

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, Messenger...
 - 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



Law . Tax

Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.
cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:

Aberdeen, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Riyadh, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law