



Newsletter, 1 October 2019

FCO vs. Facebook – 1:1 – A State of Play Analysis

Stage win for Facebook: The Higher Regional Court of Dusseldorf ordered that – for the time being – Facebook is not obliged to apply the measures imposed by the Federal Cartel Office.

On 26 August 2019, the Dusseldorf Higher Regional Court (the “Court”) granted a motion for interim relief, ordering that Facebook’s appeal against the decision of the Federal Cartel Office (“FCO”) has suspensive effect. In consequence, Facebook is not obliged to implement the measures imposed by the FCO as long as the main proceeding is pending. The decision is only marking a preliminary result; however, given the firm stand taken by the Court against the decision’s validity, it is highly likely that Facebook is also going to win its appeal in the main proceeding. Assuming that the FCO is not going to “throw in the towel”, considering the verve and effort put in this vanguard operation, it would then be up to Federal Court of Justice (“FCJ”) to ultimately decide on the many questions arising from the digital platform’s extensive use of data and the role of competition law in this context.

Facts and procedure

On 6 February 2019, the FCO revealed the findings of a three-year investigation: Facebook abused its dominant position pursuant to Sec. 19 (1) of the German Act against Restraints of Competition (“ARC”) on the German social network market through exploitative business terms.¹

The conduct in question is Facebook’s practice of making the use of its social network by private users conditional on the collection of personal and device-related data from Facebook-owned services (e.g. Instagram, WhatsApp and Oculus and Masquerade) as well as third party websites and apps, and combining this “additional data” with information from the users’ Facebook

accounts. In order to terminate the infringement, Facebook was ordered to implement the necessary changes within 12 months.

Facebook has appealed this decision and – successfully – requested an injunction against the immediate application.² This step was seen necessary by Facebook since its appeal against the FCO’s order to terminate the infringement did not have suspensive effect, as this scenario is the legal standard in Germany (Sec. 64 ARC).

Key issues of the FCO’s decision

The FCO’s decision addresses several issues in almost uncharted legal territory, including the following:

Is the relevant market rightly defined as the national market for social networks excluding Twitter, YouTube, LinkedIn, Xing etc.? How can a market-dominant position be determined in the field of multilateral platforms and internet services that are free of monetary costs?

Does a market-dominant undertaking automatically infringe competition law (i.e. exploitatively abuses its dominant position) by infringing general consumer protection rules, such as data protection law?

Is the FCO at all the right authority to prosecute such infringements or is the ball in the field of data protection authorities? To what extent can or should competition law be utilized for purposes other than protecting competition?

¹ [FCO, Case Summary of its decision of 6 February 2019, B6-22/16.](#)

² [Higher Regional Court of Dusseldorf, decision of 26 August 2019, VI-Kart 1/19 \(V\).](#)

Order by the Court

The Court granted Facebook's request for an interim injunction to suspend enforcement due to serious concerns as to the legality of the FCO's decision.

The Court clearly articulated its view on both the FCO's findings on whether Facebook's conduct constitutes an exploitative abuse of Facebook's users (Section 19 (2) no. 2 ARC) as well as an exclusionary abuse of Facebook's competitors (Section 19 (1), (2) no. 1 ARC). The Court and the FCO in particular disagree with respect to the interpretation of the FCJ's landmark rulings in the cases *VBL-Gegenwert* and *Pechstein* which similarly considered the correlation between potential abusive conduct (via specific terms of service) and the dominant position of the provider.³

Exploitative abuse of Facebook's users

The Court found that the reasoning of the FCO's decision did not match the legal requirement since it did not assess to what extent Facebook's business terms would differ from those which would most likely arise if effective competition existed ("as if competition").

In addition, so the Court, the abuse of a dominant position would require a "damage to competition" which the FCO had failed to establish. It pointed out that dominant undertakings do have particular responsibility only towards competition, not towards the adherence of the legal order as such. To this end, a mere violation of data protection laws would be insufficient.

Further, the Court argued that Facebook did not exploit its users since they are not hindered to provide their personal data to any third party. Users would also not suffer a loss of control over their personal data because they voluntarily agree to Facebook's data processing.

With regard to the criterion of causality, the Court did not see a causal link between Facebook's market dominant position and the infringement of data protection law. It held that such link must exist either between a company's dominant position and its abusive

behavior or between the market dominant position and the anticompetitive effects.

Exclusionary abuse vis-à-vis competitors

With respect to an exclusionary abuse, the Court found that the FCO's reasoning did not support its findings. The mere potential to impede effective competition would be insufficient. Facebook would not create market entry barriers by merging and using the additional data from its own services or third party websites.

What's next?

The Court found clear and unambiguous words for the FCO's Facebook decision by stating serious concerns as to its legality. The strong positioning of the Court is surprising given the preliminary nature of this interim judgment and the complexity of the underlying questions. Nevertheless, the FCJ is likely to uphold the decision following the FCO's appeal as it only conducts a plausibility test of the summary proceeding's findings in this interim step.

It can be seen as highly unlikely that the Court will change course in the main proceedings, so the score at half time appears to be a draw. Ultimately, it may be up to the FCJ to decide on the many questions set out above, in particular as to the player correctly applying its landmark rulings in *VBL-Gegenwert* and *Pechstein* on the digital economy: The FCO or the Dusseldorf Higher Regional Court.



Christoph Weinert, LL.M. Damaris Kosack

Commeo LLP
Rechtsanwälte und Notar
Speicherstraße 55
60327 Frankfurt am Main
www.commeo-law.com

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³ FCJ, decision of 6 November 2013, KZR 58/11, *VBL-Gegenwert I*; decision of 24 January 2017, KZR 47/14, *VBL-Gegenwert II*; decision of 7 June 2016, KZR 6/15, *Pechstein/International Skating Union*.

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