

Case Summary

15 February 2019

Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing

Sector: Social networks

Ref: B6-22/16

Date of Decision: 6 February 2019

In its decision of 6 February 2019 the Bundeskartellamt prohibited Facebook Inc., Menlo Park, USA, Facebook Ireland Ltd., Dublin, Ireland, and Facebook Germany GmbH, Hamburg, Germany (hereinafter: "Facebook") from making the use of the Facebook social network (hereinafter: "Facebook.com") by private users residing in Germany, who also use its corporate services *WhatsApp*, *Oculus*, *Masquerade* and *Instagram*, conditional on the collection of user and device-related data by Facebook and combining that information with the Facebook.com user accounts without the users' consent. The prohibition is based on Section 19(1) of the German Competition Act (GWB). The same applies to terms making the private use of Facebook.com conditional on Facebook being able to combine information saved on the "Facebook account" without the users' consent with information collected on websites visited or third-party mobile apps used via programming interfaces ("Facebook Business Tools") and use this data. There is no effective consent to the users' information being collected if their consent is a prerequisite for using the Facebook.com service in the first place.

The proceeding was initiated in March 2016 and aimed at user and device-related data which Facebook collects when other corporate services or third-party websites and apps are used and which it then combined with user data from the social network. The proceeding did not deal with the issue of information processed on the use of the social network that is generated after users have registered. The Bundeskartellamt saw no reason to intervene on the grounds of the prohibition of abusive practices under competition law. It is taken into account that an advertising-funded social network generally needs to process a large amount of personal data. However, the Bundeskartellamt holds that the efficiencies in a business model based on personalised advertising do not outweigh the interests of the users when it comes to processing data from sources outside of the social network. This applies in particular where users have insufficient control over the processing of their data and its allocation to their Facebook accounts. As far as this part of data processing is concerned, it was necessary to intervene from a competition law

perspective because the data protection boundaries set forth in the GDPR were clearly overstepped, also in view of Facebook's dominant position.

1. Statement of facts

Facebook develops and operates various digital products, online services and applications for smartphones (apps). Facebook's core product is the social network Facebook.com, which has been offered in Germany since 2008. Its user base has been increasing continuously worldwide. In 2018 the number of daily active users in Germany was 23 million, while 32 million users were classified as monthly active users.

Private users can access Facebook.com via the websites www.facebook.com, www.facebook.de or via a mobile app. Facebook offers private users a range of functions to connect with their friends and acquaintances and share contents with them. Private Facebook.com use is conditional upon registration by creating a user profile. Using their real names, users can enter information on themselves and their personal situation and set a profile picture. Based on this information, a personalised site is created for each user, which is subdivided into three subsites: the "profile", "home" and the "find friends" pages. Users can see the latest news ("posts") of other private and commercial users in the "Newsfeed" on their start pages. The order of appearance is based on an algorithm to match the user's interests. *Facebook Messenger* is integrated into the social network and serves for real-time bilateral or group communication. In the social network, Facebook.com offers a variety of further functionalities, e.g. a job board, an app center or event organisation.

Not only private users but also businesses, associations or business individuals can use Facebook.com to publish content in the social network to increase their reach. Publishers can create their own pages to publish content and connect with private users, e.g. via subscriptions or likes. Facebook funds its social network through online advertising offered to publishers and other businesses. The ads match a social network user's individual profile. The aim is to present users with ads that are potentially interesting to them based on their personal commercial behaviour, their interests, purchasing power and living conditions ("targeting" or "targeted advertising").

In addition, the Facebook group offers "Facebook Business Tools", a selection of free tools and products for website operators, developers, advertisers and other businesses to integrate into their own websites, apps and online offers via programming interfaces (Application Programming Interfaces, API) pre-defined by Facebook. The selection includes social plugins ("Like" or "Share"

buttons), Facebook login and other analytics services (Facebook Analytics) implemented through “Facebook Pixel” or mobile “software development kits” (SDKs).

Besides Facebook.com, Facebook also offers *Instagram*, a service for sharing photos and short video clips which is often referred to as a “photo network” or “photo blogging” service. The service has been growing considerably over the last few years and is also funded through advertising. Private users have to register via the mobile app. To register, they have to enter an email address, a user name and, as an optional piece of information, a phone number. They can also upload a profile picture. They can use the Instagram camera to take pictures or record videos and edit them using filters, texts, drawings or special effects before sharing them with other users.

WhatsApp Inc. is also part of the Facebook group. In Europe it offers the mobile app *WhatsApp* via its Irish subsidiary WhatsApp Ltd. WhatsApp is a free service which was originally developed as a free internet-based alternative to short message services (SMS). Using the service, users can send and receive a multitude of media like text messages, photos, videos, documents, locations, voice messages and voice calls. While WhatsApp has not been monetised through advertising so far, the company announced that it was going to launch advertising in the “status” function in 2019.

Masquerade is another product used for editing and sharing pictures with filters and masks. Facebook also offers virtual reality headsets and software via its *Oculus* business.

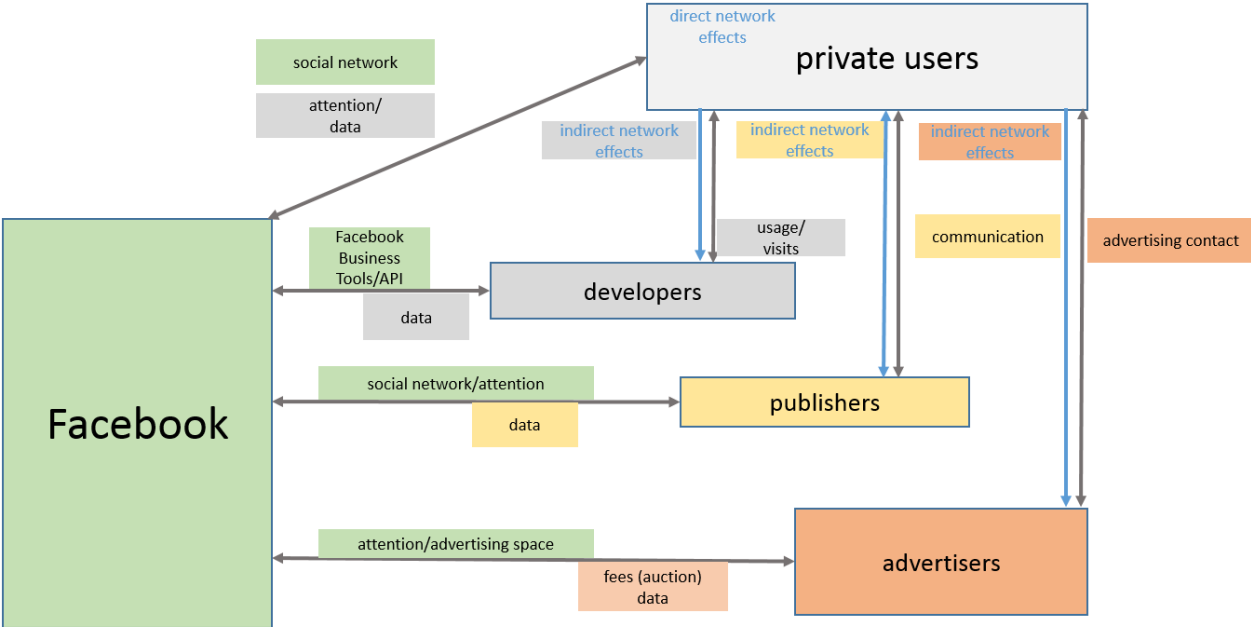
Using the social network Facebook.com is conditional on the user's agreement to Facebook's terms of service upon registration, i.e. they have to agree to the terms of service to conclude the contract. The terms of service stipulate that Facebook processes personal data as specified in particular in the data and cookie policies. Pursuant to these policies, Facebook also collects data on users and their devices outside of Facebook-related activities via Facebook Business Tools integrated by advertisers, app developers and publishers. Facebook also processes user data across other Facebook companies and products and collects user and device-related data from its corporate services. As a legal basis for data processing, Facebook claims that the data are required to provide the service and to fulfil Facebook's legitimate interests.

2. Legal assessment

1. Market definition

Based on the concept of demand-side substitutability, the Bundeskartellamt defines the product market as a private social network market with private users as the relevant opposite market side. The relevant geographic market is Germany.

In defining the market and considering the new provisions of Section 18(2a) and (3a) of the German Competition Act (GWB), the Bundeskartellamt first of all examined Facebook’s business model and its special characteristics as a multi-sided network market with free services. With its service Facebook.com Facebook offers an intermediary product, which, according to the content of its services, is a combination of a network and a multi-sided market pursuant to Section 18(3a) GWB. Essentially the product is a network financed through targeted advertising, which forms a multi-sided market precisely because of this form of financing. Key user groups are private users using Facebook.com without monetary compensation on the one hand, and advertisers running targeted advertisements on the other. Indirect network effects exist between the two user groups. Facebook added further market sides to its core product. One of these market sides is publishers using Facebook.com to promote their businesses with their own Facebook pages on which they publish editorial content and connect with users. Developers represent another side of the market. They can integrate Facebook into their own websites or apps by using “Application Programming Interfaces” (APIs) to integrate Facebook Products like social plugins (e.g. “Like” button), Facebook Login or the Facebook Analytics analysis service. Indirect network effects also exist between private users and the latter two sides:



As none of the above groups of Facebook users have demands similar to the group of private users, they have to be attributed to other markets. The network has to be considered a market service pursuant to Section 18(2a) GWB despite the fact that its use is not subject to fees for private users.

The product market definition also requires an analysis of the various online services commonly referred to as “social media” and their competitive relationships. Key criteria for defining the market are the high degree of product differentiation of social media and the various overlaps of their functionalities. When defining the market, strong direct network effects are also important. The Bundeskartellamt’s investigations, which included an examination of a large number of social media as well as a survey among users and competitors, and decisions by the European Commission in the *Facebook/WhatsApp* and *Microsoft/LinkedIn* cases have shown that a national market exists for social networks which essentially meet specific requirements that differ from other social media. With Google+ having disappeared from the market, this market now includes, besides Facebook, some smaller German providers of social networks. Networks like LinkedIn and Xing are designed to meet professional requirements and thus constitute a separate product market. Like the Commission in the *Facebook/WhatsApp* case, the Bundeskartellamt considers messaging services like *WhatsApp* as a separate market due to their technical characteristics and applications. The investigations have shown that although YouTube’s business model has some overlaps with those of social networks, the service is not sufficiently comparable to a social network. Snapchat, whose central function is a camera that opens automatically for taking “snaps” that are deleted after a short while, is not part of the product market either. The same applies to Twitter, Pinterest and Instagram. The latter is part of the Facebook group. When defining the market the Bundeskartellamt also looks at the extent to which internet companies shaped by network effects can show flexibility in adapting the products they offer. At least as far as the services affected in this case are concerned, it is not sufficient to have a “critical mass” of users or technical, financial and personal expertise in order to be able to enter neighbouring markets and be as successful as on the original market. As the example of Google+ has shown, a service cannot expect to have the same reach when providing a different type of service, due to strong direct network effects.

The geographic market was defined as Germany-wide as a result of the investigations, based on the fact that the service was found to be used predominantly to connect with people in the users’ own country, special national user habits and the lack of opportunities for supply-side substitution.

2. Market dominance

Facebook is the dominant company in the national market for social networks for private users pursuant to Section 18(1) in conjunction with (3) and (3a) GWB as, based on an overall assessment of all factors of market power, the company has a scope of action in this market that is not sufficiently controlled by competition.

First the Bundeskartellamt examined the user-based market share of Facebook on the relevant market. Facebook's user-based market share is very high, especially among daily active users, where Facebook has a market share exceeding 95%. Facebook's market share among monthly active users is above 80% and above 50% among registered users. The Bundeskartellamt considers the number of daily active users as the key indicator and relevant measurand for assessing the network's competitive significance and market success as a social network's success is measured by the intensity of use. Users use social networks as a virtual social space. When assessing the market share, the amount of time spent intensively using the network is an important indicator of the competitors' actual market position. The services of the Facebook group would have a combined market share far beyond the market dominance threshold pursuant to Section 18(4) GWB, even if YouTube, Snapchat, Twitter, WhatsApp, and Instagram were included in the relevant market.

A key element of the market dominance test are the strong direct network effects of Facebook's business model and the difficulties associated with switching to another social network. Facebook users connect with selected people in the social network, and it is difficult to motivate them to switch to another service as well. Competitors in the area of social networks have been experiencing a continuous decrease in user-based market shares in recent years; some of them have already left the market. Examples include StudiVZ and SchülerVZ, services which were temporarily operated by the Holtzbrinck publishing group and which were market leaders before Facebook entered the German market. Their operating company went into insolvency in 2017. The Lokalisten network, which was operated by ProSiebenSat.1, was discontinued in the autumn of 2016. Google+, the social network operated by the Google group, announced in the spring of 2018 that it would discontinue its service for private users and offer a payable service for internal business communications. In contrast to its competitors, Facebook's user figures keep rising or at least stagnate at a high level. The facts that competitors can be seen to exit the market and that there is a downward trend in the user-based market shares of the remaining competitors strongly indicate a market tipping process which will result in Facebook.com becoming a monopolist. This assessment is supported by the fact that the strong identity-based network effects lead to a lock-in effect which makes it difficult for users or prevents them from switching to another social network. Existing functionalities and interfaces do not alleviate the consequences of Facebook's incompatibility with other social networks.

Another important aspect of the examination are the indirect network effects encountered with Facebook as an advertising-funded service, which increase the barriers to market entry. Other advertising-financed platforms will find it difficult to enter the market and be successful in the long-

term as all competitors would have to enter both the user market for social networks and the online advertising market.

Facebook also has excellent access to competitively relevant data. Facebook's comprehensive data sources are highly relevant for competition as a social network is driven by such personal data. In addition, these specific data facilitate highly personalised advertising. Combined with the direct and indirect network effects, this access to data constitutes another barrier to market entry for a competitor's product that can be monetised.

In its overall assessment, the Bundeskartellamt took a close look at the internet's innovative power and its significance for assessing market power. The internet's innovative power cannot be taken as a general argument against an internet company's market power. Instead, specific indications of a dynamic or disruptive process are required in each individual case. This applies in particular to the control of abuse of dominant positions which focuses on the current market situation. Against this background the Bundeskartellamt examined the recent innovations which Facebook referred to. The authority's opinion is that these developments do not go beyond responses to competition from substitutes in the case of some individual functionalities. In particular in the context of pronounced direct network effects, its responses have rather shown that Facebook has been capable of successfully fighting off competitors' innovations. As a result, there is no trend towards users withdrawing from Facebook or Facebook losing market shares to a relevant extent despite the internet's high innovative power.

3. Abusive data policy

Using and actually implementing Facebook's data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook and to merge it with data collected on Facebook, constitutes an abuse of a dominant position on the social network market in the form of exploitative business terms pursuant to the general clause of Section 19(1) GWB. Taking into account the assessments under data protection law pursuant to the General Data Protection Regulation (GDPR), these are inappropriate terms to the detriment of both private users and competitors.

a) Data protection and competition law

The Bundeskartellamt holds that, being a manifestation of market power, the terms violate the stipulations of the GDPR and are abusive within the meaning of Section 19(1) GWB.

The authority bases its assessment on the case-law of the German Federal Court of Justice, which established an abuse of business terms in the *VBL-Gegenwert* and *Pechstein* cases based

on the general clause of Section 19(1) GWB. In its decisions taken in the *VBL-Gegenwert* cases the Federal Court of Justice considers the agreement of contract terms abusive if terms and conditions violating Sections 307ff. of the German Civil Code are applied, in particular if the fact that such terms and conditions are applied is a manifestation of market power or superior power of the party using these terms. The Federal Court of Justice held that it was necessary to balance all interests including constitutional rights in the *Pechstein* case. Accordingly, to protect constitutional rights, Section 19 GWB must be applied in cases where one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is abolished. If, the Court held, in such a case a dominant company handles constitutional rights of its contractual partners, the law had to intervene to uphold the protection of such rights. Relevant legal provisions in this regard were, according to the Court, the general clauses under civil law, one of which is Section 19 GWB. The Court held that these clauses should be applied with a view to balancing the conflicting positions of the contractual parties in such a way that the constitutional rights of all parties were, as far as possible, maintained.

The Bundeskartellamt holds that as far as the appropriateness of conditions agreed in an unbalanced negotiation is concerned, these decisions of the highest court apply to all other areas of the law as well. The same applies to data protection law, the purpose of which is to counter asymmetries of power between organisations and individuals and ensure an appropriate balancing of interests between data controllers and data subjects. In order to protect the fundamental right to informational self-determination, data protection law provides the individual with the right to decide freely and without coercion on the processing of his or her personal data.

The Bundeskartellamt closely examined the relation between the competition law provisions under Section 19(1) GWB and the harmonised European data protection principles of the GDPR which are mainly enforced by data protection authorities. The authority holds that it appears to be indispensable to examine the conduct of dominant companies under competition law also in terms of their data processing procedures, as especially the conduct of online businesses is highly relevant from a competition law perspective. It is the authority's view that the European data protection regulations, which are based on constitutional rights, can or, considering the case-law of the highest German court specified above, must be considered when assessing whether data processing terms are appropriate under competition law.

The responsibility and consistency regulations in the GDPR do not rule out that the Bundeskartellamt can assess whether data processing terms infringe the GDPR. The GDPR has been in force in the Member States since May 2018. It governs the responsibility of data protection authorities and is set out to ensure a uniform level of protection and application by the national

data protection authorities. For this purpose a data protection board has been set up by the Member States to decide on data protection matters in the event of disputes. The board can also instruct the national authorities accordingly. These regulations, however, do not rule out that substantive data protection law can also be applied by authorities other than the national data protection authorities. The GDPR explicitly states that data protection law can also be enforced under civil law, i.e. full consistency is not aspired to. This applies in particular to consumer protection organisations and competitors and their associations. These entities can enforce data protection based on stipulations of the Act Against Unfair Competition (UWG) or regulations on business terms linked to data protection and also based on Section 19 GWB. A large part of the ECJ's case law which data protection authorities and the data protection board have to consider has been obtained from civil law proceedings. Civil law proceedings promote rather than threaten the consistent implementation of data protection law, especially as the ECJ can be involved at an early stage as part of the preliminary ruling procedure. It is not evident that the consistency mechanism would rule out that the competition authority considers and interprets data protection law under Section 19 GWB and, at the same time, would allow a civil law enforcement of Section 19 GWB with regard to data protection law.

Also, data protection regulations do not suspend abuse control which is more specific. These regulations do not include final provisions regarding dominant companies, i.e. they only allow data processing by dominant companies to be examined by data protection authorities based on the direct data protection regulations, or the existing enforcement options under civil law (UWG or legislation on business terms). However, they do not include the prohibition of abusive practices which applies in particular to dominant companies. The GDPR does not explicitly state that its provisions are final, so it cannot be assumed that it leaves no further scope for examination by other authorities and under other aspects.

In the course of the proceeding the Bundeskartellamt maintained regular contact with data protection authorities none of which considered they had exclusive competence. The Conference of independent data protection authorities of the German Federal Government and the Länder (Konferenz der unabhängigen Datenschutzbehörden des Bundes und der Länder) expressly stated that the enforcement of data protection law must not be the sole response to violations of data protection requirements. Competition and antitrust law can, according to the conference, also be enforced. Even divestiture is mentioned as an option to punish the systematic circumvention of data protection. The Data Protection Officer for the city state of Hamburg explicitly supports the Bundeskartellamt's proceeding. The Bundeskartellamt also briefed the Irish data protection authority IDPC about the proceedings.

b) Consideration of data protection aspects

In a first step, the Bundeskartellamt examined whether the data policy is appropriate based on the data protection assessments of the GDPR. It came to the conclusion that Facebook's comprehensive processing of personal data from other corporate services and Facebook Business Tools, which enable, among other things, profiling and "device fingerprinting", violates European data protection requirements pursuant to the GDPR and is subject to the affected users' consent pursuant to data protection requirements. Facebook, which is responsible for the processing of these data, presented or substantiated hardly any justifications in the course of the proceeding. The determined facts of the case do not indicate a sufficient legal justification for the extent of data collected and merged.

There is no effective consent pursuant to Art. 6(1a) of the GDPR. The reasons for this include the fact that, in view of Facebook's dominant position in the market, users consent to Facebook's terms and conditions for the sole purpose of concluding the contract, which cannot be assessed as their free consent within the meaning of the GDPR.

Facebook does not have to process data to fulfil its contract pursuant to Art. 6(1b) GDPR. This reason for justification has to be narrowly interpreted, i.e. it has to be considered whether the unilateral determination of the contract details has to be taken into account. Particularly, it cannot be substantiated that the service has to process data to the extent that has been determined in the course of the examination for reasons of efficiency and advantages of a personalised service. If this view is taken, the company would be entitled to unlimited data processing solely on the grounds of its business model and product properties as well as the company's concept of product quality. Any kind of data processing would then have to be deemed necessary for fulfilling the contract as all data carry some information on the individual user. Processing data from third-party sources to the extent determined by Facebook in its terms and conditions is neither required for offering the social network as such nor for monetising the network through personalised advertising, as a personalised network could also be based to a large extent on the user data processed in the context of operating the social network. The latter is not a subject of the proceeding at hand. None of the stipulations of Art. 6(1c-e) GDPR apply to justify data processing for special purposes.

Even a comprehensive assessment of interests did ultimately not lead to the conclusion that Facebook's interest in processing data according to the terms and conditions it set outweighs other interests (Art. 6(1f) GDPR). This assessment is based on an evaluation of the legitimate interests Facebook brought forward, third-party interests and user interests. Criteria considered were the consequences for the affected users, taking into account the data type and the way in

which it is processed, reasonable expectations of users and the respective positions of Facebook and its users. What also had to be considered pursuant to the guidelines of the data protection board was that Facebook as a dominant company has bargaining power over its users and is in a position to impose far-reaching data processing conditions, which users cannot prevent as they have no additional control mechanisms. Data processing to the extent at hand cannot be justified without the users' voluntary consent. Voluntary consent to their information being processed cannot be assumed if their consent is a prerequisite for using the Facebook.com service in the first place.

c) Manifestation of market power

The violation of data protection requirements found is a manifestation of Facebook's market power. According to the case-law it is not necessary to determine that the conduct, i.e. the violation, was only possible in the first place because of market dominance and that other market participants did not have a chance to behave in a similar way. Instead, it is sufficient to determine that the two aspects are linked by a causality which is either based on normative aspects or the outcome. Both aspects can be assumed to be fulfilled in this case.

Normative causality with regard to the violation of data protection rules exists as the restriction of the private users' right to self-determination is clearly linked to Facebook's dominant position. Data protection law considers corporate circumstances like market dominance, the concrete purpose and the amount of data processed in its justifications, i.e. Facebook's market position is significant when assessing the violation.

In addition to that there is a causality in terms of the outcome as Facebook's conduct linked to its market dominance, which was the subject of the proceedings at hand, impedes competitors because Facebook gains access to a large number of further sources by its inappropriate processing of data and their combination with Facebook accounts. It has thus gained a competitive edge over its competitors in an unlawful way and increased market entry barriers, which in turn secures Facebook's market power towards end customers.

Both data protection law and competition law consider the aspect of an unbalanced negotiation position, i.e. a weighing up of interests under competition law which could be required in addition to the examination under data protection law, and reach the same conclusions due to the largely identical considerations including market dominance. In addition, pursuant to the *Pechstein* case-law, assessments with regard to constitutional rights have to be included in assessments of interests under competition law. Again, these assessments are largely identical with the assessments under data protection law.

As Facebook is a dominant company users cannot protect their data from being processed from a large number of sources, i.e. they cannot decide autonomously on the disclosure of their data. However, it must be ensured that the interests of the opposite market side are sufficiently considered if a provider is a dominant company which is not subject to sufficient competitive control. The terms and conditions under review have a considerable reach as Facebook's market power extends beyond its social network and consumers' data are collected whenever they use the internet. While the efficiencies of a data-driven business model for consumers are generally acknowledged, the outlined extent of data processing is to be deemed inappropriate and hence abusive.

4. Decision

Based on the above and in exercising due discretion, the Bundeskartellamt has prohibited the data processing policy Facebook imposes on its users and its corresponding implementation pursuant to Sections 19(1), 32 GWB and ordered the termination of this conduct. The prohibition refers to the terms of processing personal data as expressly stated in the terms of service and detailed in the data and cookie policies as far as they involve the collection of user and device-related data from other corporate services and Facebook Business Tools without the users' consent and their combination with Facebook data for purposes related to the social network. The Bundeskartellamt also prohibited the implementation of these terms and conditions in actual data processing procedures which Facebook performs based on its data and cookie policies. In the order to terminate the infringement Facebook is ordered to implement the necessary changes and to adapt its data and cookie policies accordingly within a period of twelve months. In addition to that Facebook has been given a deadline of four months to present an implementation road map for the adjustments. The time limits can be suspended by an emergency appeal to the Düsseldorf Higher Regional Court. Facebook has already appealed against this decision to the Düsseldorf Higher Regional Court and requested that the suspensive effect of the appeal be restored.