DATA PROTECTION LAW

Germany‘s Federal Cartel Office: Facebook‘s data collection and aggregation – an abuse of a dominant market position

The German Federal Cartel Office (*Bundeskartellamt*) has issued a landmark ruling concerning the collection and aggregation of data by Facebook, holding the practices of the company to breach German anti-trust laws. The decision comes as a surprise to many and will have wide-ranging effects, meaning that compliance with data protection laws is now no longer merely a matter for data protection supervisory authorities, but also for anti-trust regulators. This is the end of the “One Stop Shop“ the GDPR promised, and means potentially higher fines – up to 10 % of a company‘s annual world-wide turnover. The FCO‘s decision might also be the starting point of a discussion as to what extent companies (whether dominant or not) can still rely on the argument that their data processing activities are required for the performance of a contract.

BACKGROUND

The subject of the decision by the Federal Cartel Office (hereafter “FCO“) is the aggregation of Facebook data with other data sets, such as those which are collected via other services belonging to Facebook – e.g. Instagram or WhatsApp. Other data sets which are aggregated by the company include those stemming from its Facebook “Like“ button plug-in, which features on many third party websites and which collects data relating to the visitors to these sites. The privacy policy of the social media network claims that an aggregation of this data is necessary in order to be able to provide the services in their present form, relying simultaneously on the processing being necessary for the performance of a contract (Art. 6 (1)(b) GDPR) and its own legitimate interests in the processing (Art. 6 (1)(f) GDPR) as legal grounds for this processing. Facebook does not collect consent for this processing.

DECISION BY THE FCO

On 6 February 2019, the FCO issued its ruling, coming to the conclusion that Facebook had breached Sec. 19 (1) of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB), which prohibits the abuse of a dominant position.

DOMINANT MARKET POSITION

In order for Facebook to be subject to provisions concerning abuses of a dominant market position, it needs to be in a “dominant market position“ within the meaning of Sec. 18 (1) GWB. The requirements are therefore that, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market, it has no competitors, is not exposed to any substantial competition, or has a paramount market position in relation to its competitors.

The FCO considered that Facebook satisfied these prerequisites. It classified the geographic market to be the German national market, whilst the relevant market sector was “private social networks“. Notably, it employed a comparatively narrow definition of the relevant market sector, not considering other online networks such as Messenger, YouTube, Snapchat, Instagram and Twitter to be competitors. The FCO considered Facebook‘s competitors on the national market to be merely a handful of smaller German providers. This lack of significant competition, coupled with the strong “direct network effects“ of Facebook‘s business model and the difficulties involved with changing to an alternative social network were the justifications relied on by the FCO to classify Facebook as being in a “dominant market position“.

ABUSE OF A DOMINANT POSITION

After finding that Facebook is indeed in a dominant market position, the FCO turned to the question of whether its data protection policies and practices could constitute an abuse of this market position within the meaning of Sec. 19 (1) GWB.

The FCO relied on jurisprudence of the German Federal Court of Justice (*Bundesgerichtshof*) in two seminal cases, which established that where terms running contrary to the strict German provisions on general terms and conditions are agreed, especially as a manifestation of the market power of one party, then the courts could regard such terms to be abusive. This line of jurisprudence also opened the way for courts to apply Sec. 19 (1) GWB where

one of the contractual parties is so powerful that it can practically dictate terms of a contract, leading to the effective elimination of the other party's contractual autonomy. The FCO analogously applied those principles espoused by the Federal Court of Justice to data protection law, viewing data protection law as serving the purpose of counteracting market imbalances between organisations and individuals. It further considered that the processing by Facebook ran contrary to the values of the GDPR.

BREACH OF GDPR

With respect to the actual data protection clauses, the FCO considered that there is no valid consent provided, nor an adequate weighing of the interests of the data subject. Crucially, it held that the aggregation of the data to the extent carried out by Facebook is not necessary for the performance of a contract. This ground could not be used in an unlimited fashion by companies on the basis of their chosen business model, their product qualities or the vision of the companies themselves. Turning to social media companies in particular, the FCO did not consider that the collection and processing of data was required for the performance of the contract between user and platform to the extent foreseen by Facebook – the user data collected and processed from the platform itself is, in the FCO's view, sufficient for this purpose.

Finally, the FCO asserted that the clauses at issue in the particular case represented a manifestation of market power of Facebook, thereby placing them within the remit of the jurisprudence developed by the Federal Court of Justice relating to abuses of market dominance. For these purposes it suffices that there was a normative or outcome-based causality between the market power and the action taken. In both regards the FCO considered there to be causality, as the breaches of the GDPR were influenced by the market position of Facebook and, as a result of the breaches, the company was able to secure competitive advantages, thereby also raising barriers to market access, which in turn served to increase the market power of Facebook. This might be the most controversial point of the FCO's decision.

Accordingly, the FCO considered Facebook's aggregation of user data from multiple sources to constitute a breach of data protection laws as a manifestation of its market dominance and therefore held this breach to be an abuse of its dominant market position in the sense of Sec. 19 (1) GWB. The FCO has prohibited Facebook's current privacy policy and its corresponding implementation, particularly with reference to the aggregation of personal data from multiple sources. It must implement new policies within twelve months. It has also given Facebook four months to present an "implementation road map" for the decision. Facebook has appealed the decision.

CRITICISM

The FCO has come in for some hefty criticism for this decision amongst legal commentators, some reasonable and some unjustifiable.

It has been argued that if there has been a breach of data protection law then the data protection supervisory authorities should have acted and not the antitrust regulator. However, other than being a criticism of the actions of the data protection supervisory authorities, it is hard to see how this criticism materially affects the findings of the FCO. After all, the inaction of the data protection supervisory authorities does not per se lead to the legality of Facebook's policies.

Facebook has defended its practices in a public statement, arguing that popularity does not in and of itself equate to market dominance, that it complies with the provisions of the GDPR and that cross-platform and cross-service information usage makes its platforms better and more secure. These arguments also do not deal properly with the findings of the FCO. The decision of the FCO itself makes clear that a company's concept of what makes their product better could always be used as a justification under the head of "performance of contract" if allowed unchecked, so re-running the argument that its services will be better with more data will not help the social media giant. Nor does Facebook properly deal in its statement with the **aggregation** of data from across platforms and websites constituting a breach of data protection laws, again just reiterating that it is introducing additional controls for users of its platform.

Its argument that popularity does not necessarily lead to market dominance is correct as a starting point. However, the FCO's findings that Facebook is dominant are a direct consequence of the FCO's rather narrow market definition, i.e. private social networks. Therefore, the more convincing defense here would be for Facebook to dispute the classification of its market sector by the FCO. The narrow market definition used by the FCO here follows the rather narrow market definition adopted by the EU Commission.

Finally, it has been highlighted that there could be a lack of causation between the market power and the abuse. Most users accept data protection policies of even the smallest websites without a second thought, even where these policies run contrary to the GDPR. Facebook could therefore make the argument that user acceptance of its privacy policies does not, in the vast majority of cases, result from the social network's market dominance, but instead from the ambivalence of users to the content of these policies. Whether this argument holds true even with data aggregation on the sheer scale performed by Facebook and in light of growing public awareness of data protection in a post-GDPR world, with scandal after scandal dogging the internet giants, remains to be seen.

CONSEQUENCES

The practical consequences of the FCO entering the scene and enforcing GDPR will not be directly felt by most companies, but those with a significant market share should take stock of the decision and might have to take additional steps to ensure full compliance with provisions of the GDPR. Not only do larger companies have another regulator with which to concern themselves, but they also should be aware that they may be subject to more stringent checks on the basis of abuse of dominant market positions than they would be from the data protection supervisory authorities. Additionally, the FCO can impose substantially higher monetary fines than data protection authorities – up to 10 % of the aggregated world-wide turnover of the group of companies found in breach (as opposed to up to 4 % for an ordinary breach of the GDPR by a non-dominant company).

The FCO's decision also highlights a problem which is relevant for non-dominant companies. Relying on Art. 6 (1)(b) GDPR for data processing – i.e. "performance of the contract" – has been popular, as it avoids the problem which "consent" poses under the GDPR. But the FCO clearly shows that there are limits to this. Whilst the FCO's decision will certainly not be the last word here, it may well help to advance the discussion.

Decision of the Bundeskartellamt dated the 6 February 2019 (Ref: B6-22/16).

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