January – February 2019

German Competition Law Newsletter

Highlights

— FCO Orders Facebook To Change Its Data Collection Practices

— FCO Ends Probe Into Organization And Marketing Of Olympic Games With Commitment Decision

FCO Orders Facebook To Change Its Data Collection Practices

On February 6, 2019, the German Federal Cartel Office ("FCO") prohibited Facebook's practice of collecting and processing user data from Facebook's own services as well as from third-party services without users' freely given consent.[1] After an investigation of nearly three-years, the FCO found that this practice amounted to an exploitative abuse of a dominant position. For the first time, the FCO considered compliance with data protection rules in its abuse of dominance analysis.

Background

Under Facebook's current terms of service, users can only join the social network if they also agree to Facebook's practice of collecting and combining data with users' Facebook profiles obtained from sources other than Facebook's core platform (Facebook.com). These other sources include both Facebook-owned platform services (such as WhatsApp and Instagram), and third-party websites and apps with embedded Facebook interfaces.[2] These websites and apps may share user data with Facebook even when a user does not actively use these functions or has disabled the browser's or mobile device's tracking features.

Dominant Position on the German Market for Private Social Networks

The FCO found Facebook to be dominant on the German market for private social networks. It considered Facebook's platform an intermediary on a multisided market with free services, connecting private users with advertisers, publishers and developers. The FCO delineated a separate market for private social networks and excluded

[1] FCO Press Release, "Bundeskartellamt prohibits Facebook from combining user data from different sources", February 7, 2019, available in English here, FCO Case Summary (B6-22/15), "Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing", February 15, 2019, available in English here, and FCO Background Paper, "Bundeskartellamt prohibits Facebook from combining user data from different sources – Background information on the Bundeskartellamt's Facebook proceeding", February 7, 2019, available in English here. A non-confidential version of the decision is available in German only here.

[2] Such as "like" or "share" buttons, "Facebook logins", or analytics services implemented through "Facebook Pixel" or mobile software development kits.

career-oriented professional social networks such as LinkedIn and Xing, messaging services such as WhatsApp, and other social media such as YouTube, Twitter, Snapchat, Pinterest and Instagram.[3] The FCO further found the market to be limited to Germany, as users use social networks mainly to network with other users in the same country.

The FCO based its dominance finding not only on Facebook's high market share of over 95% (in terms of daily active users), but also on a number of other criteria that the German legislature only recently introduced for the assessment of market power on multisided markets. In particular, the FCO found Facebook to profit from significant direct network effects due to Facebook's large number of users (social networks are more attractive to users with an increasing number of other users, thereby making it very difficult for users to switch to other social networks – so-called "lock-in effect"), and indirect network effects encountered with Facebook as an advertising funded service (in parallel to Facebook's large number of users, its attractiveness for commercial advertisers increases) that both create high entry barriers for other social networks. In addition, the FCO took into account Facebook's access to users' personal (*i.e.*, competitively relevant) data. Interestingly, the FCO held that continuous innovation in the online sphere did not generally preclude it from considering a company dominant.

Abuse of Dominance

The FCO stressed that for the assessment whether Facebook's data collection and processing practices constituted an exploitative abuse, it only applied the German, but not the European abuse of dominance provision,[4] since it based its decision on German Federal Court of Justice ("FCJ") case law. This case law held that inappropriate contractual terms and conditions agreed upon in an imbalanced negotiation and infringing German civil law or constitutional rights could constitute an exploitative abuse under German competition law.[5] The FCO took the position that to assess whether contractual terms and conditions are inappropriate, the FCJ's case law must apply to all legal principles which aim to protect a contracting party in an imbalanced negotiation position.

The FCO held that the EU General Data Protection Regulation ("GDPR") constituted a suitable legal standard for determining whether data protection violations are competitively relevant. The GDPR aims to protect the right of informational self-determination and ensuring that users can decide freely, and without coercion, on how their data is used. The FCO also found that the data protection authorities' primary responsibility of enforcing the GDPR does not preclude the FCO from considering the GDPR in its competitive assessments.

The FCO took the position that Facebook exploited its dominant position by requiring users wanting to join Facebook's social network, to consent to the collection and processing of data from its own services as well as from third-party platforms. It concluded that this practice violated data protection law, as the users' consent did not qualify as freely given - a requirement for its validity under the GDPR: Potential users wishing to join the social network had to either agree to the data collection/processing practice or refrain from using Facebook entirely. The FCO also found that the amount of data Facebook collected from its multitude of sources and combined into user profiles was neither necessary to perform any contractual obligations to users, nor did Facebook's legitimate interests outweigh the interest of users in protecting their data.

According to the FCO, it was not necessary to analyze whether Facebook's data collecting and processing practices were only made possible because of its dominance and that competitors, for this reason, would not be able to apply similar practices. The FCO considered it sufficient to find Facebook's practices and violation of data protection

[3] The FCO refers to the European Commission's *Facebook/WhatsApp* (Case COMP/M.7217), decision of October 3, 2014, that separated consumer communication services from social networks, para. 15, available here. However, the FCO stated that even if YouTube, Snapchat, Twitter, WhatsApp, and Instagram were to be included in the relevant market, Facebook would still be presumed to be dominant.

[4] The FCO based its decision on the general provision of Section 19(1) of the German Act against Restraints of Competition (ARC).

[5] *VBL-Gegenwert* (KZR 47/14), FCJ decision of January 24, 2017, and *Pechstein* (KZR 6/15), FCJ decision of June 7, 2016.

law a manifestation of its market power.[6]

Obligations Imposed on Facebook

The FCO ordered Facebook to discontinue the collection of user data from third-party platforms without user's freely given consent within 12 months, and to develop an implementation roadmap for the FCO's requirements within the next four months. Going forward, Facebook may continue to collect user data from its own services (including WhatsApp and Instagram), but may only combine these data with Facebook user accounts if users have provided their freely given consent to do so. In relation to data originating from third-party websites, freely given user consent is required for the collection and the processing of user data. The FCO stressed that "[v]oluntary consent to their information being processed cannot be assumed if their consent is a prerequisite for using the Facebook.com service in the first place".[7] The FCO refrained from imposing a fine at this point, but it may initiate a fines proceeding in the case of recurrent abusive behavior.

Conclusion

The FCO's decision had been eagerly awaited by practitioners, not only because the FCO applied the recently introduced criteria for the assessment of market power on multisided markets, but in particular because of the FCO's theory of harm which, for the first time, includes compliance with data protection rules into the assessment of abuse of dominance.

The FCO's decision shows a current trend to closely scrutinize general business terms and conditions of companies with strong market positions.[8] It also marks a first step by the FCO to engage tech companies collecting large amounts of data from a competition law perspective. The FCO clearly considers access to personal data to be the decisive resource defining incumbency for tech companies. The FCO's president, Andreas Mundt, described the obligations imposed on Facebook as a form of "internal unbundling"; thereby limiting Facebook's future use of user data for its, *e.g.*, targeted advertising activities or other services. The Facebook decision could therefore become a blueprint for other abuse proceedings in digital platform markets. While the FCO stressed that it liaised closely with the European Commission and other competition authorities, it nonetheless remains to be seen whether the other authorities would follow the FCO's decision in light of the specific German case law underlying the FCO's approach.

Facebook has already appealed the FCO's decision to the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*, "DCA") and, in addition, requested the court to suspend the decision's effects in the interim.

FCO Ends Probe Into Organization And Marketing Of Olympic Games With Commitment Decision

On February 25, 2019, the FCO concluded its abuse of dominance investigation against the German National Olympic Committee (*Deutscher Olympischer Sportbund*, "DOSB") and the International Olympic Committee ("IOC") with a commitment decision.[9] The FCO had launched its investigation in 2017, following a complaint by the German Association of the Sporting Goods Industry (*Bundesverband der Sportartikel-Industrie*). The investigation focused on the application of Rule 40 of the Olympic Charter ("Rule 40") in Germany, which restrained advertising opportunities for athletes and their individual sponsors. Other interested third parties,

[6] The FCO also found that these practices provided Facebook with a competitive advantage to the detriment of its competitors, thereby further increasing the existing barriers to entry.

[7] FCO Case Summary, p. 11.

[8] For example, the FCO recently (in November 2018) also initiated proceedings regarding Amazon's terms and conditions and its behaviour *vis-à-vis* the retailers on its German marketplace platform amazon.de.

[9] FCO Press Release, "German Athletes and their sponsors obtain further advertising opportunities during the Olympic Games following Bundeskartellamt action – IOC and DOSB undertake to change the advertising guidelines", February 27, 2019, available in English here.

such as individual athletes and the Association of German Athletes (*Athleten Deutschland e.V.*), intervened in the proceedings.

Background

Rule 40 prevents in particular athletes, but also coaches, trainers and officials participating in the Olympic Games from using their person, name, image or athletic performances during the so-called "frozen period"[10] without the IOC's prior approval. The IOC relaxed the restrictions in the run-up to the 2016 Olympic Games in Rio de Janeiro and provided athletes with the option to engage in "generic" advertising campaigns during the frozen period. For national campaigns featuring German athletes, this option was subject to the DOSB's permission and several restrictions under the 2016 edition of the DOSB Rule 40 Guidelines ("2016 Guidelines"). German athletes and their (potential) sponsors considered the 2016 Guidelines to be unclear and too restrictive. After the FCO had initiated its investigation in 2017, advertising restrictions for German athletes were further relaxed in a revised edition of the guidelines for the 2018 Olympic Games in PyeongChang ("2018 Guidelines"). The FCO market tested the 2018 Guidelines.[11] Following discussions with a large number of athletes, (potential) sponsors and other market participants, the FCO proposed further amendments which were implemented in the most recent version of the Guidelines ("New Guidelines"), and which form the basis for the FCO's commitment decision.

FCO Decision

As the FCO's investigation concluded with the IOC's and DOSB's commitments, the FCO did not reach any final conclusions on the legal assessment. The FCO formed the preliminary view that the IOC and DOSB - as part of the Olympic Movement - enjoy a dominant position on the global market for the organization and marketing of the Olympic Games. Furthermore, it was held that the restrictions of the athletes' advertising activities during the frozen period were so far-reaching that they could amount to an abuse of market power.

A key question in the FCO's preliminary assessment was whether the restrictions of athletes' advertising activities could be justified in accordance with European Court of Justice ("CJEU") case law on sporting rules. Under this case law, sporting rules affecting an athlete's economic activity can be justified if (i) the rule pursues a legitimate objective relating to the organization and proper conduct of competitive sport; (ii) its restrictive effects are inherent in the pursuit of this objective; and (iii) the restriction does not go beyond what is necessary to achieve this objective (*i.e.*, it is proportionate).[12]

The FCO acknowledged that IOC and DOSB pursued the legitimate objective of preventing ambush marketing (*i.e.*, advertising by non-Olympic sponsors with Olympic athletes to profit from an association with the Olympic Games without making a financial contribution to the Olympic Games). It found that this objective helped to protect the exclusive rights of the IOC's, the National Olympic Committees', and the Organising Committees for the Olympic Games' official sponsors, as well as the financial stability of the Olympic Movement to ensure a regular staging of the Olympic Games as a unique and global sporting event.

In its preliminary analysis, the FCO found that the regulations on trademark, copyright, or competition law, and the German Act on the Protection of the Olympic Emblem and the Olympic Names (*Olympiaschutzgesetz*) sufficiently safeguard the legitimate objective of preventing

[10] The frozen period starts nine days before the Olympic games and lasts until three days after the closing ceremony.

[11] FCO Press Release, "Market test on commitments of DOSB and IOC", December 21, 2017, available in English here.

[12] *Meca-Medina and Majcen v Commission* (Case C-519/04 P) ECLI:EU:C:2006:492, para. 42, available here; also *International Skating Union's Eligibility Rules* (Case AT.40208), Commission decision of December 8, 2017, para. 138, available here.

ambush marketing.[13] The FCO, however, formed the preliminary view that the 2016 Guidelines' advertising restrictions that, *inter alia*, did not allow the use of terms such as "games", "gold", "silver", and "bronze" or any use of photos from present or past Olympic Games were too strict.

The Commitments

The New Guidelines include, *inter alia*, the following key changes:

— Athletes no longer need to obtain permission to implement a national advertising campaign (that complies with the New Guidelines) with an individual sponsor during the frozen period.[14]

— Athletes may - under certain conditions - receive greetings or congratulatory messages from their sponsors and may endorse their sponsors via social media.

— The list of Olympic-related terms that athletes and their own sponsors may not use during the frozen period was reduced (and no longer includes, *inter alia*, the terms "games", "gold", "silver", and "bronze"). The list is now exhaustive.

— The athletes' sponsors can use competition and non-competition photos of athletes taken at the Olympic Games in their advertisements, if the campaign complies with the New Guidelines and, *inter alia*, does not feature any inadmissible terms or symbols.

— Athletes may use their social media accounts for advertising purposes, subject to the conditions set out in the New Guidelines.

— Violations of Rule 40 and the New Guidelines can lead to financial penalties, but not to sport-related sanctions (*i.e.*, exclusion, bans, stripping of medals, *etc.*). For disputes relating to Rule 40 and the New Guidelines, recourse is now available with the German civil courts instead of the Court of Arbitration for Sports ("CAS").

The New Guidelines apply to advertising by German athletes and their sponsors until the end of the 2026 Olympic Games. However, they are restricted to advertising activities that target Germany, Switzerland and Austria, and do not apply to international advertising campaigns. International advertising campaigns are to be assessed by the IOC in accordance with the respective IOC Rule 40 Guidelines.

Conclusion

The New Guidelines considerably enhance the advertising opportunities of athletes and their sponsors during the Olympic Games. They further provide better opportunities for athletes to pursue their economic interests, but also safeguard the IOC's and DOSB's legitimate objectives to combat ambush marketing and prevent free riding on the goodwill of the Olympic Games and the Olympic Movement. In this case, the particularities of the applicable German legal framework, including national legislation and case law on the protection of Olympic terms and symbols, led to a specific distinction between illegal ambush marketing and legal "generic" marketing. The scope of the New Guidelines is, therefore, rightly confined to members of Team Germany and German advertising campaigns. Nonetheless, the FCO liaised with the European Commission during its proceedings, and it remains to be seen whether the decision will trigger reactions on a wider pan-European, or even global, scale.

[13] According to *Olympia-Rabatt* (I ZR 131/13), FCJ decision of May 15, 2014, an individual advertising during the frozen period may still not be permitted in extraordinary and exceptional cases. This is the case if, due to other features of the advertising measure, the latter (i) creates a risk of confusion, including the danger of creating an association with the Olympic Games or the Olympic Movement (*i.e.*, a consumer who sees the specific advertisement perceives a commercial or institutional connection between the sponsor on the one hand, and the DOSB or the IOC on the other), or (ii) unduly exploits/tarnishes the reputation of the Olympic Games or of the Olympic Movement (this is to be assumed if an image transfer occurs that can be attributed to specific circumstances). The aforementioned decision is available in German only here.

[14] However, the DOSB recommends a submission of the advertising campaign for review, in order to ensure that the advertising campaign meets the admissibility criteria set out in the New Guidelines.

News

FCO

FCO Blocks Plain Bearings Production Joint Venture

On January 17, 2019, the FCO prohibited the creation of a joint venture between Miba and Zollern in the market for the production of hydrodynamic plain bearings.[15] This particular type of bearings is needed for the production of large bore engines used, *inter alia*, in ships, locomotives and power generators. The FCO found that Miba and Zollern were the two major suppliers and close competitors in an already highly concentrated market. The joint venture would have exacerbated the high concentration in the market, in particular due to customers' high switching costs caused by intense and lengthy tests of the new bearings which are typically customized for each machine. The FCO also considered it unlikely that new participants would enter the market in light of the high investments and extensive technical expertise it would require. The decision marks the FCO's first prohibition decision since November 2017 (*CTS Eventim/Four Artists*)[16]. Miba and Zollern have applied for a ministerial authorization by the Federal Minister for Economic Affairs and Energy to overrule the FCO's prohibition decision.

FCO And FCA Close Joint Probe Into Agreement Between Ad Blocker Eyeo and Google

The FCO and the Austrian Federal Competition Authority ("FCA") closed a joint probe of an agreement between the German-based ad blocker company Eyeo and Google after the companies had changed certain terms of their whitelisting contract.[17] Following complaints about Eyeo's ad blocker Adblock Plus, the FCA had launched an investigation in Austria in 2013. FCO subsequently joined the proceedings in May 2016.

Eyeo's Adblock Plus software allows users to block advertisements from websites they visit. For a fee, Eyeo, however, offers advertisers to exclude certain types of advertisements from the ad blocker under a so-called "whitelisting contract". Unless users change their personal Adblock Plus settings, this whitelisting allows advertiser's content to be shown on websites if they meet certain criteria for being acceptable. Google is one of the advertisers who pays for Eyeo's whitelisting services.

In line with the FCJ's case law, the competition authorities reiterated that both ad blockers and whitelisting are generally legal. However, they took the preliminary position that certain terms in Eyeo's whitelisting contract with Google were anticompetitive, because they limited Eyeo's ability to invest, expand, or further develop its products. Against this background, Eyeo and Google voluntarily agreed to amend those terms.

Bicycle Wholesaler ZEG Fined For Vertical Price Fixing

On January 29, 2019, the FCO imposed fines totaling €13.4 million on the bicycle wholesaler Zweirad-Einkaufs-Genossenschaft eG ("ZEG") and its representatives for fixing resale prices with 47 bicycle retailers.[18] The FCO found that from early 2007 until the FCO's dawn raid of ZEG's Cologne premises in February 2015, ZEG and the retailers had agreed not to undercut minimum resale prices for a number of bicycle models that ZEG had set. ZEG had not only monitored the retailers' adherence to these prices, but also intervened in case a retailer undercut the minimum resale price. In such cases, ZEG requested the retailer to adhere to the agreed price. Given their secondary role (compared to ZEG), the FCO decided not to initiate formal proceedings

[15] FCO Press Release, "Proceeding against whitelisting contract between Google and Eyeo terminated after amendments to the contract", January 21, 2019, available in English here.

[16] FCO Press Release, "Bundeskartellamt – Ticketing: Bundeskartellamt prohibits merger between CTS Eventim and Fourt Artists", November 23, 2017, available in English here.

[17] FCO Press Release, "Proceeding against whitelisting contract between Google and Eyeo terminated after amendments to the contract", January 21, 2019, available in English here.

[18] FCO Press Release, "Fine imposed on bicycle wholesaler ZEG for vertical price-fixing", January 29, 2019, available in English here.

against the retailers involved. The FCO's fine reflects the fact that ZEG had cooperated in the proceedings and agreed to settle the case with the FCO. The fining decisions are already final.

Courts

FCJ Quashed Fining Decision Against LPG Cartel

On October 9, 2018, the FCJ quashed the DCA decision that had increased the FCO's fines on five members of the liquefied petroleum gas ("LPG") cartel significantly.[19] The FCJ found that the DCA's calculation of the fines was flawed and referred the case back to the DCA - providing guidance on how to assess the right basis for the fines.

Background

In 2007, the FCO had imposed fines totaling €208 million on seven LPG suppliers for allocating customers and deterring them from switching suppliers.[20] Upon appeal by five LPG suppliers, the DCA reviewed the FCO's decision and ultimately increased their cartel fines from €180 million to a total of €244 million.[21] In particular, the DCA found that the FCO had determined the suppliers' additional revenues gained through the infringement (*kartellbedingter Mehrerlös*) as too low. As these additional revenues provided the basis for the FCO's calculation of the fines,[22] the DCA increased the individual fines substantially - in some cases by as much as 85%. After its longest cartel fine proceeding until that date (136 days of hearings), the DCA decision marked the first time that the DCA actually increased a cartel fine imposed by the FCO.

FCJ Decision

While the FCJ confirmed that the DCA was right to base its fine on the additional revenues gained through the cartel infringement, it did not approve of the DCA's methodology to assess the value of the additional revenues.

The FCJ confirmed that the calculation of additional revenues may – in general – be based on different methodological approaches, *inter alia*, by comparing prices on a cartelized market with prices on a cartel-free market[23] or on the basis of a cost-based analysis. However, if a court decides to apply a methodology that is not among the generally accepted and well-established economic methods, it must demonstrate its suitability and provide reasons for choosing it.

The DCA, however, did not provide reasons for applying an intra-market price comparison. This method compares the prices of cartel members with the prices of other LPG suppliers in the market that have not been found to have participated in the cartel and does not constitute a generally accepted calculation method. The FCJ considered an intra-market price comparison generally fraught with uncertainties regarding the correct benchmark. In particular, it must be assumed that within a given market, a cartel would typically have an impact on non-cartelists' pricing decisions (so-called "umbrella effect").

In particular, the FCJ found that the LPG cartel's high market coverage and longevity, as well as the homogeneity of the affected products, would rather have corroborated the assumption that the cartel indeed had an inflating (umbrella) effect on the non-cartelists' prices. In addition, there were a number of other factors that could have had a decisive impact on the LPG suppliers' pricing decisions - irrespective of any cartel infringement. The DCA would have needed to (but did not) take these factors into account, *e.g.*, by applying safety margins.

The FCJ's decision once again illustrates the complexity of economic questions and hypotheses that cartel authorities and courts face when

[19] *Flüssiggas* I (KRB 51/16), FCJ decision of October 9, 2018, available in German only here.

[20] *Flüssiggas* (B11-20/05), FCO decision of December 14, 2007, a Case Summary is available in English here. Cartel members had agreed to quote not at all, or extremely high, non-competitive prices if customers attempted to switch.

[21] *Flüssiggas* (VI-4 Kart 2-6/10), DCA decision of April 15, 2013, available in German only here.

[22] Under the applicable law at the time of the FCO decision, fines could amount up to three times the additional revenues gained through the infringement. This provision was abandoned with the 7th amendment of the German ARC in 2005.

[23] This may be a comparison of prices over time in the same market, in other geographic markets or other product markets, or a combination of the comparison both over time and across markets.

determining and reviewing cartel fines. The FCJ pointed out that authorities and courts alike should involve technical experts to take full account of and handle this complexity.

It will be interesting to see how the DCA will implement the FCJ's guidance and to which result this may lead.

In a parallel proceeding concerning the LPG cartel,[24] the FCJ ruled that if courts want to reject an application for evidence in legally and factually complex cartel fine proceedings, they cannot refer only to a general statement that the taking of evidence was not necessary. Instead, courts are obligated to provide reasons why, in the case at hand, an investigation was not necessary.

FCJ Raises Evidential Bar in Cartel Damage Claims

On December 11, 2018, the FCJ passed its long awaited judgment on the use of *prima facie* evidence in cartel damage proceedings.[25] In the context of damage claims resulting from the rail cartel, the FCJ found that plaintiffs can no longer rely on *prima facie* evidence alone to prove that a cartel caused them to suffer loss and damage. This marks a significant reversal of recent German case law.

In 2006, the FCJ had noted that cartels should generally be considered as "profitable" from the cartelists' perspective and that they typically inflate the affected products' prices. Following this ruling, German civil courts developed extensive case law on *prima facie* evidence a plaintiff needs to provide in cartel damage litigation. This line of case law routinely enabled plaintiffs, in the case of a wide variety of "hardcore" cartels, to rely solely on *prima facie* evidence to show that a cartel presumptively affected their business transactions and that they had suffered damages as a result.

The FCJ now reversed this line of case law. In particular, the FCJ rejected the proposition that even hardcore cartels could be said typically to cause damage, finding that it cannot be established with the requisite very high probability that cartel agreements are always implemented successfully.

The decision of the FCJ is relevant for all current and future cartel damages proceedings. In particular, it also applies to cartels that took place after 2016. Even though the latest amendment to the German ARC implementing the EU Damages Directive introduced a statutory legal presumption of damage (applicable to damage suffered after December 26, 2016), this presumption does not extend to the determination as to whether a specific business transaction was affected by the relevant anti-competitive conduct.

For a more detailed analysis of the judgement, see Cleary Gottlieb Alert Memorandum, German Federal Court of Justice Raises Evidential Bar for Plaintiffs in Cartel Damages Claims, February 1, 2019, available here.

[24] *Flüssiggas III* (KRB 60/17), FCJ decision of October 9, 2018, only available in German here.

[25] *Schienenkartell* (KZR 26/17), FCJ decision of December 11, 2019, only available in German here.

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