[DE] Supreme Court rules in cartel authority's favour in Facebook dispute

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In a decision of 23 June 2020, the German *Bundesgerichtshof* (Federal Supreme Court – BGH), the highest civil court in Germany, provisionally upheld the charge that Facebook had abused a dominant market position. The *Bundeskartellamt* (Federal Cartels Office), which is responsible for competition-related matters in Germany, had previously prohibited social media provider Facebook from processing data captured during Internet use outside the Facebook platform without the users' specific consent. Under the BGH's decision, the prohibition notice can now be enforced.

The case concerns Facebook's use and processing of personal data collected from other services owned by the Facebook group, such as Instagram, and users' other Internet activities outside facebook.com. Users of the social network, which is financed through advertising, must accept Facebook's terms and conditions, which state that their data may be used in this way. Thanks to Facebook Analytics, companies and advertising partners can access the aggregated data and see how users interact with the Facebook group's services via different devices, platforms and websites.

The *Bundeskartellamt* thought that the use of the terms and conditions and the resulting aggregation of data from various sources breached Article 19(1) of the German *Gesetz gegen Wettbewerbsbeschränkungen* (Act against restraints of competition), which prohibits abuse of a dominant market position. In particular, it accused Facebook of abusing its dominant position in the national market by combining user- and device-related data generated outside facebook.com without the users' specific consent. In a decision of 6 February 2019, the Bundeskartellamt prohibited Facebook and other Facebook companies from using these terms and conditions and processing personal data in this way. Facebook then appealed to the *Oberlandesgericht Düsseldorf* (Düsseldorf Higher Regional Court), which initially lifted the order because it had serious doubts over its legality. However, the *Bundesgerichtshof* has now overturned this decision after concluding that Facebook's dominant position in the German social network market and its abuse thereof were not in any serious doubt.

The question of whether the processing and use of personal data were compatible with the provisions of the General Data Protection Regulation was irrelevant to the Supreme Court's decision. Rather, the key factor was whether private Facebook

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users had any choice over the personalisation of the user experience. In addition, as a network operator with a dominant market position, Facebook had a particular responsibility to maintain current competition in the social network market.

Pressemitteilung des BGH zum Beschluss vom 23.6.2020 - KVR 69/19

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html

Federal Supreme Court press release on its decision of 23 June 2020 - KVR 69/19

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