

[DE] Federal Cartels Office prohibits Facebook's unlawful data processing under competition law

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On 6 February 2019, the Bundeskartellamt (Federal Cartels Office - BKartA) issued a prohibition notice against Facebook Inc. (USA), Facebook Ireland Ltd. and Facebook Germany GmbH, primarily concerning their plans to combine user data from Facebook-owned services. On competition law grounds, Facebook was prohibited in particular from allowing private users resident in Germany to use its social network only if it could assign data collected from its other services - WhatsApp, Oculus, Masquerade and Instagram - and from third-party websites that contain Facebook interfaces to their Facebook account without their specific consent. The decision was based on the fact that Facebook was abusing its market power by processing data in this manner. According to this line of reasoning, not just Facebook but also other major providers, such as Google-owned YouTube in the audiovisual sector, could be held accountable in the future.

The decision followed an investigation lasting over two years in which the Bundeskartellamt, Germany's independent competition authority, had worked closely with the German data protection authorities. It claimed jurisdiction over the US-based group firstly on the grounds that German cartel law was always applicable to restrictions of competition in Germany, and secondly because Facebook had a German subsidiary. The primary legislative basis of the decision was Article 19(1) of the Gesetz gegen Wettbewerbsbeschränkungen (Act against restraints of competition - GWB), which prohibits abuse of a dominant market position, and Article 18(3a) GWB, under which, in the case of networks, when assessing a company's market position, account should be taken of its economies of scale arising in connection with network effects and its access to data relevant for competition.

With 23 million daily users and a market share of more than 95% in Germany, Facebook has a dominant position in the German market for social networks. Since competing services such as Twitter, LinkedIn, YouTube and Xing only offer parts of the services of a social network, the Bundeskartellamt considers that they should not be included in the relevant market. Dominant companies may not exploit the opposite side of the market, that is to say, Facebook users in this case. This especially applies if the exploitative practice also impedes competitors that are unable to amass such a 'treasure trove' of data. By collecting, processing and allocating data from third-party sources (such as 'Like' buttons on third-party websites or Facebook-owned services such as Instagram) to a user account

without clearly informing the user or obtaining their consent, Facebook was crossing the line of admissible data use. Particular account should be taken of the assessments of the General Data Protection Regulation in this regard. However, this case did not concern the processing of data generated by the use of Facebook itself.

The decision is of particular interest because it is the first time data protection regulations, which were originally to be monitored by the data protection authorities, have been used as the primary basis of a prohibition order issued under competition law. It means that, in future, large US-based platforms and networks such as YouTube and Twitter, whose business models are often data-centred and who frequently hold dominant positions in national markets, will have to face the consequences of competition law as well as data protection regulations.

Pressemitteilung des BKartA vom 7. Februar 2019

Federal Cartels Office press release of 7 February 2019

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591568

