

# The German Competition Authority's *Facebook* Decision (case no B6-22/16)

CLA Meeting

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# Procedure (1)

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- Decision of FCO dated 6 Feb 2019
  - Facebook must not make the use of its social network by private users based in Germany conditional on its right to use, process and merge personal data obtained via affiliated services (e.g. WhatsApp, Instagram) and third party partner websites and Apps without the private user's effective consent
  - Exploitative abuse by Facebook as a dominant company in violation of German competition law
  - Prohibition and order to end
- Appeal by Facebook to seek suspensory effect in summary proceedings

## Procedure (2)

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- FCO's investigation started in March 2016
- Federal Association for Consumers admitted as third party
- Various requests for information to and meetings with Facebook and other market participants, incl. competitors and Google
- Contacts with officers of the Hamburg and Federal Data Protection Authorities and the Irish Authority
- FCO commissioned a consumer survey (1,117 participants) by third party institute
- Facebook also submitted economic expert reports

## Facts (1)

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- Facebook's complex terms and conditions, including data policy and cookie policy
- Private user has to consent to this package to use Facebook free of charge
- Facebook uses, processes, merges and analysis all user- and device-related data resulting from the private user's activities on Facebook including affiliated services (e.g. WhatsApp, Instagram) and third party websites and Apps (e.g. via "Like"-Button)
- Facebook is funded by its data/advertising services to companies (online advertising market)

## Facts (2)

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- Facebook has
  - approx. 23m daily users
  - market share of the German market for social networks of more than 95% based on daily active users, and between 73-85% based on monthly active users (Q1 2012 – Q1 2018)
- 2 other social networks in Germany
  - StudiVZ
  - Jappy
  - (Google+ existed the German market in Q2 2019)
  - Each with less than 1m registered users

# Legal Considerations: Overview

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- Application of German rules prohibiting abusive behavior of market dominant companies (Sec. 19 ARC)
- Main issues
  - Is Facebook dominant? What is the relevant market?
  - What type of abusive behavior? And which ARC provision applies?
  - Causality? Is it necessary that Facebook's illegal data policy results from its market dominance?

# Legal Considerations: Relevant Market

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- Defining the relevant market to determine the question of market power
  - FCO: market for the use social networks by private users based in Germany
  - Legal test: substitutability from the demand side
  - Product scope: not social media, not partial substitutes (e.g. Youtube, LinkedIn, Twitter, Snapchat, Instagram)
    - Multi-sided market with Facebook acting as intermediary does not affect definition
    - Single-platform market?
  - Geographic scope: survey showed that approx. 80% of the users have their friends primarily in Germany

# Legal Considerations: Market Power

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- Assessing the requirements for market power (Sec. 18(3), (3a) ARC)
  - Extremely high market share
    - Unique access to personal data and details
  - Network effects in multi-sided markets (relevance of the online advertising market for Facebook's funding)
  - Partial substitute competition by other social media does not neutralize high market share
  - Likely tipping process
  - High entry barriers resulting from network effects
  - No multi-homing
  - Lock-in effect (no data portability)

# Legal Considerations: Abuse (1)

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- Exploitative abusive behavior
  - by applying abusive contract terms, i.e. business terms in violation of data protection rules (GDPR)
- FCO: Application of the general prohibition clause (Sec. 19(1) ARC); not excluded by the special clause on abusive business terms (Sec. 19(2) no. 2, requiring a *but-for* analysis)
- Supported by 2 Federal Court of Justice decisions:
  - *VBL-Gegenwert* (the use of terms in violation of general contract law is a manifestation of market power)
  - *Pechstein* (constitutional rights must be taken into account in the overall balancing of the parties' interests<sup>9</sup>)

## Legal Considerations: Abuse (2)

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- Prohibition of exploitative abuse also aims at protecting end-consumers
- Data protection law derives from the fundamental right of informational self-determination (Art. 8 EU Charter)
- Data protection law must be taken into account to ensure that contractual terms are *appropriate* in unbalanced negotiations with a dominant company
- Facebook's contract terms in violation of data protection law are a *manifestation of its market power*
  - *Causality* based on normative aspects and on outcome (access to data sources that competitors do not have)
  - This is sufficient to show an exploitative abuse

## Legal Considerations: Abuse (3)

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- Data Protection Authorities not exclusively competent
  - GDPR relevant in balancing of interests in abuse cases
- Detailed assessment of Facebook's contract terms under the GDPR to determine their appropriateness - FCO concluded that requirements are not met
  - *No effective (voluntary) consent* by the affected users
  - *No legal justification* for the extent of data collected and merged
    - Terms *unilaterally* imposed by dominant company
    - Data from sources outside Facebook *not necessary* for offering personalized services, incl. profiling

# Questions and Comments

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- Market definition?
- Relevance of the case limited to Germany because of German legal particularities / case law?
- Would the decision have been different under Art 102 TFEU?
- Concept of causality? Theory of harm?
- Interface between data protection rules (consumer protection) and competition law: authorities' competence? Scope of substantive law?
- General relevance for big data business models?

# Thank you for your attention!

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