

Facebook vs. Bundeskartellamt

Decision by the German Federal Court of Justice KVR 69/19

Agenda



Facebook



Abuse of dominance



German Federal Cartel Office



Balancing of interests / GDPR



Higher Regional Court Düsseldorf



Facebook case in a nutshell



Federal Court of Justice



Market definition and dominance

Background

Facebook

- Facebook offers a social network service
 - Users do not have to pay
 - Facebook financed via advertising

- When registering for Facebook, users must accept T&Cs
 - Facebook offers a "personalized experience"
 - Users accept that Facebook may process user data collected on
 - the Facebook website
 - Facebook-owned other services such as WhatsApp, Instagram, Masquerade...
 - third party websites which use "Facebook business tools", e.g.
 - the "Like Button" or the "Share Button"
 - the Facebook logo on the website/app
 - the "Facebook Login"
 - the analysis service "Facebook Analytics"

off-Facebook data

German Federal Cartel Office (6 February 2019)

- Facebook dominant on national social network market
- Strong positive network effects – tipping of the market?
 - Direct network effects: the more users, the more users
 - Indirect network effects: the more users, the more ads, the more money
- Facebook abuses its dominant position by asking for too much data without offering users a choice (exploitative abuse of users)
- What is "too much" data?
 - Counterfactual difficult to establish
 - so GDPR as yardstick – in FCO's assessment users did not validly consent to collection of off-Facebook data ➡ infringement of GDPR = abuse

Appeal: Higher Regional Court Düsseldorf (26 August 2019)

- Facebook
 - appealed decision (main proceedings) and
 - requested suspension of immediate enforcement (summary proceedings)

- Court expressed "serious doubts" and suspended enforcement
 - Users free to choose to sign up to Facebook and no dependency of users when signing – no coercion by Facebook
 - Exploitative abuse requires strict causation – did users accept T&Cs because of dominance or because of laziness?
 - Abuse requires behaviour that distorts competition – GDPR infringements do not automatically lead to distortion of competition
 - No foreclosure of competitors, no sign of increased barriers to enter social network market as a result of GDPR breach

Decision of Federal Court of Justice

KVR 69/19 of 23 June 2020

Market definition and dominance

- Market definition confirmed: national market for social networks
- Dominance confirmed
 - Market shares 95 – 97%
 - Strong lock-in effect
 - Network effects do not limit market power but are incentive for abuse
 - Competition through innovation too weak (Google+ left the market)

Abuse of dominance

- Typical contractual service of social networks is to provide the user with a comprehensive, personal "virtual space" allowing the user to establish "real interpersonal relationships" in the network
- Facebook's "personalized experience" goes beyond this typical contractual service, i.e. offers more than what "typical" social network services would offer
 - ➡ Resemblance to concept of bundling – you need to purchase more than you actually wanted to

Abuse (of dominance?) – Causation!

Germany – §§ 18/19 ARC

- Bundling classical example of exploitative abuse
- Exploitative abuse requires finding of causation, i.e. dominance must be reason why other side can be exploited
- If people are too lazy to read T&Cs, then their acceptance is not abuse of dominance

EU – Art. 102 TFEU

"A dominant undertaking has a specific responsibility not to prejudice, by its conduct, effective and undistorted competition within the European Union"

(ECJ C-457/10 P – *AstraZeneca*)

- No causal link between dominance and conduct required, sufficient if conduct likely distorts competition

Abuse of dominance

- Court found that in functioning markets Facebook would have had to offer users option to use Facebook in a "light" version and without having to allow Facebook to also process off-Facebook data
 - Court found that Facebook's conduct is
 - exploitative abuse towards users because users "pay" with too much data
 - exclusionary abuse towards competitors because Facebook's ability to collect and combine more data allows Facebook to strengthen its dominant position on social network market
 - More data = more targeted service = more users
 - More users = more ad income
 - More data = more ad income
- ➡ Additional barriers to enter the market for (potential) competitors

Abuse of dominance

- Court found that under these circumstances (exploitative *and* exclusionary abuse) *AstraZeneca* standard is sufficient
- I.e. no strict causation required but sufficient if conduct objectively has the potential to distort markets
- Court found that off-Facebook data collection creates additional barriers to entry for Facebook's competitors and therefore has potential to distort markets

Balancing of interests

- Whether exploitation of dominance constitutes an "abuse" requires a comprehensive balancing of interests of all relevant parties
 - The fact that the conduct in question is in and by itself illegal under laws other than competition laws is only one factor amongst others in that balancing test
- ➡ GDPR illegality allows for no conclusive finding on abuse

Balancing of interests

- Interests of users
 - Facebook is an important form of social communication
 - Abuse can exist without coercion as protection against abuse is not limited to vital services
 - Data protection is legitimate interest
- Interests of Facebook
 - Data collection is legitimate interest, within the limits of the GDPR
 - No legitimate interest in structuring own offer in a manner which allows for maximum data collection under GDPR
 - For procedural reasons (non-participation of Facebook in Federal Cartel Office investigation) Federal Cartel Office was allowed to assume that Facebook does not need off-Facebook data
- Interests of Facebook's competitors (social networks)

Balancing of interests

- In view of the special social importance of Facebook and the fact that Facebook did not demonstrate why it required off-Facebook data, the interests of users in having the option to choose whether to allow Facebook to (also) collect off-Facebook data outweighs Facebook's interest in collecting such information.
 - Result: Abusive to not allow Facebook users to choose
 - whether they want to use the network with a "personalized experience" and at the price of allowing Facebook to also process off-Facebook data, or
 - whether they only want to agree to personalization based on the data they disclose on Facebook themselves.
- ➡ Application for suspension of immediate enforcement rejected

Facebook case in a nutshell

- Facebook case not a general precedent
 - Extremely high market shares
 - Two-sided markets
 - Social responsibility of Facebook
- GDPR infringements committed by dominant entities do not automatically constitute abuse of dominance, but illegal data collection cannot be a legitimate interest in interest balancing test
- AstraZeneca standard has reached Germany



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