**Courtesy translation of Decision KVR 69/19 rendered by the Bundesgerichtshof (Federal Court of Justice) on 23/06/2020 provided by the Bundeskartellamt.**

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Facebook

Section 19(1) German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*)

a) In the case of exploitative business terms within the meaning of Section 19(1) GWB, the abuse of a dominant market position does not always require a causal link between the dominant position and the condemned conduct (conduct causality). A causal link between the dominant position and a specific market result (result causality) can be sufficient where, on account of specific market conditions, the conduct of the dominant company leads to market results that would not be expected in a competitive market, and where the condemned conduct is not only exploitative but also liable to impede competition.

b) In the case of two-sided platform markets, such a causal link between a dominant position and a specific market result can exist in particular where the exploitation by the intermediary on one side of the market is liable to impede competition, both on the dominated market and on the other side of the market.

c) Where the dominant operator of a social network stipulates in its terms of use to provide the user with a “personalised experience” by using that user’s personal data collected from the user’s visits to websites outside the social network, this can constitute an abuse of the dominant position held by said operator.

BGH (*German Federal Court of Justice*), decision of 23 June 2020 – KVR 69/19 – OLG Düsseldorf (*Düsseldorf Higher Regional Court*)

FEDERAL COURT OF JUSTICE

DECISION

KVR 69/19

of

23 June 2020

in the cartel administrative proceedings

Bundeskartellamt, represented by its President, Kaiser-Friedrich-Straße 16, Bonn,

appellant,

versus

1. Facebook Inc., represented by its Chief Executive Officer, 1601 Willow Road, Menlo Park, California (United States of America),
2. Facebook Ireland Ltd., represented by its Management Board, 4 Grand Canal Square, Grand Canal Harbour, Dublin (Ireland),
3. Facebook Deutschland GmbH, represented by its Chief Executive Officer, Caffamacherreihe 7, Brahmsquartier, Hamburg (Germany),

interested parties, applicants and respondents

- represented by: the lawyers Prof. Dr Rohnke and Dr Winter; Latham & Watkins LLP, Dreischeibenhaus 1, Düsseldorf (Germany) -

Third parties admitted to the proceedings:

Verbraucherzentrale Bundesverband e.V., Rudi-Dutschke-Straße 17, Berlin

On 23 June 2020 the Cartel Panel of the Federal Court of Justice, represented by the presiding judge Prof. Dr Meier-Beck and the judges Prof. Dr Kirchhoff, Dr Tolkmitt, Dr Rombach and Dr Lindner,

decided as follows:

Following the appeal on points of law, the decision by the first Cartel Panel of the Düsseldorf Higher Regional Court of 26 August 2019 is set aside.

ECLI:DE:BGH:2020:230620BKVR69.19.0

The request to order the suspensive effect of the appeal against the Bundeskartellamt's decision of 6 February 2019 is denied.

The interested parties bear the costs of the appeal proceedings. This includes the reimbursement of necessary expenses incurred by the Bundeskartellamt in the matter.

The value in dispute in the appeal proceedings is set at EUR 30 million.

Reasons:

1 I. The party under 1 is the parent company of the Facebook Group; the party under 2, which is based in Ireland, is responsible for operating the internet-based communication network *Facebook* in Europe; the party under 3 is the German subsidiary (in the following jointly referred to as: Facebook). Other subsidiaries of the Facebook Group offer further internet services, such as, in particular, *Instagram*, *WhatsApp*, *Masquerade* and *Oculus*.

2 The *Facebook* network allows private users to use a multi-functional platform on which they can communicate with other users, especially with people that are close to them (friends), grant access to texts, photos and videos (share) and set up or join groups of interest. To be able to use this service, users have to sign up on *Facebook* and create a personal *Facebook* account with a user profile containing information on themselves and their personal situation. They can also specify their interests and add a profile picture. Based on this information, Facebook provides users with personal *Facebook* pages. The home page of an account displays in a standardised form (news feed) recent information (posts) posted by the users' friends or third parties to which the user has subscribed. Users can post content via "status updates".

3 The social network is funded by online advertising. Facebook's advertising partners can use the network's ad manager which identifies the right target group for an ad and places it on the respective *Facebook* pages. For this purpose, companies can transmit their own encrypted customer list to Facebook via an

interface (*Facebook Pixel*). Via various other interfaces (*Facebook Business Tools*) Facebook enables companies to link their websites or mobile device applications (apps) to *Facebook* pages in a variety of ways. Through feature extensions (plugins) on company websites, *Facebook* users can express their interest in these sites or certain content from these sites (“like” button or “share” button) or post a comment; such reactions are then displayed in the news feed of their *Facebook* friends. Via the *Facebook Login* feature, users can log into third-party websites using their registered *Facebook* user data. *Facebook Login* works under all common operating systems. Facebook offers a number of functions and programs to measure and analyse the success of a company’s advertisements. Data collected for this purpose are not limited to data gathered from the users’ behaviour on *Facebook* pages, but also include (e.g. via *Facebook Pixel*) data generated by visits to third-party sites. With the help of the analytical and statistical functions of *Facebook Analytics*, companies are provided with aggregated data on how users interact with their services using different devices, platforms and websites.

4 In order to be able to create a *Facebook* account, users have to agree to Facebook’s terms of service. The terms of service stipulate, *inter alia*, that Facebook provides the user with a “personalised experience” for which Facebook uses the personal data available to Facebook, including any data collected from the use of Facebook-owned services as well as the users’ other online activities outside of *facebook.com*. Facebook’s terms of service refer to a data policy which explains, *inter alia*, that Facebook collects and connects information about the users’ activities on different “*Facebook* products” and the devices used, and that this includes information collected by “Facebook partners” and transmitted to Facebook via *Facebook Business Tools*. The data policy refers to a cookie policy which explains that Facebook places site-related pieces of text information (cookies) on the user’s device that enable Facebook to collect information generated from the user’s visits on *Facebook* pages or web pages of companies that use *Facebook Business Tools*. This happens without the user having to engage in any action other than visiting those pages.

5 In consideration of the principles of data protection as laid down in Regulation (EU) 2016/679 (General Data Protection Regulation – GDPR), the Bundeskartellamt sees in Facebook's terms of service and the policies to which they refer and under which Facebook is allowed to collect, use and connect data generated off the *Facebook* pages a violation of the prohibition of abusive practices under Section 19(1) GWB.

6 In its decision of 6 February 2019, the Bundeskartellamt essentially prohibited Facebook from using terms of service which make the use of *Facebook* by private users resident in Germany conditional on the operator of *facebook.com* being allowed to collect and store personal and device-related data generated from the use of the Facebook services *WhatsApp*, *Instagram*, *Oculus* and *Masquerade* as well as from visiting third-party web pages via integrated plugins, and to connect these data with the data generated from the use of *facebook.com* without the users' consent. In addition, it prohibited Facebook from using such data and ordered it to take measures to bring the infringement to an end.

7 Facebook appealed the Bundeskartellamt's decision. Upon Facebook's request, the appellate court ordered the suspensive effect of the appeal pursuant to Section 65(3) sentence 3 in conjunction with sentence 1 no 2 GWB (OLG Düsseldorf, WRP 2019, 1333). The Bundeskartellamt appeals this decision on points of law. The appeal on points of law has been admitted by the appellate court.

8 II. The appellate court based its decision essentially on the following grounds:

9 There are serious doubts as to the legality of the contested decision. An exploitative abuse pursuant to Section 19(2) no 2 GWB would require a finding that Facebook's terms of service differ from the terms of service that would very likely be used under effective competition. The Bundeskartellamt has failed to provide such a finding. There is no abuse of a dominant position within the meaning of Section 19(1) GWB. Gathering data from third-party sources does not

constitute an anti-competitive exploitation of users. The users remain at liberty to provide their data to as many third parties on the market for social networks as they wish. Nor can an exploitation be found to exist on the grounds of an excessive disclosure of data as the market value of the “additional data” has not been determined. There is no loss of control on the side of the users. The data are processed with their knowledge and intent. Realistically, a user’s unawareness of Facebook’s terms of service is not a sign of Facebook’s market power but in all probability a sign of that user’s indifference or laziness. The question of whether Facebook’s terms of service and its processing of data based thereon comply with the General Data Protection Regulation is irrelevant since the necessary causal link between Facebook’s market position (which according to the Bundeskartellamt is dominant) and the alleged violation of data protection laws cannot be shown to exist. Such causality can only be found where the market power of the dominant undertaking is required to impose the allegedly abusive terms of service on its contractual partners. A mere result causality is, unlike in the case of exclusionary abuse, not sufficient. Exclusionary abuse to the detriment of Facebook’s competitors is also not shown to exist.

10 III. This reasoning does not stand up to a review on points of law. The appellate court erroneously saw grounds for ordering the suspensive effect of the appeal against the Bundeskartellamt’s decision on account of serious doubts as to the legality of the contested decision.

11 1. “Serious doubts” within the meaning of Section 65(3) sentence 3 GWB in conjunction with sentence 1 no 2 exist if there are significant grounds for assuming that the contested decision is unlikely to stand up to judicial review (cf. BVerfG (*German Federal Constitutional Court*), decision of 14 May 1996 – 2 BvR 1516/93, BVerfGE 94, 166, 194 = NVwZ 1996, 678, 680; BVerwG (*German Federal Administrative Court*), decision of 20 February 2020 – 1 C 19.19, juris para 35). In summary proceedings under Section 65(3) GWB, the appealed decision is thus not subject to a comprehensive review of lawfulness (BGH, decision of 26 January 2016 – KVZ 41/15, WuW 2016, 249 para 19 –

Energieversorgung Titisee-Neustadt). “Serious doubts” does not mean that the reviewing court needs to be fully convinced that the decision under appeal is unlawful (cf. BVerwG, decision of 20 February 2020 – 1 C 19.19, juris para 35).

12 2. On account of the limited scope of review, decisions reached by the appellate court in Section 65(3) GWB cases are usually only subject to a limited review in appeal proceedings on points of law. It is the Cartel Panel’s settled case law that its judicial review of the appellate court’s finding is confined to establishing whether or not the decision is legally plausible. As a rule, the appellate court’s decision is therefore upheld in review proceedings to the extent that, upon review, it is deemed arguable (BGH, decision of 8 May 2007 – KVR 31/06, WuW/E 2007, 907 para 17 – Lotto im Internet; decision of 25 September 2007 – KVR 19/07, WuW 2008, 57 para 10 – Sulzer/Kelmix; decision of 18 October 2011 – KVR 9/11, WRP 2012, 557 para 8 – Niederbarnimer Wasserverband).

13 A limited scope of review does not conflict with the purpose for which the legislator in the 7th Amendment to the GWB extended the possibility to seek an appeal on points of law to include decisions of the higher regional courts under Section 65 GWB (with a different view Nothdurft in *Münchener Kommentar zum Wettbewerbsrecht*, 3rd ed. 2020, § 76 GWB para 34; sceptically Kühnen in Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann, 4th ed. 2020, § 65 para 15). The amendment was proposed on the grounds that in this way legal questions of fundamental importance for the case could be brought before the Federal Court of Justice even in those cases where no decision was reached in the main proceedings against which an appeal on points of law could be lodged with the court. It was argued that the legal protection of a preliminary injunction was often more important for the parties to the proceedings than the main action. By introducing the possibility of directly appealing a decision on points of law, the legislator reacted to this (government bill of the 7th Amendment to the German Competition Act, Bundestag printed paper 15/3640, p. 81; on the origins of this argument cf. BGH, decision of 11 November 2008 – KVR 18/08, WuW 2009, 521

para 17 – Werhahn/Norddeutsche Mischwerke). This does not conflict with the principally limited scope of review applied in appeal proceedings before the Federal Court of Justice. It does not necessarily follow from a limited scope of review that legal issues of fundamental importance cannot be clarified by the court. Where in the course of assessing the arguability of the appellate court's decision legal issues material to the decision are raised, the Federal Court of Justice may clarify these where and insofar as the factual and legal situation has been sufficiently examined. For this reason, the Cartel Panel has already clarified legal issues of fundamental importance in the context of reviewing decisions under Section 65(3) GWB (cf. BGH, decision of 25 September 2007 – KVR 19/07, WuW 2008, 57 para 15 – Sulzer/Kelmix).

14 3. There is no serious doubt that Section 19(1) GWB applies to Facebook. Based on the limited scope of review applied by this court, there are no grounds to reject the Bundeskartellamt's assumption that Facebook holds a dominant position on the relevant national market for private social networks.

15 a) Under Section 18(1) GWB, an undertaking is dominant where, 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.

16 b) The appellate court has presented no findings as to whether the Bundeskartellamt's definition of the product and geographic market is correct and whether Facebook holds a dominant position on that market. This does not prevent the Cartel Panel from conducting its own assessment based on the limited scope of review as explained above (para 11) as to whether or not Facebook is subject to Section 19(1) GWB.

17 aa) Defining the relevant market primarily falls to the judge of the facts of the case, as the market definition essentially depends on the actual market situation which is to be determined by the judge of the facts of the case (BGH,

decision of 16 January 2007 – KVR 12/06, BGHZ 170, 299 para 15 – National Geographic II; decision of 11 December 2018 – KVR 65/17, WuW 2019, 262 para 21 – EDEKA/Kaiser´s Tengelmann, with further references). However, where – as is regularly the case – the decision on a request to order the suspensive effect of an appeal is made at a time where the appellate court has not conducted any further investigations to establish the facts of the case, the appellate court, and consequently also the court deciding on the appeal on points of law, has to base its decision on the facts as established in the contested decision. This is provided that there are no serious doubts that the decision of the appellate court can be based on the established facts and it is not to be expected that the appellate court will make additional findings or findings amending the Bundeskartellamt's findings to the benefit of the undertaking concerned.

18 bb) In the case at hand, the Bundeskartellamt's findings are based on a sufficient assessment of the market conditions. What is more, the members of the Bundeskartellamt's decision division handling the case belong to the demand side of the service provided by Facebook and were therefore also able to base their findings on their own experience (BGHZ 170, 299 para 15 – National Geographic II).

19 cc) While it is true that, according to the Cartel Panel's case law, the appellate court may in appeal proceedings order the Bundeskartellamt to conduct additional investigations to establish the facts of the case (BHG, decision of 11 November 2008 – KVR 60/07, BGHZ 178, 285 para 32 – E.ON/Stadtwerke Eschwege), such additional investigations are not required in the case at hand. Usually, such additional investigations are only required where, after careful consideration, the parties' arguments or the facts of the case itself give reason to further investigate the facts (BGH, decision of 11 November 2008 – KVR 60/07, BGHZ 178, 285 para 32 – E.ON/Stadtwerke Eschwege). In view of the facts presented to the court at the current stage of the proceedings, there is no indication that this may be the case.

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c) Contrary to Facebook's view, the Bundeskartellamt's assumption that the relevant market in the case at hand is not a global market for the users' attention but a national market for social networks does not give rise to objections.

21 aa) Decisive for the definition of the relevant product market is the demand side of the market for social networks.

22 (1) Facebook wrongly bases its line of argument on the view that the aspect primarily relevant for the market definition is the fact that Facebook competes with other providers of online services for the limited time and attention of users worldwide. Relevant for the definition of the product market is the view of the opposite market side, not the view of the undertaking concerned or its competitors. Competitive effects that occur outside the defined product market but have an effect on the undertakings and their scope of action on that market (as is the case with competition from substitutes) only become relevant in the assessment of market dominance (BGHZ 170, 299 para 18 – National Geographic II). It is therefore of no relevance for the definition of the product market that other service providers have publicly referred to themselves as competitors of Facebook. This can at best suggest that these competitors are part of the relevant market.

23 (2) Where, as in the case at hand, a case revolves around the question of whether a provider of a product or service holds a dominant position, the first step is to identify the product or service offered. In a second step it is to be examined whether there are products or services offered by other providers that, from the purchasers' perspective, are interchangeable with the identified product or service as regards their characteristics, intended use and price to satisfy a specific need (demand-side substitutability (*Bedarfsmarktkonzept*); cf. only BGH, decision of 24 January 2017 – KZR 2/15, WRP 2017, 707 para 20 – Kabelkanalanlagen; decision of 8 October 2019 – KZR 73/17, WuW 2019, 638 para 23 – Werbeblocker III).

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(3) With its offer of social networking services, Facebook enables private users to find friends and acquaintances and to share experiences, opinions and content with them in various forms within defined user groups. The typical contractual service provided by a social network is to offer users a comprehensive, personalised “virtual space” (European Commission, decision of 3 October 2014 – COMP/M. 7217 para 54 – Facebook/WhatsApp). The aim is to enable users to develop “authentic interpersonal relationships” in the social network. The users’ own “virtual identity” is supposed to be at the heart of their user experience. This virtual identity is created through the users’ personal profile and list of friends. The users’ online identity is supposed to be a virtual reflection of their real life. All the activities pursued by users in a social network are linked to their personal network of friends and acquaintances, providing them with a “personalised user experience” and communication.

25 (4) The Bundeskartellamt did not err in law in finding that from the perspective of (potential) users, these social networking services are not functionally interchangeable (cf. BGHZ 170, 299 para 18 – National Geographic II) with the services offered by professional networks and career platforms (*Xing*, *LinkedIn*, *Indeed*, *Stepstone*), messaging services such as *Snapchat*, *WhatsApp* and *Skype* and other social media such as *YouTube*, *Twitter* and *Pinterest*. Their object or at least their main purpose is either professional communication or networking (*Xing* and *LinkedIn*), bilateral communication or communication in small groups (*WhatsApp* and *Snapchat*), the sharing of pictures or videos (*Instagram* or *YouTube*) or the public expression of opinions (*Twitter*).

26 (5) The Bundeskartellamt did not fail to recognise the necessity to consider in its market definition whether providers of similar products and services are willing and able to modify their offer at short notice and at reasonable economic cost (supply-side substitution) (BGHZ 170, 299 para 20 – National Geographic II). The Bundeskartellamt’s assessment that this is not the case does not give rise to objections.

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(6) Neither applying the concept of demand-side substitutability nor Facebook offering its services free of charge precludes the assumption of a relevant market as defined by the Bundeskartellamt. According to Section 18(2a) GWB, the fact that a service is provided free of charge does not invalidate the assumption of a market.

28 (a) The finding of a trade relationship that is free of charge for one side does not, however, always justify the assumption of a market that is relevant under competition law. This is particularly true outside the scope of multi-sided markets. Where services are offered free of charge for non-economic reasons and without being part of a medium or long-term business strategy to generate revenue, the provision of such services has no competitive relevance (government bill of the 9th Amendment to the German Competition Act, Bundestag printed paper 18/10207, p. 48). In the case at hand, the relevant market is a multi-sided market on which a service is provided free of charge as part of a profit-generating business activity. Although Facebook offers its social networking services to private users free of charge, it at the same time finances the platform by acting as an intermediary enabling third-party companies to reach *Facebook* users with their ads.

29 (b) The fact that users do not pay a monetary consideration does not require a re-evaluation of the demand-side substitutability concept. In this context, it is of no relevance whether the users' consideration can be seen in the fact that they provide their personal data for Facebook to collect and monetise. For even if one reached the conclusion that the users do not provide a consideration for using the service, their views would still be decisive because by deciding on which service provider to choose they align supply and demand. For the same reason, in another case concerning the scope of benefits in kind in the statutory health insurance scheme, the Cartel Panel considered the view of the recipient of the benefits decisive for the assessment, despite the fact that the recipient did not personally pay for them (BGH, decision of 16 January 2008 –

KVR 26/07, BGHZ 175, 333 para 29 – Kreiskrankenhaus Bad-Neustadt, with further references).

30 (7) The Bundeskartellamt has rightly found that the two sides of this multi-sided market do not form a uniform opposite market side.

31 (a) The purpose of defining the relevant market is to determine the competitive forces the undertakings concerned are facing, while the purpose of Section 19 GWB is to prevent a dominant undertaking from abusively, and to the detriment of third parties, taking advantage of the fact that its scope of action is not sufficiently controlled by competition (cf. only BGH, decision of 4 November 2003 – KZR 16/02, BGHZ 156, 379, 384 – Strom und Telefon I; WuW 2019, 638 para 26 – Werbeblocker III). In the case of multi-sided markets, defining the market as a uniform market is therefore only justified if there is a uniform demand on all sides of the market. For only then will the competitive effects arising from the respective demand groups be the same.

32 (b) It is obvious that the demand Facebook caters to on the side of advertisers is different than the demand on the side of private users. On the advertisers' side, Facebook meets their demand to gain the network users' attention with (personalised) ads and thus raise their sales of products or services.

33 bb) There are no grounds to reject the Bundeskartellamt's definition of the relevant geographic market.

34 (1) The definition of the relevant geographic market is based on the question of whether or not there are alternative offers available for the opposite market side, in the case at hand the (potential) users of the social network. Decisive for this assessment are the actual market conditions (BGH, decision of 13 December 2005 – KVR 13/05, WuW 2006, 780 para 16 – Stadtwerke Dachau). These can be the result of economic, technical or other factual circumstances, including consumer preferences (cf. for submarkets: BGHZ 156, 379, 383 f. – Strom und Telefon I).

35 (2) The Bundeskartellamt is right in defining the relevant geographic market as the German national market. The existing language barriers, content shared about regional or national topics, as well as ads written in German and addressing the interests of German consumers all point towards a national geographic market. The fact that social networks are often available worldwide and designed for international use, as is also the case with *facebook.com*, is not of decisive relevance here. Language settings vary depending on the user's region. According to a user survey commissioned by the Bundeskartellamt, more than three quarters of the users surveyed indicated that their *Facebook* friends and acquaintances considered relevant for their network lived in Germany. For these users there is essentially no reason to use services that do not provide German language settings. Defining the market as national in scope is also consistent with the Bundeskartellamt's unchallenged finding that domestic user behaviour differs from user conduct in other countries.

36 d) Accordingly, the relevant market in this case is the German national market for social networks. Based on the Bundeskartellamt's findings in the contested decision, Facebook holds a dominant position on this market.

37 aa) A dominant position within the meaning of Section 18(1) GWB (para 15) usually derives from a combination of several factors which, taken separately, are not necessarily determinative (cf. European Court of Justice, decision of 14 February 1978 – C-27/76, NJW 1978, 2439, 2440 – United Brands/Commission; BGH, decision of 5 May 2020 – KZR 36/17, juris para 57 – FRAND-Einwand). The assessment of a company's market position therefore needs to be based on an overall evaluation of all the circumstances (cf. government bill of the 9th Amendment to the German Competition Act, Bundestag printed paper 18/10207, p. 49). Considering all the essential facts of the case, the Bundeskartellamt was right to hold that Facebook has a dominant position on the relevant market.

38 bb) In its assessment of Facebook's market share, the Bundeskartellamt has mainly focused on Facebook's share of daily active users of social networks. According to the user survey conducted by the

Bundeskartellamt, Facebook's share of users amounted to between 90 and 95% in 2012, between 92 and 97% in 2013, more than 95% from 2014 to 2016, more than 96% in 2017 and more than 97% in 2018.

39 (1) In an overall assessment of the facts of the case, this high market share is particularly relevant not only in terms of its size but also in terms of the significant market share lead over other competitors (cf. BGHZ 170, 299 para 21 – National Geographic II; BGH, decision of 4 March 2008 – KVR 21/07, BGHZ 176, 1 para 27 – Soda-Club II, with further references).

40 (2) Facebook argues in vain that the Bundeskartellamt's market share calculation is flawed because the user survey revealed that more than 42.1% of social media users and more than 70% of the monthly active users do not use *Facebook*. The figures cited from the user survey do not refer to the relevant demand market for social networking services but to the market for social media, which includes services such as *YouTube*, *WhatsApp*, *Xing, Twitter*, *Instagram*, *Message*, *LinkedIn*, *Pinterest* and *Snapchat*.

41 cc) Contrary to Facebook's submission, an overall assessment of the facts of the case did not require an exhaustive competitive analysis of the advertising market as the other side of this multi-sided market.

42 (1) For the benefit of Facebook, it can be assumed that there is effective competition on the advertising market side. It is therefore immaterial that the Bundeskartellamt has refrained from defining a market on this market side. Facebook's market position on the relevant market is not significantly diminished by the fact that in its strategic decisions Facebook in principle also considers the potential effects the market conduct on one side of the market will have on the other side of the market. It is true, however, that there are interdependencies between the two market sides. Higher user numbers signify a larger reach for advertising companies. An increase in the number of users who use *Facebook* free of charge therefore can have a positive effect on Facebook's position vis-à-vis its advertising customers (indirect network effects). Conversely, a loss of

users on account of disadvantageous strategic decisions on the user side can have a direct negative impact on the advertising side. For this reason, Section 18(3a) no 1 GWB stipulates that, in the case of multi-sided markets and networks, such indirect network effects must be considered in the assessment of a company's market position.

43 (2) Contrary to Facebook's claim, however, these indirect network effects do not preclude an uncontrolled scope for action on the user side. On the contrary, they motivate Facebook to make full use of its scope for action on the user side to the benefit of the advertising market side. This is a case of asymmetrical network effects because the effects do not occur on both market sides in equal measure (cf. government bill of the 9th Amendment to the German Competition Act, Bundestag printed paper 18/10208, p. 50). This applies at any rate with regard to access to data relevant for competition on the advertising market. Pursuant to Section 18(3a) no 4 GWB, such access to data is a relevant market structure parameter in the assessment of the market position of a potentially dominant undertaking active on a multi-sided market, as is the case here. The service Facebook offers to its advertising customers becomes more attractive the more the quality and quantity of the data it provides to these customers increase. Accordingly, Facebook has an incentive to exploit its scope for action on the user market to increase the amount of data generated from its users' activities. This incentive is not countered by any significant competitive forces on the market for social networking services.

44 At the same time, 46% of the users participating in the Bundeskartellamt's survey have indicated that "having to reveal fewer data" would be a reason for them to use an alternative service more often. Because of existing direct network effects, however, this does not have an impact on Facebook's market position. The term 'direct network effects' denotes the relation between the value of a product or service and the number of its users (government bill of the 9th Amendment to the German Competition Act, Bundestag printed paper 18/10207, p. 49). The appellate court has rightly confirmed the existence of direct network

effects in the case at hand. From the users' perspective, the value of Facebook's network increases with the number of users, because the more people use *Facebook* the more opportunities for communication arise for each individual user. In this context, the user survey has confirmed that not only the number of users available is relevant for users, but also the identity of the users ('identity-based' network effects). Accordingly, 85.8% of the users surveyed find it important that their friends also use *Facebook*. 47.2% find the overall number of users important (question 10 of the survey). These direct network effects create a strong lock-in effect and ultimately render users more willing to accept the disadvantages associated with using the social network – also and in particular those that are beneficial for advertisers. Because of the size of Facebook's social network, this lock-in effect is very pronounced.

45 dd) Other relevant factors that have to be considered when assessing the market position of an undertaking especially in a multi-sided market as in the case at hand are the parallel use of several services ("multi-homing", government bill of the 9th Amendment to the German Competition Act, Bundestag printed paper 18/10207, p. 50) and the users' costs of switching to another service. The Bundeskartellamt did not fail to recognise this but rightly assumed that these factors have no significant effect on Facebook's market position.

46 (1) According to the Bundeskartellamt's findings, there is no significant parallel use of social networks in the market which could prevent the elimination of competitors and facilitate new market entries. Between 2012 and 2018, *Facebook's* user-based market shares were increasing while the market shares of *StayFriends* and *Jappy* were constantly falling. The operator of the network *StudiVZ* has become insolvent, current user figures are not available. The Bundeskartellamt has therefore not erred in law in assuming that user numbers of competing services have stagnated at the level reached in 2016. The user-based market shares of *Jappy* and *Wize.Life* are at a very low level. Perceptible market share increases have been marginal at best. *Google+* was temporarily able to increase its user-based market share, although at a very low level. It

increased slightly during the period between the 1st quarter of 2014 and the 1st quarter of 2015. In subsequent quarters, however, its share continuously dropped and ultimately reached 1-2%.

47 (2) Against this argument, Facebook claims in vain that multi-homing is the norm on the markets on which the applicants are active. Facebook fails to sufficiently substantiate that this argument applies to the market relevant in this case. In addition, its submissions relating to this issue are not convincing. There is nothing in the Bitkom presentation “Social Media Trends 2018” of 27 February 2018 (annex Ast 35) submitted by Facebook in the appeal proceedings that supports the submission that multi-homing is the norm on the relevant market. While it is true that the presentation states that the average internet user is registered on three social networks, the presentation’s definition of a social network differs from the one applied in the case at hand and, in addition to *Facebook*, includes *YouTube*, *Instagram*, *Pinterest*, *Twitter*, *Snapchat*, *Xing*, *LinkedIn*, *Tumblr* and *Reddit*.

48 (3) An argument in favour of multi-homing is the fact that users can use several social networks without incurring any additional costs. However, there are other impediments to a parallel use of social networks. The Bundeskartellamt was right to assume that the identity-based direct network effects (para 44) constitute a major barrier to multi-homing. On account of the (technical) incompatibility of the social networks in the market, these direct network effects cannot exist across networks. Keeping in mind the purpose of using a social network, users will only find multi-homing useful if they can encounter their friends and acquaintances as users in the other networks as well. Consequently, users wanting to engage in multi-homing would have to convince their existing contacts in the currently used network to also switch to or additionally register with the other network(s). However, as these contacts also have other contacts in the network they currently use, the latter would also have to be persuaded to switch or multi-home. The more contacts a user has in the currently used network, and the more closely these contacts are connected with other users, the more difficult or even

impossible it will be to take these contacts along to a new network. Another argument against multi-homing is the lack of data portability. Users contemplating switching to another network will face the same hurdles as described for multi-homing.

49 ee) There are no grounds to reject the Bundeskartellamt's conclusion reached in the overall assessment that Facebook's market position is not significantly challenged by competition from substitutes in the social media market, such as *YouTube*, *Twitter* and *Snapchat*. The competitive pressure exerted by Facebook on social media outside the social networking market is bigger than the one exerted on Facebook through potential competition from substitutes. The Bundeskartellamt rightly points out that *Twitter* and *Snapchat*, in particular, can be replaced by equivalent functionalities offered by *facebook.com,* but are themselves not in a position to fully replace the functionalities offered by *facebook.com* and cannot offer users the same "personalised user experience". On account of the direct network effects and the fact that they can use the service offered by Facebook free of charge, users will be reluctant to forgo the more comprehensive service offered by Facebook. And there is no need for them to do so, since they are able to use the above services in addition to *Facebook*. The Bitcom presentation submitted by Facebook (annex Ast 35) shows that such a parallel use of *Facebook* and at least one other service is quite common. Accordingly, 79% of users aged between 14 and 29 indicated that they had used *YouTube* in the three months preceding the survey. 78% of that same user group indicated that they had used *Facebook* over the same period.

50 ff) When assessing the market position of an undertaking on a multi-sided market, particular account needs to be taken of competitive pressure driven by innovation (Section 18(3a) no 5 GWB). Contrary to Facebook's claim, the Bundeskartellamt has sufficiently considered this aspect in its decision. The fact that Facebook is forced to react to innovation from its competitors does not preclude it from holding a dominant position.

51 (1) In theory, the market positions of online networks are more likely to be challenged by competitors, either on account of dynamic developments resulting from sometimes simple technological innovations or on account of a sudden change in user preferences. The competitive pressure based on the innovative power of internet-based offers carries the potential of disruptive changes in the market which in turn can make even strong market positions vulnerable. While this is true, each case requires a careful assessment whether this vulnerability is merely abstract and too vague in terms of time and substance. The mere possibility that a dominant position might one day cease to exist is no ground to deny its existence in the first place. Otherwise the control of abusive practices would become obsolete (cf. government bill, Bundestag printed paper 18/10207, p. 51). This would run counter to the purpose of abuse control which is to limit economic power in those markets where competition cannot serve (or no longer serves) as an effective control mechanism (recommendation for a decision by the Committee for Economic Affairs on the draft of the 4th Amendment to the German Competition Act, Bundestag printed paper 8/3690, p. 24; BGH, decision of 15 November 1994 – KVR 29/93, BGHZ 128, 17, 27, 29 – Gasdurchleitung; BGHZ 156, 379, 384 – Strom und Telefon I, WuW 2019, 638 para 26 – Werbeblocker III).

52 (2) According to the Bundeskartellamt's findings as presented in the contested decision, Facebook has so far been able to successfully counter competitive moves from neighbouring markets with innovations and by expanding its own offer of social media. In the Bundeskartellamt's view, Facebook's own innovations and the examples of influential innovations by competitors referred to by Facebook failed to demonstrate the kind of competitive pressure which would so far have been necessary to challenge Facebook's market position. These findings are sufficiently supported by the fact that, despite the innovative power of the internet, in the past seven years there has been no indication that Facebook is in danger of being replaced by another service or of losing relevant market shares to another service. Consequently, the contestability of Facebook's market position is only vague and abstract, which – at present and at the time of

the Bundeskartellamt's decision – is not sufficient to question Facebook's dominant position on the market to a decisive extent.

53 4. Contrary to the view of the appellate court, there is no serious doubt that Facebook is abusing its dominant position by using the terms of service prohibited by the Bundeskartellamt and making the private use of its network conditional on Facebook being allowed (without any further consent by the user) to connect personal and device-related data generated outside of *facebook.com* (in the following: "off-Facebook" data) with the personal data generated from the use of *Facebook* itself and to further process these connected data.

54 a) Facebook argues in vain that its data policy is not part of the contractual provisions and therefore not used as a contractual basis to permit the use of "off-Facebook" data. From the objective perspective of a prospective user, the fact that Facebook's terms of service refer to the data policy (which explains the processing of data that is essential for platform use and content) can only be understood in such a way that the data policy forms part of the terms of service and that by registering on *Facebook*, the user also consents to the application of the data policy. The question of whether and to what extent the data processing described in the data policy also requires the user's consent under data protection laws is irrelevant in this context.

55 b) The appellate court has rightly found that the use of unlawful terms and conditions by a dominant undertaking can constitute an abuse of that undertaking's dominant position under the general clause which is Section 19(1) GWB (BGH, decisions of 6 November 2013 – KZR 58/11, BGHZ 199, 1 para 65 – VBL-Gegenwert I, and of 24 January 2017 – KZR 47/14. WuW 2017, 283 para 35 – VBL-Gegenwert II).

56 c) In the case at hand, however, the appellate court has rejected an abuse of a dominant position under Section 19(1) GWB. The court's reasoning for this rejection is not sustainable.

57

aa) The appellate court has assumed that the contested conditions do not lead to a loss of control or a predicament for users. According to the court, Facebook's terms of service simply require users to weigh up the benefits of using an ad-financed (and therefore free) social network against the consequences that result from Facebook's use of the additional data gathered by it. In the appellate court's view, no influence is exerted on users in this decision process and they are entirely free to make their choice based on their personal preferences and values. In the view of the court, the significant number of *Facebook* users (about 32 million per month) and non-users (about 50 million) shows that consumers arrive at different conclusions in this deliberation and does not remotely prove that users are exploited.

58 bb) However, an abuse of power cannot be denied on these grounds. The court's reasoning fails to consider the interest of those users that do not want to refrain from using *Facebook* but find it equally important that the collection and processing of their data is limited to what is necessary for the use and financing of the network. By expanding the typical offer (para 24) of a social platform with the "offer of a personalised user experience" that is also based on data generated from off-Facebook user activities, Facebook imposes a service on them they might not want, or in any case for which they are not willing to provide access to personal data they have not provided to Facebook itself. There is no need to establish whether by offering this personalised user experience, Facebook is tying two separate products (the provision of functionalities for the use of its network on the one hand and the provision of services based on data generated off-Facebook on the other) or – which is more likely – simply expanding one service. This service expansion is relevant from an antitrust perspective because it means that private users of the platform can only have access to a service they consider indispensable in conjunction with another service they do not want (cf. BGH, decision of 9 November 1982 – KVR 9/81, WuW/E BGH 1965, 1966 – Gemeinsamer Anzeigenteil). They are not given the choice of whether they want to use the network with a more "personalised experience" that is associated with Facebook's potentially unlimited access to information about their off-Facebook

online activities, or whether they only want to consent to a level of personalisation that is based on data they reveal on *facebook.com* itself.

59 cc) Contrary to the view of the appellate court, the fact that the use of *Facebook* (and, consequently, the provision of a “personalised user experience” using “off-Facebook” data) is free of charge does not make such an imposed service expansion irrelevant for assessing the abuse of market power. On the contrary, and subject to an assessment of all circumstances of the individual case (see para 98 below), antitrust concerns are raised by the fact that with the undesired service forced upon users, the consideration (in this case the provision of personal data) for the desired service (the use of the social network) increases. This applies all the more as the provision of personal data is a key competition parameter for the other side of the market.

60 (1) It is generally accepted that data have a significant economic value (Berberich/Kantschik, NZI 2017, 1; Schweitzer/Haucap/Kerber/Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen (*modernisation of abuse control of dominant companies*), 2018, p. 13; Eichberger, VersR 2019, 709, 711; Paulus, ZIP 2019, 2133; Kornmeier/Baranowski, BB 2019, 1219). The market capitalisation of companies such as Facebook and Google are a clear illustration of this value.

61 (2) It is true that Facebook does not cause its users economic harm since data are an immaterial, non-rival, non-excludible and wear-proof resource (Schmid/Schmidt/Zech, sic! 2018, 627, 628; Kornmeier/Barnowski, BB 2019, 1219). Contrary to the appellate court’s view, however, this does not render an antitrust assessment of Facebook’s conduct obsolete. The fact remains that by allowing Facebook to gather and commercially process their private data, users provide Facebook with a resource of economic value (cf. BGH, decision of 12 April 2016 – KZR 30/14 WuW 2016, 427 para 41 – Net Cologne I). In this context, it is irrelevant whether or not these data form part of the users’ assets (cf. in that regard Eichberger, VersR 2019, 709, 710, 713).

62 (3) From an economic perspective, which has to be taken into account in the assessment under competition law, users provide a consideration for the use of the network. Including “off-Facebook” data in the “personalised user experience” increases the value of this consideration. It is true that users use the *Facebook* network without having to pay a monetary consideration, i.e. free of charge, whereas the advertising companies pay Facebook as the network operator for placing their ads and analysing data traffic. In fact, Facebook finances its network with this revenue. However, the particular attractiveness of advertising on and via the social network for companies interested in advertising their products and services stems from the fact that, based on the user data, the companies are able to specifically target their ads to individual users. By providing Facebook with their personal data which Facebook can then monetise on the other market side, users make this “cross-subsidisation” possible in the first place (cf. Mohr, EuZW 2019, 265, 268). The quality and quantity of the user data have a direct impact on the prices Facebook can demand from its advertising partners. In view of the interdependencies described above (cf. in that regard also the government bill, Bundestag printed paper 18/1027, p. 48), this aspect also affects the users’ relationship with Facebook as the operator of the network. In this regard, it is of particular relevance that the value and usability of data can be increased when they are combined with other data or used to establish behavioural patterns. The value of each individual data element and the possibility of gaining insights from it increases the more other data elements are available. The argument of the appellate court that the users are free to provide their data as often and to as many companies as they wish therefore fails to recognise the key economic point of users disclosing their data to Facebook: The users contribute to a data pool that is created by Facebook and therefore only available to Facebook and its customers on the other market side. This data pool is not at the users’ disposal (and this applies also to the data resulting only from their own individual online activities), which is why they cannot make it equally available to third parties.

63

The idea that the provision of user data to the intermediary network operator has the economic relevance of a contractual consideration where the processing of such data goes beyond the purpose of the contract is also expressed in Article 3(1) of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ EU 2019, L 136, p.1). Accordingly, the Directive also applies in cases where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data (instead of a monetary consideration) to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose. Number 2 of Facebook's terms of service ("How our services are funded") also mirrors this principle of supply for consideration.

64 dd) Just as with the use of unlawful contractual terms by a dominant undertaking, the contractually imposed expansion of a service offered by a dominant undertaking does not *per se* constitute a threat to the interests protected by the German Competition Act. As in the case of a compulsory tying of products or services, anti-competitive effects may arise both in the vertical relationship and in the horizontal relationship if the imposed expansion of the service offered proves to be an exploitation of customers or an obstacle to competition (cf. BGH, decision of 30 March 2004 – KZR 1/03, BGHZ 158, 334, 340/341 – Der Oberhammer). In this case, the harmful effect for competition lies in both, the exploitation of customers and the anti-competitive effect of the imposed service expansion itself.

65 Contrary to the view of the appellate court, an abuse of a dominant position does not always require a direct causality between the dominant position of the company and its ability to impose terms which result in an exploitation of

customers. At least in those cases where the imposed expansion of a service leads to a market result that is detrimental for customers, that would not be expected under effective competition and that at the same time hinders competition, the causality required under Section 19(1) GWB cannot be denied. Such a causality is to be considered in particular in the case of a two-sided market where the exploitation of one market side by the intermediary is likely to also have an adverse impact on competition on the other market side.

66 (1) The question of the extent to which the use of exploitative business terms within the meaning of Section 19 GWB requires a causal link between the market dominance of the company and the imposed contractual terms and conditions has been the subject of controversial debates, in particular in the context of the case at hand and with a view to unlawful data processing terms.

67 (a) Some hold the view that the applicability of Section 19(1) GWB does not depend on such a causal link (Lettl, WuW 2016, 214, 215).

68 (b) One view, which the appellate court has followed, holds that in order to affirm a use of exploitative business terms there has to be an instrumental causality (conduct causality) between the dominant position of the company and the exploitation of its customers (Franck, ZWeR 2016, 137, 151 ff.; Körber, NZKart 2016, 348, 355; Wiedemann/Jäger, K&R 2016, 217, 219; Thomas, NZKart 2017, 92, 95 f.; Schweitzer/Haucap/Kerber/Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, final report, 29 August 2018, p. 108; Engert, AcP 218 [2018], 304, 373; Grothe, Datenmacht in der kartellrechtlichen Missbrauchskontrolle (*the power of data in antitrust abuse control)*, 2019, p. 233). Which requirements need to be met in order to assume such conduct causality is viewed differently:

69 (aa) The concept that is predominantly applied is the concept of ‘as if’ competition. If the same terms and conditions can be imposed – e.g. on account of information asymmetries or a rational apathy on the part of the consumers – without the company holding a dominant position or under effective price

competition, the contested terms cannot be deemed abusive because they were not imposed on the consumers based on market dominance (Franck, ZWeR 2016, 137, 152; Nuys, WuW 2016, 512, 519; Thomas, NZKart 2017, 92, 95; id., NZKart 2019, 187, 192 f.; Karbaum, DB 2019, 1072, 1076).

70 (bb) Another view holds that it is sufficient if the market position contributed to consumers accepting the contractual conditions without hesitation. Accordingly, private users can expect from a company in a prominent position and specialised in the handling of user data to provide its services in a manner that does not violate data protection laws (Bergmann/Modest, NZKart 2019, 531, 534).

71 (c) Finally, there is the view that the necessary causal link is of a “normative nature” and does not require an instrumental causality between the market dominance and the exploitation (Mohr, EuZW 2019, 265, 273; Fuchs in Immenga/Mestmäcker, Wettbewerbsrecht (*competition law*), 6th ed., 2020, § 19 GWB para 234a). The Bundeskartellamt follows this view in the contested decision. Accordingly, for there to be a causal link between a dominant position and a specific market result, it is sufficient that the conduct in question (which in principle can be applied by any undertaking) will only have a negative impact on competition if applied by a dominant undertaking (Special Opinion of the German Monopolies Commission, Bundestag printed paper 18/5080 para 527; Fuchs loc.cit. § 19 GWB para 215a, para 234a; Mohr, EuZW 2019, 265, 272 f.).

72 (2) This latter view is correct in that a strict conduct causality as demanded by the appellate court is a sufficient but not necessary condition for the application of Section 19(1) GWB. At least in cases such as the present one where the imposed terms and conditions are objectively suitable to hinder competition and lead to a market result that is detrimental for customers and would not be expected under effective competition, the causality required under Section 19(1) GWB cannot normally be denied.

73

(a) An application of Section 19(1) GWB requires an abuse of a dominant position. Accordingly, there has to be a certain causal link between the dominant position and the abusive conduct. Especially for the classic case of tying and bundling, where a contractual agreement is made dependent on the contractual partner of a dominant undertaking purchasing goods or services that are not customarily linked to the subject of the contract, the historic legislator has made it clear that in order for there to be an “abuse of a dominant position”, it is necessary that the dominant position of the undertaking caused the contractual partner to enter into the tying or bundling agreement (written report by the Committee for Economic Policy on the draft Competition Act – printed papers 3644, 1158 – of 28 June 1957, on Bundestag printed paper 2/3644, p. 26, right column).

74 (b) The causality required for an application of Section 19(1) GWB is determined by the purpose of abuse control. The purpose of abuse control is to limit economic power on markets where competition cannot serve (or no longer serves) as an effective control mechanism of such power (recommendation for a decision by the Committee for Economic Affairs on the draft of the 4th Amendment to the German Competition Act, Bundestag printed paper 8/3690, p. 24). Dominant undertakings are to be prevented from abusively, and to the detriment of third parties, taking advantage of the fact that their scope of action is not sufficiently controlled by competition (BGHZ 128, 17, 27, 29 – Gasdurchleitung; BGHZ 156, 379, 384 – Strom und Telefon I; WuW 2019, 638 para 26 – Werbeblocker III). This way, consumers are protected from suffering indirect damage from interference with the market structure that impedes competition (cf. European Court of Justice, decision of 21 February 1973 – C-6/72, juris para 26 – Europemballage & Continental Can/Commission). This is based on the special responsibility of dominant undertakings to not engage in behaviour that hinders or distorts effective competition (cf. European Court of Justice, decision of 6 December 2012 – C-457/10 P, WuW 2013, 427 para 98 – AstraZeneca/Commission; BGH, decision of 5 May 2020 – KZR 36/17, juris para 72 – FRAND-Einwand).

75 In particular in cases where the use of specific contractual conditions (be they legal or illegal according to the general standards of the legal system) is suitable to consolidate or extend a dominant position, the impact of the terms and conditions as a rule (and subject to a case-by-case balancing of interests) justifies an application of antitrust abuse control.

76 Accordingly, the Cartel Panel has held that the use of inappropriate terms and conditions that make it harder to terminate a long-term contractual relationship with a dominant undertaking within the meaning of Section 19(1) GWB normally constitutes an abuse of market power (WuW 2017, 283 para 35 – VBL-Gegenwert II). For it is the “result of market power or great superiority of power” held by the party imposing the terms and conditions (BGHZ 199, 1 para 65 – VBL-Gegenwert I, BGH, WuW 2017, 283 para 35 – VBL-Gegenwert II) where such market power leads to a situation in which the conditions not only harm the contractual partner but are also objectively capable of bringing about adverse effects on the market activity and competition.

77 (aa) This objective capability of impeding competition justifies applying a less stringent causality requirement as regards the market dominance of the undertaking and the damage incurred by its contractual partners, because the capability of impeding competition is in itself sufficient to assume an abusive exploitation of a dominant position. At any rate, in the necessary overall evaluation of a party’s conduct it is therefore justified and sufficient to assume an abuse of a dominant position also to the detriment of the contractual partners if the contested terms and conditions lead to a market result that would not be expected under effective competition.

78 (bb) According to the case law handed down by the Federal Court of Justice, the assumption of abusive exclusionary conduct within the meaning of Section 19(2) no 1 GWB does not necessarily require a strict causality between market dominance and the contested conduct. Instead, it is sufficient that there is a causal link between the market dominance and the adverse effects on

competition (BGH, decision of 4 November 2003 – KZR 38/02, WuW/E DE-R 2004, 1210, 1211 – Strom und Telefon I).

79 (cc) At least in a constellation where due to its exclusionary nature the conduct of the dominant undertaking constitutes an abuse of a dominant position to the detriment of its competitors, there is no objective reason to ignore the detrimental effects of that conduct for its users simply because of stricter causality and evidence requirements. In particular in the case of two-sided markets, account must be taken of the interrelations between both market sides not only when assessing market power (Section 18(3a) GWB), but also when assessing the impact of a certain conduct. As the business model of a two-sided market includes both sides of the market, market conduct and its effect cannot be assessed with a view to one market side only.

80 (dd) The fact that in the case of exploitative business terms market conduct and market effects, in principle, coincide cannot be used as an argument for applying different causality requirements (with a different view Franck, ZWeR 2016, 137, 151; Satzky, NZKart 2018, 554, 557). The impact of the contested conduct on market conditions is not limited to the relationship between the undertaking and its contractual partners. In fact, such conduct can also impair market conditions for (potential) competitors of the undertaking.

81 (c) Where a certain conduct is objectively capable of appreciably affecting market conditions, an abuse of a dominant position within the meaning of Section 19(1) GWB through abusive business terms does not require a high probability that different terms would be used under effective competition as demanded under Section 19(2) no 2 GWB. A mere expectation instead of a high probability is sufficient, provided it is based on actual indications as to how market players will react in an economically reasonable way to identifiable user preferences and what incentives for using different business terms or diversifying their offer they have on account of these preferences.

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This is not in conflict with the stricter benchmark for exploitative abuses under Section 19(2) no 2 GWB. The standard example under Section 19(2) no 2 GWB is limited to a conduct that constitutes a mere exploitation. The concept of "as if" competition, on which Section 19(2) no 2 GWB is based, is not (or only to a limited extent) suitable in cases where the degree of market dominance, specific market conditions and the type of abuse make effective competition virtually impossible and make it equally impossible to ascertain with certainty what market conditions would very likely emerge in a competitive environment.

83 An abusive exclusionary conduct pursuant to Section 19(2) no 1 GWB also does not mandatorily require that actual effects of the conduct are ascertained. Instead, it is deemed sufficient if a certain competitive activity is objectively capable of appreciably affecting market conditions (cf. on exclusionary conduct pursuant to Section 19(4) no 1 GWB old version: BGH, decision of 6 November 2012 – KVR 54/11, WuW 2013, 627 para 41 – Gasversorgung Ahrensburg; on Article 82 EC (now Article 102 TFEU): European Court of Justice, WuW 2013, 427 para 112 – AstraZeneca/Commission). On account of the special responsibility of a dominant undertaking to not engage in behaviour that impedes or distorts effective competition (para 74), a threat to competition has been considered sufficient for Section 19(2) no 1 GWB to apply.

84 ee) There are no serious doubts that the contested terms of service lead to anti-competitive market results. This is so because the use of such terms of service would not be expected under effective competition.

85 (1) According to the Bundeskartellamt's findings, a significant number of users wish to disclose a smaller amount of personal data in order to be able to use *Facebook*. 46% of the *Facebook* users have stated that "having to reveal fewer data" would be a reason for them to use an alternative service more often (question 11, Bundeskartellamt file p. 682). 38.5% of the users have even indicated their willingness to pay for the use of the social network if in return Facebook would refrain from collecting their data.

86 (2) Under effective competition and without the barriers to switching providers caused by the lock-in effects described above (para 44), a more diverse offer on the market for social networks could be expected, taking account of user preferences in favour of more autonomy as regards the disclosure of data that provide an almost comprehensive idea of their online activities as a whole, and offering users a choice between using a network with a more personalised user experience (as offered by Facebook with the processing of “off-Facebook” data) and a network that limits the personalisation to the use of data gathered from the users’ activities on the platform itself. Facebook does not offer its users this kind of choice. According to the Bundeskartellamt’s uncontested findings (para 654 of the contested decision), the fact that, upon registration, users are given the option to decide against a display of ads “on the basis of partner data” does not affect the collection of data via the *Facebook Business Tools*, nor does it prevent their combination with data from the user’s *Facebook* account. As regards the collection and combination of data gathered from the use of other services owned by Facebook, users are deprived of any possibility to exercise some sort of control.

87 Such conduct that is not (at least in part) driven by user preferences can be the result of a scope of action insufficiently controlled by competition. It is true that even under effective competition it cannot be expected for all markets that user preferences will always be considered in their entirety. However, since the number of users of a social network has a direct positive impact on the market position of the operator of that network vis-à-vis its advertising customers, said operator has a particular interest in attracting as many users as possible with its offer. This suggests that under effective competition user preferences would be a significant competitive factor (cf. Broemel, Strategisches Verhalten in der Regulierung (*strategic conduct in regulation*), 2010, p. 240) and would generate corresponding offers.

88 (3) Facebook argues in vain that the prohibited terms of service and data policy are customary in the market.

89 The use of similar terms by *YouTube*, *Skype*, *Yahoo*, *Twitter* and *LinkedIn* is irrelevant as they do not belong to the relevant market. Google+ is no longer offered on the relevant market. What is more, the submitted copy of the privacy statement of *Google*+ dated 22 January 2019 does not substantiate (Section 65(4) sentence 2 GWB) that *Google*+ also exchanged information gathered from the operation of a social network within the company group and made the use of the social network conditional on users consenting to such an exchange of data.

90 Facebook alleges in vain that the Bundeskartellamt failed to conduct a sufficient examination of the facts in this regard. Even if the contested terms of service were customary in the relevant market for social networks, this would not allow for a conclusion as to the kind of terms that would be offered under effective competition. Because of Facebook's superior position in the market, competitors modelling their terms of service on Facebook's terms of service would be seen as customary in this sector. Such conduct could therefore not be used as an indication of market conditions under effective competition.

91 (4) The argument that information asymmetries and a rational apathy of consumers can lead to consumers uncritically accepting general terms and conditions even in markets where there is strong competition is therefore not decisive for the case at hand. The fact remains that the amount of data disclosed (and thus the terms of service relating to this question) would be of specific relevance in the use of a social network under effective competition. This is also reflected in the finding of the appellate court that 80% of the *Facebook* users have not read the contested terms of service because they have to agree to them anyway. The appellate court was right to conclude from this finding that users consider participating in the social network to be more important than the question of whether "off-Facebook" data are processed and if so, which data. However, the court failed to take proper account of the fact that under effective competition, the users would have a real choice in this matter and that it could be expected that at least the data-sensitive users would make use of that choice.

92

ff) The contested terms of service are also capable of impeding competition.

93 (1) It cannot be successfully argued that the objective capability to impair market conditions on the market for social networks has to be denied on the grounds that Facebook's market position is the result of direct network effects on the user side since the value of the network increases with the number of people that use it (para 44). It is true that Facebook's market position can only be successfully challenged if a competitor succeeds, within a reasonable period of time, in winning a sufficient number of users to make its network attractive. On account of *Facebook's* significant user numbers this constitutes a significant barrier to market entry (para 38). However, this does not call into question the objective capability of Facebook's access to high-quantity and high-quality user data to safeguard or impair market conditions. Account must be taken of the interrelations between both market sides not only when ascertaining the existence of market power (Section 18(3a) GWB), but also when assessing the impact of a certain conduct. As the business model of a two-sided market includes both sides of the market, market conduct and its effect cannot be assessed with a view to one market side only.

94 (2) It is therefore of relevance that with its offer of a more personalised user experience, based on its access to "off-Facebook" data, Facebook is able to improve its offer compared to actual or potential competitors (at least in the eyes of those users that value a more personalised experience). The more data Facebook has at its disposal, the more accurate it can anticipate user behaviour. This does not only allow Facebook to adapt its offer accordingly and to precisely adjust future or other business purposes and technologies. With every increase in the data quantity and quality underlying Facebook's offer of data and data analyses (which, given the user numbers, is already very broad), the chances that actual or potential competitors can match Facebook's offer decrease, so that in addition to the barrier to entry due to direct network effects, (potential)

competitors are also more likely to lose out to Facebook in the competition for advertising contracts needed to amortise the network.

95 (3) Against this background, the argument that – if there are sufficiently strong network effects – barriers to entry into the social networking market cannot be further raised through an expanded access to data is flawed. Contrary to the appellate court's view, the argument is not backed by the fact that the social network Google+ failed on the market although its share in the online collection of data was higher (33%) than Facebook's share (6.39%). In the absence of further findings by the appellate court, Google+'s failure only allows for the conclusion that good access to data relevant for competition is not sufficient to compensate for a lack of direct network effects.

96 (4) In the light of the adverse effects on competition for advertising contracts and based on the sources of information available to the Cartel Panel in the summary proceedings, it cannot be ruled out that the market for online advertising is also impaired by Facebook's conduct. Contrary to the view of the appellate court, this does not require a finding that there is a separate market for online advertising on social media and that Facebook is dominant on this market. The impairment does not necessarily have to occur on the dominated market but may also occur on a non-dominated third market (regarding Section 19(4) no 1 GWB old version cf.: BGH, WuW/E DE-R 2004, 1210, 1211 – Strom und Telefon II).

97 d) The functionalities offered by Facebook with the use of "off-Facebook" data therefore constitute an expanded service that is imposed on users by Facebook through an abuse of its dominant position. Users have to accept that Facebook accesses their "off-Facebook" data irrespective of whether or not they are willing to provide this consideration for the expanded service. Considering the disadvantages for those users who do not want to use the functionalities because of the associated data disclosure, and considering the exclusionary effects on competition, there is no serious doubt that a weighing of

the competing interests leads to the conclusion that this enforced service expansion is abusive.

98 aa) The question of whether the exploitation of a dominant position is abusive needs to be answered based on a comprehensive assessment and weighing of all the interests affected, taking into account the objective of the German Competition Act, which is to promote free competition (BGH, decision of 27 September 1962 – KZR 6/61, BGHZ 38, 90, 102 – Treuhandbüro; decision of 13 July 2003 – KZR 40/02, BGHZ 160, 67, 77 – Standard-Spundfass; decision of 7 June 2016 – KZR 6/15, BGHZ 210, 292 para 47 – Pechstein/International Skating Union). Such a balancing of interests will always have to be done on a case-by-case basis (BGH, WRP 2017, 707 para 30 – Kabelkanalanlagen).

99 The question of whether the conduct in question is illegal (and in particular the question of whether certain terms and conditions are to be considered illegal based on the general standards of the legal system) is only one – possibly decisive – factor in the balancing of interests since interests that are considered illegal may not be taken into account in the balancing process (cf. BGH, WRP 2017, 707 para 30 – Kabelanlagen). It is not, however, a prerequisite for the assumption of abuse that the terms and conditions be illegal.

100 bb) Contrary to the view of the appellate court, those users who find it important that the data collected and processed are limited to what is necessary for the use and financing of the social network and, in particular, do not include their online activities “off-Facebook” deserve protection, even though they are not “trapped” and are able to decide freely and based on their personal preferences and values whether or not they want to use the network.

101 (1) The use of exploitative business terms does not require a predicament on the opposite market side in the sense that the opposite market side is unable to prevent the exploitation by withholding its demand and is therefore forced to enter into an agreement with the dominant company at any rate (cf. BGH, decision of 26 may 1987 – KVR 4/86, BGHZ 101, 100, 104 – Inter-Mailand-Spiel). In such cases, the abuse primarily relates to an exchange of goods and services with the opposite market side (cf. Satzky, NZKarta 2018, 554, 556) and therefore requires that such an exchange actually takes place.

102 (2) The appellate court also failed to recognise that having access to *Facebook* is, at least for some of the consumers, to a significant extent decisive for them to participate in social life, which is why they cannot be expected to forego this service (on the significance of this argument in establishing an indirect effect of Article 3(1) of the German Basic Law vis-à-vis third parties (*mittelbare Drittwirkung*) cf.: BVerfGE 147, 267 para 41 – Stadionverbot). The social network is an important means of social communication. On account of the high number of users and the network effects (para 44), being able to use the platform established for the purpose of exchanging information and expressing opinions is of particular importance (cf. BVerfG, NJW 2019, 1935 para 15). As there is no alternative available to users, their decision to use *Facebook* can only be considered autonomous to the extent that they are able to dispense with the use of a service that is non-essential. The protection of consumers against exploitation by a dominant company is, however, not limited to essential products and services.

103 cc) In light of the significant political, social and economic relevance of online communication – and in view of the scope and sensitivity of the data created when communicating over the internet – users deserve particular protection against the exploitation of their communication data by the operator of a social network through a disproportionate disclosure of data for further processing by that operator. This follows directly from their constitutional right to informational self-determination.

104 (1) The right to informational self-determination does not entail a general, or indeed comprehensive, right to determine the use of one's data. It does, however, guarantee individuals the possibility of influencing, in a differentiated manner, the context and the way in which their personal data are made available to and used by others. In other words, individuals are guaranteed the right to be substantially involved in the decision as to which characteristics can be ascribed to them (BVerfG, WRP 2020, 39 para 87 – Recht auf Vergessen I).

105 (2) This constitutional guarantee also has an impact on legal relationships under private law and must be taken into account in the interpretation of general clauses under civil law (cf. BVerfGE 81, 242, 255 f.; 89, 214, 232 ff.; 115, 51, 66, 67 f.) to which Section 19 GWB also belongs (BGHZ 210, 292 para 57 – Pechstein). The fact that fundamental rights have an impact in civil law as constitutional value decisions that have to be upheld does not mean that their requirements under civil law are always less far-reaching or less demanding than their protective effects directly directed at the state. Depending on the circumstances, especially when a private company – as in this case – gains a dominant position and provides the very framework in which public communication takes place, private companies can be bound by fundamental rights to a similar or equal extent as the state. In such a case, strict structural requirements regarding the processing of data and limitations in relation to the purpose for which they may be used – in particular in connection with a requirement to obtain consent – can be an adequate or possibly even constitutionally required means to protect the right to informational self-determination (BVerfG, WRP 2020, 39 para 88 – Recht auf Vergessen I).

106 (3) The need to grant individuals a substantial voice in the decision as to how their personal data are being used as well as the concept of purpose limitation of data processing, reciprocally linked with requirements to obtain consent for the processing of personal data, are also reflected in the General Data Protection Regulation. Article 6(1) of the GDPR provides that the processing

of personal data is only lawful if at least one of the conditions listed in Article 6(1) is satisfied.

107 One of these conditions is the freely given consent of the data subject (Article 6(1)(a) GDPR). Pursuant to Article 7(4) GDPR, when assessing whether consent is freely given, utmost account is to be taken of whether the performance of a contract is conditional on consent to the processing of personal data that are not necessary for the performance of that contract. Recital 43, second half of sentence 2, of the GDPR emphasises this limitation of purpose even more expressly. Accordingly, consent is presumed not to be freely given if the performance of a contract, including the provision of a service, is conditional on the consent despite such consent not being necessary for such performance.

108 Article 6(1)(b) GDPR permits the processing of data to the extent that it is necessary for the performance of a contract. This permission is based on the idea that the processing of data necessary for the performance of a contract is directly linked to the autonomous decision made by the data subject to enter into a contractual obligation with the controller, thus authorising a processing of his or her data for that purpose (cf. Assion/Nolte/Veil in Gierschmann/Schlender/Stentzel/Veil, GDPR, Article 6 para 86; Buchner/Petri in Kühling/Buchner, GDPR, 2nd ed., Article 6 para 26; Schantz in Simitis/Hornung/Spiecker, Datenschutzrecht (*data privacy laws*), Article 6(1) GDPR para 15; Spindler/Dalby in Spindler/Schuster, Recht der elektronischen Medien (*electronic media laws*), 4th ed., Article 6 GDPR para 5; Sydow/Reimer, GDPR, 2nd ed., Article 6 para 18).

109 (4) Contrary to Facebook's claim, the General Data Protection Regulation does not preclude the application of the right to informational self-determination. To the extent that EU law provides the Member States with a margin of discretion, pursuant to Articles 1(3) and 20(3) of the German Basic Law, the German courts will always have to apply the fundamental rights laid down in the Basic Law (cf. BVerfG, WRP 2020, 39 para 73 – Recht auf Vergessen I). Facebook is right to claim that Article 6(1)(a) and (b) GDPR make the lawfulness

of the data processing dependent on the contractual basis of the legal relationship between the controller and the data subject, unless another ground for permission is applicable, and do not specify the content of the contractual relationship. Consequently, the General Data Protection Regulation does not decide on the question of whether a specific contractual obligation which may result in the collection and processing of specific data can be effectively agreed between two parties. Nevertheless, the GDPR's values can be a relevant factor in a necessary weighing of interests, just like the right to informational self-determination.

110 (5) The protection granted by the right to informational self-determination and the limitation of data processing based on what is necessary for the performance of a contractual obligation under Article 6(1)(b) GDPR would be significantly impaired if a dominant undertaking such as Facebook were allowed to exploit without limitations the significance of accessing its social network by tailoring its service offer solely based on its interest in marketing personal data generated from online activities on and off-Facebook, while neglecting the users' interests and expanding its data processing activities beyond what is necessary to effectively use its social network.

111 The idea that the data subject is to be protected against an arbitrary expansion of what would be the characteristic performance of that contract is also reflected in deliberations to define, for data protection purposes, the characteristic performance of a contract as narrowly as possible and limit the characteristic performance to the core of the obligation as requested by the data subject (cf. BeckOK DatenschutzR/Albers/Veit, 32rd ed., Article 6 GDPR para 32; Buchner, WRP 2019, 1243, 1247; EDPB, Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, para 36; EDPS, Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, para 52; Buchner/Petri in Kühling/Buchner, GDPR, 2nd ed., Article 6 para 26 and 39 f.; Plath/Plath, GDPR, 3rd ed., Article 6 para 35; Schantz in Simitis/Hornung/Spiecker, Datenschutzrecht, Article 6(1) GPR para 32 f.). The

definition of what constitutes the characteristic performance of the contract is, however, a question that needs to be answered before data privacy aspects can be assessed.

112 dd) Contrary to what Facebook claims, Facebook is not entitled to collect and process “off-Facebook” data without the user’s consent. Asking the users to accept its terms of service would therefore ultimately not create a disadvantage for Facebook.

113 (1) It is to no avail that Facebook invokes Article 6(1)(c) of the GDPR.

114 (a) Accordingly, the processing of data is lawful if it is necessary for compliance with a legal obligation to which the controller is subject. Pursuant to Article 6(3) sentence 1 GDPR, such a legal obligation can be imposed by Union law or by Member State law (cf. BeckOK DatenschutzR/Albers/Veit, 32nd ed., Article 6 GDPR para 34; Heberlein in Ehmann/Selmayr, GDPR, 2nd ed., Article 6 para 16; Buchner/Petri in Kühling/Buchner, GDPR, 2nd ed., Article 6 para 77). According to Article 6(3) sentence 4 GDPR, the Union or the Member State law has to pursue an objective of public interest. Typical legal obligations in this regard are obligations to record, store and archive data under trade, industrial, tax and social laws (cf. Plath/Plath, GDPR, 3rd ed. Article 6 para 38 with further references).

115 (b) To the extent that Facebook relies on Article 6(3) sentence 4 GDPR with regard to requests from an authority with a preventive or punitive mandate, this does not establish permission to collect and process “off-Facebook” data. To the extent that there exists an obligation to collect and process such data, this obligation lies with the company on whose site the “off-Facebook” data are generated. Facebook claims without success that in order to help establish the identity of an offender, all data have to be available to it. Permission to process data is only possible on specific grounds, a “precautionary” processing of data is therefore not allowed (cf. Heberlein in Ehmann/Selmayr, GDPR, 2nd ed., Article 6 para 17; Buchner/Petri in Kühling/Buchner, GDPR, 2nd ed., Article 6

para 104; Schantz/Wolff, Das neue Datenschutzrecht (*The new data privacy legislation*), part D, para 596). An exception to this rule is the mandatory retention of data by telecommunication service providers under Section 113a German Law on Telecommunications (*Telekommunikationsgesetz, TKG*) and by air carriers under Section 31a of the German Law on the Federal Police (*Bundespolizeigesetz, BPolG*) (cf. in that regard Assion/Nolte/Veil in Gierschmann/Schlender/Stentzel/Veil, GDPR, Article 6 para 92; Frenzel in Paal/Pauly, GDPR, 2nd ed., Article 6 para 17). These exceptions, however, do not apply to the case at hand.

116 (2) The same applies to Facebook's reliance on Article 6(1)(d) GDPR, according to which the processing of data is lawful if it is necessary to protect the vital interests of the data subject or of another natural person.

117 (3) Facebook is not permitted to process "off-Facebook" data based on Article 6(1)(f) GDPR either. According to this provision, processing is lawful if it is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data.

118 (a) Facebook claims that it has a legitimate interest in processing data from third-party sources because such data enable it to provide targeted advertising and thus finance its network. In addition, according to Facebook, such data serve measurement and analytical purposes, user and network safety, research purposes and enable Facebook to respond to legal requests.

119 (b) In principle, these may be considered legitimate interests; in particular the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest (Recital 47 sentence 7 GDPR). However, any derogations and limitations in relation to the protection of personal data must be limited to what is strictly necessary (cf. European Court of Justice, decision of 4 May 2017 – C-13/16, juris para 30 – Rigas satiskme). It is not

evident, nor has it been argued, that Facebook's legitimate interests cannot be sufficiently preserved by the collection and processing of data that stem exclusively from the use of its social network. Pursuant to Section 57(1) GWB, in administrative antitrust procedures the competition authority investigates the facts of a case *ex officio*. The same is true for the appellate court in appeal proceedings under Section 70(1) GWB. Accordingly, the competition authority has to establish that the conditions laid down in Section 19(1) GWB are met. If it fails to do that, it may not order the termination of an infringement pursuant to Section 32(1) GWB. However, under Section 26(2) of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz, VwVfG*) Facebook has a duty to cooperate and present its interests. This duty is further defined by the provisions of Section 59(1) GWB (request for information). The undertaking has to provide the competition authority with such data relating to its business that the authority could not reasonably be expected to obtain otherwise (BGH, decision of 22 July 1999 – KVR 12/98, BGHZ 142, 239, 248 f. – Flugpreisspaltung; decision of 15 May 2012 – KVR 51/11, WuW 2012, 848 para 17 ff. – Wasserpreise Calw I; decision of 14 July 2015 – KVR 77/13, BGHZ 206, 229 para 30 – Wasserpreise Calw II). Where the undertaking refuses such cooperation, the competition authority may draw its own conclusions within the boundaries of free assessment of evidence. In individual cases, it may come to the conclusion that a certain fact can be deemed proven if the undertaking has refused to cooperate with the authority (BGHZ 206, 229 para 30 – Wasserpreise Calw II). The Bundeskartellamt asked Facebook to provide evidence to substantiate a permission to collect "off-Facebook" data based on Article 6(1)(f) GDPR. Facebook, however, failed to provide such evidence which is why the Bundeskartellamt was entitled to base its decision on the assumption that Facebook's interests can be sufficiently preserved by the collection and processing of data that stem exclusively from the use of its social network.

120 ee) Another indication of the abusive nature of Facebook's conduct are the exclusionary effects for (potential) competitors that have been established (para 92). The fact that (potential) competitors would also suffer such detrimental

effects if users were given a choice about the intensity of the data processing conducted by Facebook (because a certain number of users would still opt for the more intensive data processing option) does not preclude taking into account the interests of these competitors. It is true that, as a rule, in the weighing of interests those effects on competitors that would also exist under effective competition need not be considered. In the case at hand, however, the market result differs from a market result under effective competition with regard to those users that, given a real choice, would opt against a "more personalised experience" and, hence, against a processing of their "off-Facebook" data. The appellate court has failed to recognise this when it argues that the obstruction of competition in the horizontal relationship with Facebook can obviously not depend on whether or not private *Facebook* users have consented to the processing of their data.

121 ff) Facebook's in principle legitimate interest in being free to shape its service offer as it sees fit ranks below the users' interest in being able to limit the processing of their data to what is necessary for the use of the social network. The users' interest prevails here on account of the great importance of their legal position, the level of market dominance, the existing market structures, and the exclusionary effects resulting from Facebook's conduct. Under the Bundeskartellamt's prohibition decision, Facebook is still allowed to offer its users a "personalised experience" that is based on a comprehensive analysis of their online activities on and off-Facebook. However, in view of its distinctively dominant position, it has to provide users with a choice between such a service offer and a service offer that refrains from collecting and processing off-Facebook data, unless the users have explicitly agreed to such a data collection.

122 (1) In principle, every company, even a dominant one, is free to shape its entrepreneurial activities and to decide which goods or services it wants to offer. The freedom of a dominant undertaking to shape its business model is, however, only granted within the limits of antitrust law (BGHZ 156, 379, 389 – Strom und Telefon I). It ends where it is being used to engage in abusive conduct or leads to a restraint of competition that is incompatible with the objective of the

Competition Act to promote free competition. In the necessary weighing of interests, the interest of a dominant undertaking in pursuing its business goals is less worthy of protection the more the opposite market side is dependent on the good or service it offers (cf. BGH, decision of 23 January 2018 – KZR 48/15, WuW 2018, 326 para 35 – Vertragswerkstatt). The significance of the service offered by Facebook (para 102) for the users therefore justifies limiting Facebook's entrepreneurial freedom in light of the anti-competitive effects of its terms of service as established by the Bundeskartellamt.

123 Typically, the competitive process and its function of coordinating demand and supply ensures that consumers have a choice of supply options. Where this function is impaired on account of specific market structures (such as in this case the level of dominance and the lock-in effects) and a corresponding weakening of competitive forces, and where in view of the specific market conditions it cannot be expected that the (actual or potential) remaining competition will ensure that consumer preferences are met, the prohibition of abusive practices under Section 19(1) GWB can – in line with the significance of the interests affected – impose specific obligations on the dominant undertaking that take account of the consumer choices that would be expected under competitive conditions (on the significance of consumer choice as a protective aim of competition law cf. Crémer/de Montjoye/Schweitzer, Competition Policy for the digital era, p. 77). This is all the more true the more the conduct of the dominant undertaking also serves to consolidate or strengthen its market position on the relevant market or neighbouring markets.

124 (2) An additional aspect in the present case is the fact that with its social network Facebook provides a communications platform that (at least for some of the consumers) is to a significant extent decisive for their participation in social life and has particular relevance for the public debate on political, social, cultural and economic issues. As a consequence, the company has a special legal responsibility with regard to the right to informational self-determination when

laying down the terms and conditions for the use of its platform (cf. BVerfGE 148, 267 para 41 – Stadionverbot; NJW 2019, 1935 para 19).

125 5. The established violation of Section 19(1) GWB justifies the appealed order to terminate the infringement pursuant to Section 32 GWB.

126 a) Since the General Data Protection Regulation does not contain any provisions relating to the content of a contractual relationship (para 109), nor does it make any definitive provisions, there is no doubt about the applicability of Section 32 GWB and the competence of the Bundeskartellamt in this case (Köhler, WRP 2018,1269, 1271/1272; Künstner, K&R 2019, 605, 606; Buchner, WRP 2019, 1243, 1244). The fact that data privacy laws are to be considered in the application of antitrust law (as are the EU legislation and all other national legal provisions) does not establish a lack of competence on the Bundeskartellamt's part (Körber, NZKart 2019, 187, 194; Karbaum, DB 2019, 1072, 1076; Louven, CR 2019, 352, 356).

127 b) Facebook argues in vain that the prohibition to use the data (issued under (2) of the decision) and the imposed obligation to clarify that they will not be processed without consent (issued under (3b) of the decision) are typical data protection measures. The Bundeskartellamt's competence in this regard follows from Section 32(2) sentence 1 GWB. Accordingly, the competition authority may require undertakings to take all necessary behavioural or structural remedies that are proportionate to the infringement identified and necessary to effectively bring the infringement to an end. The Bundeskartellamt's measures imposed on Facebook are proportionate and necessary to prevent the established exclusionary effects of processing "off-Facebook" data without an alternative option for users.

128 c) The same applies to a collection and processing of data for safety reasons. A permission to process "off-Facebook" data for safety reasons cannot readily be established on the basis of the General Data Protection Regulation (para 115). Where in individual cases the General Data Protection Regulation

should allow for such processing, this would not be prohibited by the Bundeskartellamt's decision. For the prohibition under (2) of the decision merely prohibits the processing of data in the context of "implementing Facebook's terms of service" (i.e. on a contractual basis).

129 d) Contrary to the appellate court's view, the fact that Facebook is not generally prohibited from collecting, combining and using "off-Facebook" data but only if the private user has not separately consented to the processing and combining of such data, does not render the Bundeskartellamt's decision unsuitable to end the competition law infringement. As explained in the context of the weighing of interests, Facebook's competitors only deserve protection to the extent that and for so long as the, from their perspective detrimental, market result does not follow from a decision made by Facebook's users (para 120).

130 e) Facebook's claim made in the oral hearing before the Cartel Panel that the prohibition decision is not coherent with the established competition law infringement is also unfounded. Facebook's argument that in order to end the infringement, Facebook would have had to be obliged to enter into new contractual agreements with its users rather than ask for their consent – which could be revoked at any time – falls short. The order under (1) of the appealed decision does not contain an obligation but a prohibition. It prohibits Facebook from continuing with its current market conduct, which is to use terms of service that make the use of its social network by private users in Germany conditional on Facebook being allowed, without the users' consent, to use and combine data generated "off-Facebook" with the data collected and stored from the use of *facebook.com*. This conduct can be terminated by asking users to give their (specific) consent to the processing of "off-Facebook" data. Such consent is also given, however, where the user has been given a choice and has opted for a use of the social network in which "off-Facebook" data are also processed.

131 f) The fact that the contested decision mainly relies on a violation of data protection criteria to establish a violation of Section 19(1) GWB does not provide grounds for alleging defective reasoning. Even if the decision is based on

data protection considerations, the Bundeskartellamt still identifies the core of the abusive conduct in denying users a “genuine or free choice” to refuse or withdraw consent to the use of “off-Facebook” data without suffering a disadvantage (decision para 645). The further findings of the Bundeskartellamt support the accusation that Facebook abuses its dominant position by imposing the prohibited terms of service on its users, thus denying users this free choice between a contractual agreement that includes or excludes the use of “off-Facebook” data. The Bundeskartellamt’s decision therefore does not suffer from defective reasoning. The Panel’s fleshing out of the infringement does not change the nature of the contested decision nor does it unreasonably restrict Facebook in its legal defence (cf. BVerwG, decision of 21 September 1987 – 8 B 55.87, juris para 5).

132 IV. The enforcement of the decision does not result in undue hardship for Facebook which is not justified by prevailing public interests (Section 65(3) sentence 3 in conjunction with sentence 1 no 3 GWB).

133 1. Undue hardship within the meaning of Section 65(3) sentence 1 no 3 GWB exists where, depending on the circumstances of the case and in weighing the public interest in the enforcement of the decision and the interests of the party affected by it, the adverse effects likely to be suffered by the party affected cannot be justified. Substantial disadvantages alone are not sufficient to establish undue hardship. A threat to the undertaking’s existence, on the other hand, is generally considered undue hardship. Irreparable consequences can also only in exceptional cases be justified by an overriding public interest (cf. OLG Düsseldorf, WuW 2013, 1097, 1098 – Chemikalienhandel II). Another aspect in the weighing of interests is the question of how likely the appeal is to succeed (cf. BGH, WuW 2016, 249 para 31 – Energieversorgung Titisee-Neustadt).

134 2. For the sake of public interest, orders pursuant to Section 32 GWB to terminate a violation of Section 19 GWB always have immediate effect. In those cases, other than in the case of an order of immediate enforcement under Section 65(1) GWB, a specific interest in the immediate termination of the

infringement is presumed to exist by the legislator and does not require a case-based substantiation (cf. BGH, WuW 2007, 907 para 59 – Lotto im Internet).

135 3. The disadvantages brought forward by Facebook do not, individually or in their entirety, create undue hardship for Facebook.

136 a) The expected development and implementation costs in the double-digit million range are, on their own and weighed against the public interest in the implementation of the decision, not sufficient to establish undue hardship.

137 b) The same applies to the expected loss of turnover. It is evident that the implementation of the prohibition decision will reduce the value of Facebook's advertising and analytical tools for its advertising customers (cf. para 62). For the benefit of the applicants it can therefore be assumed that the implementation will result in a substantial daily turnover loss. This is, however, a disadvantage that will necessarily result from the implementation for as long as Facebook does not succeed in gaining its users' consent to its business model in its current form.

138 c) The fact that the processing of "off-Facebook" data would help Facebook to determine the true identity of a user that is suspected of having committed a criminal offence does not establish undue hardship. While it is true that there is a public interest in identifying a perpetrator, this does not justify the use of unlawful means.

139 d) The potential disadvantages for users resulting from the implementation are also not sufficient to assume undue hardship.

140 For the benefit of Facebook it can be assumed that the implementation will – at least for a certain period of time – have negative effects for users, such as a less accurate news feed ranking, disruptions in the login process, a less straightforward connection with other users and the loss of the "cross-posting" option. These are, however, drawbacks that are necessarily linked to the implementation of the prohibition decision.

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e) The expected implementation period of 18 months is also not sufficient to assume undue hardship. The order under (3) of the decision provides for an implementation period of 12 months. According to the order under (5), this period is suspended and extended once by 2 months if an admissible request to order the suspensive effect of the appeal against the decision is filed. Under the wording of the decision, the suspension ends upon termination of the expedited proceedings relating to the request at first instance. However, in view of the case constellation – and in accordance with the statement made by the Bundeskartellamt's representative in the oral hearing – the Cartel Panel is of the opinion that the suspensive effect of the request only ends upon termination of the review proceeding before the Federal Court of Justice. Accordingly, Facebook still has a period of 14 months upon termination of the summary proceedings to implement the decision. In addition, under (7) the Bundeskartellamt has reserved the right to revoke the decision in full or in part. This allows for an adjustment of the implementation period, provided that the need for such an adjustment is sufficiently substantiated. Considering the fact that the period necessary to implement the decision cannot be accurately predicted, adequate consideration has been given to the interest of the applicants in this matter.

142 f) As there are no serious doubts as to the legality of the contested decision, the expected duration of the proceedings does not justify the assumption of undue hardship, either.

143 V. The ruling on costs is based on Section 78 sentence 1 GWB.

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