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BGH decision on Facebook confirms allegations of abuse of a dominant position

The decision of the Federal Court of Justice (BGH) on the admissibility of the Bundeskartellamt's (Federal Cartel Office) decision regarding Facebook represents a turning point in dealing with globally operating Internet services which, due to their dominant position, have so far been able to dictate their terms of use and privacy policy to users. Without effective control over their data and considering the lock-in effect, the Federal Court of Justice has identified an exploitation of users on Facebook that is relevant under cartel law. As a market-dominating network operator, the Facebook Group will thus be obliged in future either to grant users fair options with regard to the use of their personal data so that they can decide for themselves whether to personalize their data, or Facebook has to refrain from exchanging data within the Facebook Group in future.

The decision of the Federal Court of Justice (BGH) is an urgency decision. However, it means that the Bundeskartellamt's decision to prohibit Facebook from further processing data without users' further consent can now be enforced. In this respect there are considerable consequences for the company's data processing practice to an extent not previously known. Facebook has a 12-month deadline for implementation, whereby an implementation plan must be submitted in advance. Ultimately, data processing and the exchange of data between different services of the Facebook Group in future shall only be based on consent. This may not be given across-the-board and has to be obtained separately from the users. The refusal of the individual consent must not result in the service not being usable. Consent must be given freely and informed.

Johannes Caspar, Hamburg Commissioner for Data Protection and Freedom of Information: "The decision of the BGH marks a turning point: The compulsion to give blanket consent, whereby users had to accept a buy out of their data for an admission ticket at the door to the Facebook network, must be a thing of the past. Up to now market power generated data power, which in turn created more market power. The decision of the BGH now points in a different direction. Facebook will have to realize that time is running out for this business model. The fact that this approach comes from competition authorities, but not from the competent data protection supervisory authorities, will not change this result. Overall, the decision has brought about a breakthrough in the principle of the reciprocity between competition law and data protection law. Competition and data protection authorities have already cooperated successfully in the past. It is to be expected that this will be further intensified in the future."

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