GERMANY'S HIGHEST ANTITRUST COURT PUBLISHED THE DETAILED WRITTEN STATEMENT OF REASONS OF ITS FACEBOOK-DECISION -- WITH CONSEQUENCES FOR THE ENTIRE INDUSTRY

Date: 9 September 2020

EU Antitrust, Competition, and Trade Regulation Alert

By: Dr. Annette Mutschler-Siebert, M. Jur. (Oxon), Marion Baumann, Tobias Schneider, Jennifer P.M. Marsh, Mélanie Bruneau, Francesco Carloni

On 23 June 2020 the German Federal Court of Justice (*Bundesgerichtshof*, BGH) orally announced its decision[1] in the interim proceedings initiated by Facebook against the prohibition and cessation orders of the German Federal Cartel Office (*Bundeskartellamt*, BKartA): the highest German antitrust court considered the data collection by Facebook (without sufficient user consent) as an abuse of a dominant position. On 27 August 2020 the BGH has published the lengthy reasoning in writing for this high-profile legal development.

In the decision, the BGH clearly - and in much detail – rejects any counterarguments by the Higher Regional Court and fully backs the BKartA´s assessment that Facebook`s data collection behaviour constitutes an abuse of a dominant position and must be terminated. The BGH expressly confirms the BKartA's findings that data processing, consolidation and exploitation can and must also be scrutinised under competition law.

Many competition authorities in Europe are following the proceedings with particular interest, since the GDPR[2] is an EU-wide regulation of data protection law and its “import” into competition law could well be taken up also by competition authorities outside Germany.

STATUS OF PROCEEDINGS

In order to stop Facebook's abuse of its dominant position in the market, the BKartA had requested that Facebook would have to give users a real choice to what extent their data is collected and merged into their Facebook user account - i.e. only data generated on facebook.com (On-Facebook data) or also data generated outside of facebook.com (Off-Facebook data). Thus far users had to consent to both the usage of On- and Off-Facebook data in order to be able to use the services offered by Facebook.

After the decision of the BGH, Facebook is now obliged to implement the BKartA´s order after a fourteen-month transition period for Germany.

Considering the depth of the BGH's substantive and legal examination of the case in its recent written reasons in the interim procedure, a different outcome of the main proceedings seems highly unlikely – even though the Higher Regional Court of Düsseldorf had in the interim procedure explicitly contradicted the BKartA´s assessment. Thus, the proceedings initiated by the BKartA in March 2016 (and the ensuing battle between the

©2005-2026 K&L Gates LLP. All Rights Reserved.

BKartA and the Higher Regional Court of Düsseldorf) have reached their preliminary climax and it is worthwhile to take a closer look at the essential points of the written statement of reasons for the ruling.

DOMINANCE IN THE MARKET

The BGH - in contrast to the Higher Regional Court of Düsseldorf - has no serious doubts about the dominant position of Facebook on the market for social networks in Germany.

While the Higher Regional Court had left open whether the BKartA`s market definition was correct, the BGH has now provided its own market definition – based on the judges' own experience (“as members of the demand side concerned”). It rejected the argument that Facebook competes with other providers of online services for the limited time and attention of users worldwide and came to the conclusion that Facebook - which enables a personalized user experience and communication in a social networking market – is active on the narrowly defined market for previously aggregated social internet services. Other services like professional communication or contact management in job exchanges, bilateral communication or group communication in small groups (as in messaging services), the distribution of pictures or films or the expression of public opinion via short messages in the BGH´s view do not form part of this relevant product market.

On the flipside of this multisided market, Facebook offers companies the opportunity to place advertisements and display them in a personalized manner by processing the collected data and using the personalized user experience and communication of the users. The provision of Facebook´s services free of charge is part of a business activity intended for commercial purposes (i.e. the financing of the services through advertisement), so clearly a market under competition law according to the BGH.

In view of the language barriers and the shared content of users with regional or national connections, as well as German ads targeting German users, the BGH confirmed the BKartA's view that the geographic marked should be defined as national.

The determination of Facebook´s dominant position on this market is then primarily based on the share of active Facebook users in social networks (over 97% in 2018). The BGH states that – contrary to Facebook`s argumentation - indirect network effects between the user side and the advertising customer side do not create a natural restriction for behavior to the detriment of any of these customers, but on the contrary motivate Facebook to exploit their existing dominance on the user side in favor of the advertising market side. The court also refers to the BKartA's findings that a considerable proportion of private users would like to see less of their personal data processed. It considers the lock-in effect as particularly strong in the market for social internet services and not able to be effectively countered by multi-homing (i.e. the parallel use of several social networks) due to the specific social bond in the network – evidenced in the BGH´s view by the fact that there is currently no significant use of competing networks in Germany.

ABUSE OF DOMINANCE THROUGH DATA COLLECTION

The BGH sees an abuse of dominance in Facebook's behavior – unlike the Higher regional court, which had found that Facebook users did not lose control through the terms and conditions and that the terms and conditions did not constitute a situation of constraint.

©2005-2026 K&L Gates LLP. All Rights Reserved.

According to the BGH an abuse can exist even when the user has other choices beside contracting with the dominant company. Neither the fact that there are other social networks nor that users do not have to pay money for Facebook´s services was seen as hindering the finding of an abuse: no (behavioral) causality between market dominance and the abusive conditions must be shown as the imposed extension of services (i.e. very personalized Facebook through Off-Facebook data) results in a market reality to the disadvantage of the user which would not be expected if there was effective competition. Furthermore, in a two-sided market, where the business model refers to both sides of the market, the causal effects of the respective conduct may not be considered in isolation.

The BGH rejected Facebook's claim that their terms and conditions were customary in the market and thus not abusive: considering Facebook's dominant market position even a customary imitation of Facebook's terms and conditions in the industry could not be taken as an indication of effective competition.

According to the BGH, Facebook´s terms and conditions were capable of impeding competition. Specifically, the additional valuable data collected from its users and Facebook's advanced data processing make it difficult for current and potential competitors to create similarly individualized offers and to compete via advertising contracts for the amortization of the network. Thus, this may well further heighten the entry barriers on the market for previously aggregated social internet services. In addition the BGH pointed to a potential impediment on the market for online advertisement – with the sidenote that an abuse of dominance in one market may also result in an impediment to competition on another market.

Finally, the BGH stressed the importance of the constitutionally guaranteed right to informational self-determination and of the protection of personal data (under the GDPR) also as a scale for judging anti-competitive behavior under competition law rules. In light of the scope and depth of the data collected by Facebook, the BGH considered special protection of users necessary against the exploitation of this communication data through inappropriate disclosure for exploitation by the operator of a social network. The BGH clearly rejects Facebook's arguments that the GDPR had not been breached and states that users' consent would have been needed for the collection and processing of the Off-Facebook data under the General Data Protection Ordinance (GDPR).

FOOTNOTES

[1] File number KVR 69/19.

[2] General Data Protection Regulation (EU) 2016/679, which entered into force on 25 May 2018, is a European Union regulation that is directly applicable in all Member States for the protection of natural persons with regard to the processing of personal data and on the free movement of such data. For recent developments see also our alerts on What Comes Next After Privacy Shield Shattered, Standard Contractual Clauses, and Sectorial Code of Conduct for Safeguard Data Transfers Outside the EU/EEA.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



DR. ANNETTE MUTSCHLER-SIEBERT, M. JUR. (OXON)
PRACTICE AREA LEADER - POLICY AND REGULATORY

BERLIN
+49.30.220.029.355
ANNETTE.MUTSCHLER-SIEBERT@KLGATES.COM



MARION BAUMANN
COUNSEL

BERLIN
+49.30.220.029.306
MARION.BAUMANN@KLGATES.COM



TOBIAS SCHNEIDER
ASSOCIATE

BERLIN
+49.30.220.029.407
TOBIAS.SCHNEIDER@KLGATES.COM



JENNIFER P.M. MARSH
PARTNER

LONDON
+44.20.7360.8223
JENNIFER.MARSH@KLGATES.COM



MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.2.336.1940
MELANIE.BRUNEAU@KLGATES.COM



FRANCESCO CARLONI
OFFICE MANAGING PARTNER, BRUSSELS

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.