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German Competition Law Newsletter

Highlight

— German Federal Court Of Justice Provisionally Finds Facebook's Data Collection Practices Abusive

German Federal Court Of Justice Provisionally Finds Facebook's Data Collection Practices Abusive

On June 23, 2020, the Federal Court of Justice ("FCJ") overturned the Düsseldorf Court of Appeals' ("DCA") interim decision and rejected Facebook Inc.'s ("Facebook") request to suspend the enforceability of the Federal Cartel Office's ("FCO") prohibition decision.[1] The FCJ disagreed with the FCO's determination of an abuse based on a violation of data protection law, but instead examined Facebook's data usage exclusively under competition law.

Although the FCJ implicitly rejected the FCO's reasoning, the decision amounts to a major victory for the German authority whose order was reviewed quite critically by the DCA in the first instance. As a direct consequence, Facebook must end its practice of combining user data from different sources without the users' explicit consent. It must also change its terms and conditions in Germany within 12 months. The FCJ's ruling was rendered in summary proceedings. Facebook's appeal in the main proceedings is still pending before the DCA. The FCJ's ruling may, nevertheless, have significant implications for data-driven businesses.

Background

Under the current terms of service, users must agree to Facebook's practice of combining data collected on the Facebook social media platform with data collected from sources outside of facebook.com. This includes other Facebook-owned services (*e.g.*, WhatsApp and Instagram) as well as third-party websites with embedded Facebook software (*e.g.*, the "Like" button and the "Facebook Pixel").

The FCO's Decision

On February 6, 2019, the FCO found that Facebook had abused its dominant position on the German market for private social networks through its data collection practices, because Facebook was combining user data from its social network with

[1] *Facebook* (KVR 69/19), FCJ decision of June 23, 2020, only available in German here. The FCJ's Press Release is only available in German here. The FCO's translation of the Press Release is available in English here. This article has also been published as a Cleary Gottlieb Alert Memorandum on June 29, 2020, available here.

data from its other services as well as data from third-party websites. The FCO prohibited this form of data consolidation and ordered Facebook to change its terms of service in Germany within 12 months.[2] Relying on earlier FCJ case law, the FCO argued that the illegality of general terms and conditions under German civil or constitutional law could also constitute an exploitative abuse under German antitrust law. Specifically, the FCO alleged that Facebook infringed the EU General Data Protection Regulation ("GDPR") by making users consent to the collection and combination of their data across different services a prerequisite for using Facebook's social network. According to the FCO, this practice also constitutes an exploitative abuse under competition law.

Facebook appealed the FCO's decision to the DCA and also filed a request to restore the suspensory effect of its appeal.

The DCA's Interim Decision

On August 26, 2019, the DCA granted Facebook's request and suspended the FCO's prohibition decision.[3] While the DCA did not criticize the FCO's conclusion that Facebook is dominant, it voiced serious doubts regarding the finding of an abuse for lack of competitive harm—regardless of whether Facebook's terms of service infringed data protection law.

Doubts Regarding Proof Of An Exploitative Abuse Of Facebook's Users

First, the DCA noted the FCO failed to show that Facebook had required the disclosure of an excessive amount of data or had employed unfair terms and conditions, because the FCO did not establish what terms and conditions would be offered in a hypothetical competitive market.

Second, the DCA found that the use of unlawful terms and conditions by a dominant company was insufficient to conclude that there was an exploitative abuse. The FCO would have had to demonstrate that Facebook's market power enabled it to use unlawful terms and conditions (so-called strict causality)—which it failed to do.

No Proof Of An Exclusionary Abuse

According to the DCA, the FCO did not show that the combination of user data from different sources enabled Facebook to hinder its actual or potential competitors on the market for private social networks by raising barriers to entry. Specifically, the DCA rejected adverse effects on the online advertisement market because of a lack of Facebook's dominance on that market.

The FCJ's Interim Decision

Following an appeal by the FCO, the FCJ overturned the DCA's interim decision on June 23, 2020 and rejected Facebook's request to suspend the enforceability of the FCO's decision. The FCJ noted that it had no serious doubts regarding the legality of the FCO's decision both with regard to the finding of a dominant position on the German market for private social networks as well as to the determination of an abuse of said dominant position through the use of terms and conditions. In interim proceedings, such a finding is particularly surprising when the legal review is limited to a mere plausibility check of the authority's decision. Most notably, the FCJ considered the compliance of Facebook's terms and conditions with data protection law to be irrelevant, while at the same time underlining the economic importance of access to data and its relevance for the competition law assessment.

Exploitative Abuse Regardless Of Data Protection Issues

The FCO's analysis indicated that a considerable number of Facebook users would like to disclose less personal data on Facebook. According to the FCJ, in a competitive market for social networks, competing offers that allowed users to disclose less data would also exist. Users for whom the

[2] *Facebook* (B6-22/16), FCO decision of February 6, 2019, available in English here. See also our article in the German Competition Law Newsletter January – February 2019, p. 1 *et seq.*, available here.

[3] *Facebook* (VI-Kart 1/19 (V)), DCA decision of August 26, 2019, only available in German here. See also our article in the German Competition Law Newsletter July – August 2019, p. 1 *et seq.*, available here.

disclosure of data is a relevant factor would then have the option to switch to these service providers. Against this backdrop, the FCJ found Facebook's data collection practices to be abusive, particularly because Facebook did not leave users a choice between a more personalized user experience based on the combination of data from different sources or an experience based solely on the data disclosed on facebook.com. Choice for all economic operators is a prerequisite for a competitive process and therefore in line with the overarching goal of German competition law to protect competition. However, the FCJ's reasoning appears not to be based on an established abuse of dominance doctrine.

This finding seems to hint at a strict causality requirement. However, this remains unclear, particularly in light of the fact that the FCJ also found a hindrance of competitors where a normative causality standard applies. Under the latter standard, it suffices that the relevant conduct increases the dominant company's market power. Moreover, there are doubts regarding the strict causality of the dominance for the abuse as non-dominant companies also apply far-reaching terms and conditions for the processing of user data.

In addition, the DCA had criticized the FCO for not having properly investigated the counterfactual scenario of data collection under competitive conditions.

Exclusionary Abuse Vis-à-Vis Facebook's Competitors

The FCJ noted that Facebook's position in the market is primarily based on direct network effects, since the total number of users increases the usefulness of the network for each user. The access to data from different sources was found to reinforce these lock-in effects. Furthermore, access to more data was held to improve Facebook's ability to monetize and further invest into its platform through online advertising. The FCJ concluded that Facebook's data collection thus raises the barriers to entry for its competitors.

Interestingly, the FCJ rejected the DCA's conclusion regarding the absence of an abuse of a dominant position on the market for online advertising. According to the FCJ, there is no need to establish Facebook's dominance on a separate market for online advertising, because a restriction of competition does not have to occur on the dominated market (in this case the market of social networks), but can also occur on a non-dominated third market (*in casu* the market for online advertising).

Conclusion

The FCJ's decision clearly dismisses the FCO's attempt to enforce data protection law through antitrust law. The FCJ instead focuses on an innovative theory of harm rooted in competition law which emphasizes consumer choice as a prerequisite for the competitive process. However, it also raises the question of how the hypothetical counterfactual scenario of data collection under competitive conditions is determined. It will be interesting to see the full reasoning of the decision on this point.

Implications

10th Amendment of the ARC

Against the backdrop of the draft proposal for the 10th Amendment of the German Act against Restraints of Competition ("Draft Proposal"), the long-term impact of the FCJ's decision remains to be seen. The decision could influence the Draft Proposal, which has still not been introduced into parliament and is unlikely to enter into force before 2021. The FCJ's ruling suggests that the existing rules on abuse of dominance are flexible enough to address new types of conduct on multi-sided markets, particularly because effects on markets without dominance can also be taken into account.

Next Steps

The ball now lies in the DCA's court for the decision in the main proceedings. The FCJ's interim decision is non-binding on the DCA in the main proceedings. In light of the significant implications for Facebook's business model and the FCO's enforcement, the case may likely return to the FCJ, and even be referred to the European Court of Justice to clarify what the appropriate legal test for data related exploitative abuses is.

News

FCO

FCO Clears Acquisition Of Vossloh Locomotives By CRRC Zhuzou Locomotives

On April 27, 2020, after an in-depth review, the FCO cleared the acquisition of Vossloh Locomotives GmbH Kiel ("Vossloh") by CRRC Zhuzhou Locomotives Co., Ltd. ("CRRC").[4] German shunter manufacturer Vossloh is the market leader in Europe with a market share of 40 to 50 percent. CRRC is a state-owned Chinese company and the world's largest manufacturer of rolling stock, selling its products predominantly in China.

FCO DECISION

The FCO considered the involvement of CRRC as a state-owned company from a centrally planned economy and identified several particularities in this respect. First, the FCO noted that CRRC is part of a large group of companies in which the Chinese state is a majority shareholder. It thus benefits from significant economies of scale and scope as well as from a high degree of vertical integration, such as internal production.

Second, the FCO considered state-owned companies more likely to be able and willing to implement low-pricing strategies to strengthen their market position. Although low-pricing strategies are not necessarily anticompetitive, there is a risk that they distort competition if they are not based on comparative cost advantages in the medium term. In particular, the FCO considered subsidies received from the Chinese government and CRRC's access to financial resources, including beneficial financial treatment from Chinese state-owned banks (*e.g.*, in case of insolvency). The FCO also referred to internal documents showing that CRRC had applied low-pricing strategies in the past to extend its market position to foreign markets. Further, European Commission decisions adopted against Chinese State-owned companies for price-dumping practices indicate a readiness of such companies to engage in such practices.

Nonetheless, the FCO found that CRRC's nature as a Chinese state-owned company did not affect its substantive assessment of the transaction. While the FCO analyzed several counterfactual scenarios for its substantive assessment, the FCO ultimately found that there is not sufficient evidence that the transaction would create a dominant position or otherwise significantly impede competition within the next five to ten years:

The FCO took into account particularities of the shunter industry: First, since demand volumes fluctuate significantly from year to year due to the long product life, the FCO looked at sales volumes of the past five years instead of a single year period. Second, due to huge delays between the award of a contract and the provision of the goods, the FCO applied a five-to-ten year forecast period instead of the usual three to five years.

The FCO did not consider it appropriate to rely on Vossloh's (nor CRRC's) historic market position, but took into account that Vossloh's competitiveness declined over the past few years due to its lack of investments in new technologies, whereas new strong competitors (Alstom, Stadler, and Toshiba) have entered the shunter market with new products. CRRC, on the other hand, has not yet established a secured market position in the European shunter

[4] *Vossloh/CRRC* (B4-115/19), FCO decision of April 27, 2020, only available in German here. A Case Summary is available in English here.

market, where high barriers to entry are expected to affect CRRC's possibility to expand. The FCO found it likely that CRRC would establish a secured market position in the forecast period of five years, but that this would not amount to a dominant market position. Further, since it is still uncertain whether Vossloh is able to regain its past market strength, in particular in light of the new strong competitors, the FCO considered an expected low-pricing strategy by CRRC to be unlikely to help the merged companies to create a dominant market position.

CONCLUSION

For the first time, the FCO provided guidance on its approach to acquisitions by state-owned companies from centrally-planned economies. Although the FCO highlighted the state-owned character of the acquiring company, it based its analysis purely on competitive grounds, leaving no space for corrections of the legal framework through policy considerations. In that regard, the FCO explicitly stated that "*competition law cannot and must not correct difficulties in* [international] *trade relations*"[5].

Courts

No Prima Facie Evidence For Causal Harm In Information Exchange Cases

On May 12, 2020, the Frankfurt am Main Court of Appeals found drugstore chain Anton Schlecker e.K. i.I.'s ("Schlecker") insolvency estate was not entitled to cartel follow-on damages.[6] In the Court of Appeals' view, Arndt Geiwitz, Schlecker's insolvency receiver acting on behalf of the estate, did not prove the estate incurred damages as a result of the cartel's information exchange.

Geiwitz had claimed damages of €212 million plus interest from several drugstore product manufacturers involved in an anti-competitive information exchange regarding personal care products, detergents, and cleansers. In the first instance, the Frankfurt am Main District Court dismissed Geiwitz's claims based on a lack of standing and the statute of limitations.[7]

The Frankfurt am Main Court of Appeals ruled that Geiwitz did not prove to the requisite standard that Schlecker had suffered any damage as a consequence of the anti-competitive information exchange. Geiwitz cannot rely on *prima facie* evidence in this regard. Given that the FCJ recently held that at least in relation to quota fixing and customer allocation cartels, there is no *prima facie* evidence that prices were higher than they would have been without the cartel[8], the Court of Appeals held that this must apply all the more in relation to a non-hard core cartel infringement in the form of a mere information exchange. The Frankfurt am Main Court of Appeals left open whether for information exchanges, generally a factual presumption of damage could apply. Rather, in the case at hand, there were numerous indications that the information exchange did not have a price-increasing effect (including the market conditions, the practice and subject matter of the information exchange and the legal objectives of the working group, the lack of cartel discipline, and Schlecker's strong countervailing negotiation power).

Geiwitz has lodged an appeal against the Frankfurt am Main Court of Appeals' decision with the FCJ.

DCA Closed Cartel Proceeding Against Alleged Member Of The LPG Cartel

On May 7, 2020, the DCA closed the proceedings against Propan Rheingas GmbH & Co KG ("RG"), an alleged member of the liquefied petroleum gas ("LPG") cartel, thereby ending an almost 15-year saga.

[5] See *Vossloh/CRRC* (B4-115/19), FCO decision of April 27, 2020, p. 95, para. 358, only available in German here.

[6] Frankfurt am Main Court of Appeals decision (11 U 98/18) of May 12, 2020, only available in German here. See the Press Release, May 20, 2020, only available in German here.

[7] Frankfurt am Main District Court decision (2-03 O 239/16) of August 10, 2018, only available in German here.

[8] See more on this topic in the German Competition Law Newsletter March – April 2019, p. 3 *et seq.*, available in English here.

In 2015, the DCA had imposed a €7 million fine on RG,[9] thereby considerably reducing the fine of €22.5 million originally set by the FCO.[10] Three years later, the FCJ quashed the DCA's ruling,[11] finding that the DCA did not provide sufficient grounds for refusing to hear a defense witness, who allegedly could have exonerated RG and was present in the courtroom, and referred the case back to the DCA.

This time, the DCA made use of its discretionary power and decided to close the proceedings against RG, as it considered further prosecution of the alleged infringement not to be appropriate. This leaves RG without any binding finding of a cartel infringement and without having to pay any fine.

It remains to be seen whether this will also happen in a parallel case in which the DCA had increased the fines for five other alleged members of the LPG cartel from a total of €180 million to €244 million.[12] In 2018, this decision was also reversed by the FCJ due to an incorrect calculation of the fines.[13] However, since the FCJ did not challenge the DCA's finding regarding the cartel infringement as such (but only with regard to the amount of the fine), it probably seems less likely that the DCA will also terminate these proceedings without setting a fine.

FCJ Confirms That German Model T&Cs For Online Banking Were Anticompetitive

On April 7, 2020, the FCJ confirmed a FCO decision finding some of the German Banking Industry Committee's (*Deutsche Kreditwirtschaft*, "GBIC") model T&Cs for online banking to be anticompetitive.[14]

The model T&Cs for banking services recommended by the GBIC, the umbrella organization of most German banks, serve as an industry standard and are, in practice, adopted by all member banks. In 2016, the FCO found that the 2009 version of GBIC's online banking services T&Cs restricted the customers' use of their online banking information.[15] In particular, they prohibited customers from using their PIN and TAN to access their accounts when using third-party payment initiation services providers[16] such as Klarna Bank AB.[17] In the FCO's view, these restrictions were not indispensable to ensuring security in online banking. Rather, the specific provisions constituted a by-object infringement of competition law since their main purpose was to exclude alternative payment service providers from the market or make their market entry considerably more difficult.

GBIC appealed the decision to the DCA, which confirmed the FCO's findings.[18] Interestingly, during the proceedings, a law based on the 2015 Payment Services Directive entered into force which obliged banks to allow their customers to use payment initiation services.[19] As a result, the GBIC had to amend their model T&Cs and drop the clauses contested by the FCO. Although the GBIC was no longer directly affected by the FCO's decision, the DCA held that the GBIC's appeal was admissible and issued a reasoned judgment, as the

[9] *Flüssiggas* (4 Kart 7/10 OWI), DCA decision of March 30, 2015, only available in German here.

[10] *Flüssiggas* (B11-20/05), FCO decisions of December 14, 2007, February 2, 2008, February 12, 2009 and April 9, 2009 (the latter concerning RG), a Case Summary is available in English here. Cartel members had allegedly agreed to not participate in bids, or only quote extremely high, non-competitive prices if customers attempted to switch.

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

[12] *Flüssiggas* (VI-4 Kart 2-6/10), DCA decision of April 15, 2013, only available in German here. The DCA does not apply the FCO's fining guidelines and instead applies a different calculation method, which usually leads to higher fines as it takes the cartelist's total turnover into account and not only the turnover affected by the cartel. In the present case, the DCA increased the fine, in particular, because the cartel affected a service of general interest over a significant period of time (more than seven years).

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

[14] FCJ decision (KVR 13/19) of April 7, 2020, only available in German here.

[15] FCO decision (B4-71/10) of June 26, 2016, only available in German here; see the FCO's Press Release of July 7, 2016 available in English here.

[16] Payment initiation service providers allow customers in web shops to conduct bank transfers comfortably by entering their online banking information including PIN and TAN directly on the shop's website.

[17] At the time operating through Sofort GmbH under the brand name "*Sofortüberweisung*" in Germany.

[18] DCA decision (VI-Kart 7/16 (V)) of January 30, 2019, only available in German here.

[19] Directive (EU) 2015/2366 on payment services in the internal market, which was transposed into German law as Sections 675c *et seqq.* of the German Civil Code (BGB).

FCO's decision could serve as a basis for potential follow-on damages actions.

The DCA did not allow an appeal against its decision and GBIC therefore filed a complaint with the FCJ. Following the FCJ's dismissal, the FCO's decision is now final and binding.

AUTHORS

Friedrich Andreas Konrad
+49 221 80040 136
fkonrad@cgsh.com

Sylvia DeTar
+49 221 80040 117
sdetar@cgsh.com

Rieke Kaup
+49 221 80040 0
gercontact@cgsh.com

Janine Discher
+49 221 80040 119
jdischer@cgsh.com

EDITORS

Katharina Apel
+49 221 80040 133
kapel@cgsh.com

Julian Alexander Sanner
+49 221 80040 151
jsanner@cgsh.com

PARTNERS, COUNSEL AND SENIOR ATTORNEYS – GERMAN ANTITRUST PRACTICE GROUP

Dirk Schroeder
dschroeder@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Romina Polley
rpolley@cgsh.com

Thomas Graf
tgraf@cgsh.com

Patrick Bock
pbock@cgsh.com

Stephan Barthelmess
sbarthelmess@cgsh.com

Till Müller-Ibold
tmuelleribold@cgsh.com

Rüdiger Harms
rharms@cgsh.com

Niklas Maydell
nmaydell@cgsh.com

Katharina Apel
kapel@cgsh.com

Bernd Langeheine
blangeheine@cgsh.com

Lars-Peter Rudolf
lrudolf@cgsh.com

Michael Mayr
mmayr@cgsh.com

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