[DE] OLG Düsseldorf expresses serious doubt over legality of Bundeskartellamt's Facebook decision

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In a decision of 26 August 2019 (Case no. VI-Kart 1/19 (V)), the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court – OLG Düsseldorf) temporarily lifted the order issued against Facebook by the Bundeskartellamt (Federal Cartel Office – BKartA) at the start of the year concerning the social network's combination of user data (see IRIS 2019-4/10). It thought the prohibition notice and termination order issued by the Cartel Office were potentially unlawful and should therefore not take effect until a final court decision had been reached.

The OLG Düsseldorf's judgment followed the Cartel Office's decision of 6 February 2019 in which it had 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 only allowing private users resident in Germany to use its social network if it could assign data collected from its other services – WhatsApp, Oculus, Masquerade and Instagram – and from third-party websites that contained Facebook interfaces to their Facebook account without their specific consent. A termination order was also issued against the company. The decision was based on the fact that Facebook had infringed Article 19(1) of the Gesetz gegen Wettbewerbsbeschränkungen (Act against restraints of competition - GWB) by abusing its dominant position in the market for social networks for private users in Germany. It had done so by requiring private users, when registering for its network, to agree to contractual conditions that were inappropriate in view of the data protection law assessments conducted under the General Data Protection Regulation (GDPR) and that allowed Facebook to collect, link and use additional data generated outside its network. Facebook lodged an appeal against the Cartel Office's decision with the OLG Düsseldorf and applied for interim relief.

The OLG Düsseldorf upheld Facebook's appeal. It agreed there were 'serious doubts' about the legality of the Cartel Office's decision, as required under Article 65(3)(1)(2) GWB to give suspensive effect to an appeal against such a decision. Contrary to the Cartel Office's view, it thought that the data processing carried out by Facebook which was the subject of the complaint did not give rise to any relevant competitive damage or undesirable development of competition. This applied with regard both to exploitative abuse to the detriment of users of the Facebook social network and to exclusionary abuse to the detriment of a current

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or potential competitor of Facebook. Although the OLG Düsseldorf confirmed that Facebook held a dominant market position, it could not be found to have violated the abuse prohibition of Article 19(2)(2) GWB (exploitative abuse) because the Cartel Office "did not carry out sufficient investigations into an "as-if" competition and, as a result, did not make any meaningful findings on the question of which terms of use would have been formed if effective competition had existed". The court also had serious doubts over whether Article 19(1) GWB as a general clause had been violated because the data processing did not damage competition. The submission of the data did not weaken the consumer economically or result in a loss of control because users knowingly and willingly submitted their data. A violation of the GDPR alone was, in any case, not sufficient evidence of anti-competitive behaviour. The Cartel Office had also failed to provide proper, well-founded and plausible evidence that Facebook had hindered its competitors.

The Cartel Office's decision against Facebook, which had received significant international attention, therefore does not have to be immediately implemented by Facebook. However, a final decision will be taken as part of the main proceedings. In view of the clarity and scope of the OLG's decision, which extends far beyond the type of summary examination normally conducted in interim relief proceedings, it is not difficult to guess what the outcome of the case will be.

Beschluss des OLG Düsseldorf (Az.: VI-Kart 1/19 (V)), 26. August 2019

http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-_V_.pdf

Decision of the Düsseldorf Higher Regional Court (case no. VI-Kart 1/19 (V)), 26 August 2019

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