



## Competition Law Association

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### **The German Competition Authority's Facebook Decision**

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**Venue:** Bristows LLP, London

On 6 February 2019 the German Competition Authority, the Federal Cartel Office ('FCO'), announced the results of its three year investigation of Facebook. In a seeming convergence of competition and data protection law the FCO found that Facebook had abused its dominant position in the German social network market through its use of 'exploitative business terms'. The abusive conduct in question was Facebook's practice of making the use of its social network by private users conditional on its right to collect and merge personal data from its affiliated services (e.g. Instagram and WhatsApp) and third party providers with data from users' Facebook accounts – a practice that enabled Facebook to build a unique database of information on each user. The FCO did not impose a fine but prohibited Facebook's abusive conduct and imposed an 'order to end' within one year. Facebook has appealed.

#### **Facebook is dominant in the German social network market**

The FCO recognised that Facebook is a multi-sided platform that serves both private users and advertisers but considered that only the private user market was relevant for the harm being caused. Applying the legal test of substitutability from a private user's perspective the FCO concluded that social media platforms such as Twitter, LinkedIn, Instagram and WhatsApp were not part of the relevant market because, functionally, they are not fully interchangeable with social networks like Facebook. Results of an independent consumer survey revealed that 80% of German users predominantly use social networks to connect with friends in Germany, indicating that the market was a national one.

Google+ left the German market earlier this year leaving only three platforms within the relevant market – Facebook, Jappy and StudiVZ. The latter two platforms each have only 1 million registered German users whereas Facebook has over 23 million active daily users in Germany, resulting in a market share of over 95%.

In accordance with the most recent amendments to the German Competition Act (the "GWB") the FCO's analysis of dominance was not limited to market share, it also considered the following:

- Facebook has an extremely high market share which gives it unique access to personal data;
- Facebook's position is strengthened by direct network effects;
- Indirect network effects act as additional barriers to market entry for platforms reliant on advertising revenue;
- Partial substitution of Facebook with another social media platform would not neutralize Facebook's high market share;
- There was no evidence of multi-homing, private users will either use Facebook or another platform;
- The lack of data portability creates a lock-in effect for users; and
- Facebook's user figures continue to rise whilst competitors are leaving the market, indicating a tipping effect in the market that could result in Facebook becoming a monopolist.

## **Facebook abused its dominance through ‘exploitative business terms’**

The FCO assessed Facebook’s terms of use in light of the General Data Protection Regulations (“GDPR”) and determined that Facebook had no legal justification to make the use of its platform conditional on users agreeing to the collection and merging of data from its affiliated services and third party providers with data from users’ Facebook accounts. It was not necessary for Facebook to render its services in this way and by making use conditional on acceptance the consent was not voluntary within the meaning of the GDPR. This violation of data protection law was a manifestation of Facebook’s market power and therefore an exploitative abuse of dominance.

In reaching its decision the FCO strongly relied on two German Federal Court of Justice decisions:

- *VBL-Gegenwert*: When contracting with a less dominant party, the use of terms in violation of general contract law is a manifestation of market power and therefore an abuse. The FCO applied the same principle to terms and conditions which breach data protection law; and
- *Pechstein*: In assessing whether a dominant company has abused its position, constitutional rights must be taken into account in the overall balancing of the parties’ interests. The FCO noted that data protection law derives from the fundamental right of informational self-determination and so must be taken into account to ensure that contractual terms are appropriate in unbalanced negotiations.

## **Normative and outcome causality**

The FCO concluded that normative causality exists because Facebook’s violation of data protection law is a restriction on the user’s right to informational self-determination which is clearly linked to its dominant position. Outcome causality also exists because, through its data processing, Facebook has access to large volumes of data and data subjects which its competitors cannot replicate. This increases the barriers to market entry and in turn enhances Facebook’s market position.

## **Technical note**

In an approach that was fiercely opposed by Facebook, the FCO applied the general prohibition clause of the GWB (section 19(1)) rather than the specific provision which prohibits abusive business terms (section 19 (2) no. 2). Under the specific provision the FCO would have been legally required to conduct a ‘but for’ analysis using a comparable market to determine whether the business terms would have been the same in a competitive environment.

Article 102 of the Treaty on the Functioning of the European Union was briefly considered but not pursued due to the lack of comparable case law to support the FCO’s assessment.

## **Was the FCO competent to enforce data protection law?**

The FCO rebutted Facebook’s argument that it was not competent to enforce the GDPR, noting that:

- Access to data has been classified as a relevant factor for market dominance under section 18(3a) GWB;
- The GDPR is relevant in the balancing of interests in abuse cases and data protection authorities will not conduct this assessment; and
- It closely co-operated with the competent data protection authorities in Hamburg and Ireland (where Facebook has its European HQ) throughout the investigation.

## **Concluding remarks**

In her concluding remarks, Dominique noted that this decision is unlikely to be of general concern for big data business models because the FCO did not directly attack the practice of social networks selling personal data to businesses for advertising purposes.