze – Concorrenza Digitale e Big Data
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Control of Data – The German Facebook Proceedings

The Federal Cartel Office's Starting Point



Today data are a decisive factor in competition. In the case of Facebook they are the essential factor for establishing the company's dominant position. On the one hand there is a service provided to users free of charge. On the other hand, the attractiveness and value of the advertising spaces increase with the amount and detail of user data. It is therefore precisely in the area of data collection and data use where Facebook, as a dominant company, must comply with the rules and laws applicable in Germany and Europe.

Andreas Mundt, Head of the FCO (February 6, 2019).

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The Federal Cartel Office's Decision of February 6, 2019

Proceeding

- On March 2, 2016, the FCO initiated the proceeding against FB on suspicion of having abused its market power by infringing data protection rules.

Accusation

- The FCO ruled that the extent to which FB collects and merges certain additional user data violates data protection laws and constitutes an abuse of a dominant position under Section 19 of the German Act against restraints of competition (ARC).



Prohibition Decision

- FB must no longer make the use of its social network Facebook.com subject to FB being able to collect and use data generated by the use of further FB-owned services such as WhatsApp and Instagram and assign these data to the FB user accounts without the separate consent of the users.
- FB must no longer use terms and conditions allowing the company to collect user data generated by calling up third party websites or using mobile apps via interfaces (Facebook Business Tools), and to use and assign them to FB user accounts.
- The FCO not only prohibited the relevant parts of the terms of service and the explanatory data and cookie policies, but also the actual processing of data carried out by FB on the basis of these terms.
- FB was ordered to discontinue the incriminated conduct within twelve months.

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The Federal Cartel Office's Landmark Decision of February 6, 2019

The FCO's Legal Assessment

Market Dominance

Abuse of Dominance by Infringement of Data Protection Laws

Relevant Market

- Product market: social networks for private users
- Geographic market: Germany
- FB as the dominant undertaking in this market with a market share exceeding **95%**



Exploitative Business Terms

- Infringement of data protection laws ➡ abuse of dominance in the form of *exploitative business terms* (violation of Section 19(1) ARC ≈ Article 102 TFEU)
- Based on two decisions of the German Federal Court of Justice
 - Not only excessive prices, but also inappropriate contractual terms and conditions may constitute an exploitative abuse
 - General clauses under civil law (one of which is Section 19 ARC) should be applied to outbalance unequal bargaining powers
- Damage caused to users ➡ "*loss of control*": users cannot freely determine and oversee how their personal data is used from the various FB data sources

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Düsseldorf Court of Appeals Injunction Decision of August 26, 2019

[T]he data processing by Facebook, which the Federal Cartel Office has objected to, does not give rise to any relevant damage to competition, nor does it give cause for concern about any undesirable development in competition. This applies both with regard to exploitative abuse to the detriment of consumers participating in the social network of Facebook ([...]) and with regard to exclusionary abuse impairing current or potential competitors of Facebook ([...]).

[...] [T]he Federal Cartel Office is merely discussing a data protection issue, and not a competitive problem.*



Based on its summary review, the Court of Appeals suspended the FCO's decision, expressing "serious doubts" as to the legality of the contested decision. The FCO has appealed this injunction decision, so the Federal Court of Justice will have to decide (probably in 2020).

* Düsseldorf Court of Appeals, August 26, 2019, Case VI-Kart 1/19 (V), p. 7, 11 (English convenience translation available here: http://www.computerundrecht.de/CoA_Decision_August_26_2019_Translation.htm)

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The Düsseldorf Court of Appeals' Reasoning

Lack of evidence for competitive harm

The unlawfulness of a contractual term as such cannot justify the allegation of abuse of market power.

- In all decisions of the Federal Court of Justice, the violations of law were associated with obvious anti-competitive effects (foreclosure of markets, restriction of freedom to terminate contractual relationships)

There must be a considerable gap between the terms demanded by the dominant firm and those in a hypothetical competitive scenario (“as-if-competition”).

- Competition law must not go beyond the regulatory purpose of abuse control and competition authorities must not prosecute violations of law that are not relevant to competition processes

The necessary causal link between the assumed dominant position of FB and the assumed breach of data protection law has not been established.

- No indication of coercion, pressure, exploitation of a weakness or other unfair means
- Consent is based on a free and independent user decision

Consumers have to weigh the benefits of using a social network financed through advertising (which hence is free) against the consequences associated with the use of the additional data by FB.

- The majority of Germany's population does not use FB

No evidence of users' “loss of control” over their data.

- 80% of users do not read the general terms and conditions because they must accept them anyway
- Failure to take notice of the terms is not due to FB's market power but rather to the indifference or convenience of the FB
- Thus, no proven causal link between FB's conduct and its market power

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“One of the leading senior advisors in competition and antitrust”
JUVE Handbuch 2019/2020

“One of the leading names in antitrust”
The Legal 500 Deutschland 2019

“Thought Leader – Global Elite 2020: Competition”
Who's Who Legal: Thought Leaders – Global Elite 2020

“highly professional (client)”
JUVE Handbuch 2018/2019

COMPETENCES

Ingo advises clients on German and European antitrust law, in particular in connection with merger control, investigations and litigation, and compliance programmes. He has lead numerous important cases before the Federal Cartel Office and the European Commission as well as before the European General Court/European Court of Justice and the German antitrust courts. Since December 2018, Ingo is chairman of the Association for the Study of Antitrust Law (*Studienvereinigung Kartellrecht e. V.*).

SELECTED CREDENTIALS

- **Booking.com** regarding the FCO's decision on its narrow parity clause
- **Bundesregierung** on the restructuring of Airbus/EADS
- **Siemens** regarding both the GIS and transformer cartels before the European Commission and the Federal Cartel Office; litigation before the European General Court and the European Court of Justice in the GIS antitrust proceedings
- **Infineon Technologies** regarding DRAMs in proceedings before the European Commission and regarding Smart Card Chips in proceedings before the European Commission and the European Courts
- **Facebook** regarding the FCO's decision on the use of user and customer data
- **Rethmann Group** inter alia on its acquisition of a shareholding in Transdev S.A. and on its acquisition of Duales System Deutschland (DSD)
- **GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte)** in the CISAC proceedings before the European Court of Justice
- **Syngenta** in EU merger control proceedings (Phase II) on the acquisition of Monsanto's sunflower seed business, the defense against hostile takeover attempts by Monsanto, the takeover by ChemChina and on the sale of a business unit in the context of Bayer/Monsanto commitments

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PROFILE

Ingo studied at the universities of Freiburg, Münster, Munich (Dr. iur. 1994) and Chicago (LL.M. 1993). He has been a partner at Gleiss Lutz since 1997.

He is a member of various associations, including the Association for the Study of Antitrust Law (Chairman, Board Member), the International Bar Association (Co-Chair Editorial Board CLI, Retired Co-Chair of the Working Group Private Antitrust Enforcement) and the Society of European Law (Board Member).

He is furthermore the co-publisher of the periodical Neue Zeitschrift für Kartellrecht (NZKart) and co-editor of the journal Europarecht (EuR). He regularly publishes articles etc. on antitrust issues and European law, while also co-authoring the commentary on EU antitrust law (Beck'sche Gelbe Reihe, 3rd edition 2014, 4th edition under preparation).

Ingo speaks German and English.



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THANK YOU

for your attention