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Bundeskartellamt prohibits Facebook from combining user data from different sources

Bonn, 7 February 2019: The Bundeskartellamt has imposed on Facebook far-reaching restrictions in the processing of user data.

According to Facebook's terms and conditions users have so far only been able to use the social network under the precondition that Facebook can collect user data also outside of the Facebook website in the internet or on smartphone apps and assign these data to the user's Facebook account. All data collected on the Facebook website, by Facebook-owned services such as e.g. WhatsApp and Instagram and on third party websites can be combined and assigned to the Facebook user account.

The authority's decision covers different data sources:

(i) Facebook-owned services like WhatsApp and Instagram can continue to collect data. However, assigning the data to Facebook user accounts will only be possible subject to the users' voluntary consent. Where consent is not given, the data must remain with the respective service and cannot be processed in combination with Facebook data.

(ii) Collecting data from third party websites and assigning them to a Facebook user account will also only be possible if users give their voluntary consent.

If consent is not given for data from Facebook-owned services and third party websites, Facebook will have to substantially restrict its collection and combining of data. Facebook is to develop proposals for solutions to this effect.

Andreas Mundt, President of the Bundeskartellamt: *"With regard to Facebook's future data processing policy, we are carrying out what can be seen as an internal divestiture of Facebook's data. In future, Facebook will no longer be allowed to force its users to agree to the practically*

unrestricted collection and assigning of non-Facebook data to their Facebook user accounts. The combination of data sources substantially contributed to the fact that Facebook was able to build a unique database for each individual user and thus to gain market power. In future, consumers can prevent Facebook from unrestrictedly collecting and using their data. The previous practice of combining all data in a Facebook user account, practically without any restriction, will now be subject to the voluntary consent given by the users. Voluntary consent means that the use of Facebook's services must not be subject to the users' consent to their data being collected and combined in this way. If users do not consent, Facebook may not exclude them from its services and must refrain from collecting and merging data from different sources."

Facebook is the dominant company in the market for social networks

In December 2018, Facebook had 1.52 billion daily active users and 2.32 billion monthly active users. The company has a dominant position in the German market for social networks. With 23 million daily active users and 32 million monthly active users Facebook has a market share of more than 95% (daily active users) and more than 80% (monthly active users). Its competitor Google+ recently announced it was going to shut down its social network by April 2019. Services like Snapchat, YouTube or Twitter, but also professional networks like LinkedIn and Xing only offer parts of the services of a social network and are thus not to be included in the relevant market. However, even if these services were included in the relevant market, the Facebook group with its subsidiaries Instagram and WhatsApp would still achieve very high market shares that would very likely be indicative of a monopolisation process.

Andreas Mundt: "*As a dominant company Facebook is subject to special obligations under competition law. In the operation of its business model the company must take into account that Facebook users practically cannot switch to other social networks. In view of Facebook's superior market power, an obligatory tick on the box to agree to the company's terms of use is not an adequate basis for such intensive data processing. The only choice the user has is either to accept the comprehensive combination of data or to refrain from using the social network. In such a difficult situation the user's choice cannot be referred to as voluntary consent."*

Abuse of market power based on the extent of collecting, using and merging data in a user account

The extent to which Facebook collects, merges and uses data in user accounts constitutes an abuse of a dominant position.

The Bundeskartellamt's decision is not about how the processing of data generated by using Facebook's own website is to be assessed under competition law. As these data are allocated to a specific service users know that they will be collected and used to a certain extent. This is an essential component of a social network and its data-based business model.

However, this is what many users are not aware of: Among other conditions, private use of the network is subject to Facebook being able to collect an almost unlimited amount of any type of user data from third party sources, allocate these to the users' Facebook accounts and use them for numerous data processing processes. Third-party sources are Facebook-owned services such as Instagram or WhatsApp, but also third party websites which include interfaces such as the "Like" or "Share" buttons. Where such visible interfaces are embedded in websites and apps, the data flow to Facebook will already start when these are called up or installed. It is not even necessary, e.g., to scroll over or click on a "Like" button. Calling up a website with an embedded "Like" button will start the data flow. Millions of such interfaces can be encountered on German websites and on apps.

Even if no Facebook symbol is visible to users of a website, user data will flow from many websites to Facebook. This happens, for example, if the website operator uses the "Facebook Analytics" service in the background in order to carry out user analyses.

Andreas Mundt: *By combining data from its own website, company-owned services and the analysis of third party websites, Facebook obtains very detailed profiles of its users and knows what they are doing online."*

European data protection provisions as a standard for examining exploitative abuse

Facebook's terms of service and the manner and extent to which it collects and uses data are in violation of the European data protection rules to the detriment of users. The Bundeskartellamt closely cooperated with leading data protection authorities in clarifying the data protection issues involved.

In the authority's assessment, Facebook's conduct represents above all a so-called exploitative abuse. Dominant companies may not use exploitative practices to the detriment of the opposite side of the market, i.e. in this case the consumers who use Facebook. This applies above all if the exploitative practice also impedes competitors that are not able to amass such a treasure trove of data. This approach based on competition law is not a new one, but corresponds to the case-law of the Federal Court of Justice under which not only excessive prices, but also inappropriate contractual terms and conditions constitute exploitative abuse (so-called exploitative business terms).

Andreas Mundt: *"Today data are a decisive factor in competition. In the case of Facebook they are the essential factor for establishing the company's dominant position. On the one hand there is a service provided to users free of charge. On the other hand, the attractiveness and value of the advertising spaces increase with the amount and detail of user data. It is therefore precisely in the area of data collection and data use where Facebook, as a dominant company, must comply with the rules and laws applicable in Germany and Europe."*

The Bundeskartellamt's decision is not yet final. Facebook has one month to appeal the decision to the Düsseldorf Higher Regional Court.

Further information on the proceeding can be found in a background paper.

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