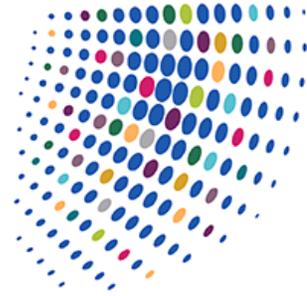


# Alerts & Publications



## Germany's Supreme Court Sides with National Antitrust Enforcer in Facebook Abuse of Dominance Case

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Facebook suffered a serious setback today, as the German Federal Court of Justice (FCJ) sided with last year's decision by the Federal Cartel Office (FCO) that the social network company's practice of collecting and commercialising users' data constitutes an abuse of market power and breaches German antitrust laws. The FCO's 6 February 2019 decision had ordered Facebook to change its terms and conditions, but the company lodged an appeal to the Düsseldorf Higher Regional Court, where a suspension order was issued on 26 August 2019. Today's FCJ decision lifts that suspension order and forces Facebook to comply with the FCO decision pending the outcome of the ongoing appeal.

The FCO's 2019 decision attracted global attention, as it marked the first time an antitrust enforcer had based a market power abuse case on alleged breaches of data protection rules. Considering that competition laws offer far more powerful enforcement tools than what is available, for example, under the EU's General Data Protection Regulation (GDPR)<sup>1</sup>, the practical implications of the CO's Facebook decision are immense. At a time when the European Commission is looking to expand its toolkit to regulate digital platforms under [new competition rules](#) and a specialised [Digital Services Act](#), the German FCO's stance was based on a perception that existing competition laws could also be employed to tackle 21st century issues.

The final verdict is still outstanding. In today's decision, the FCJ only [settled](#) the dispute around the interim measures, finding that the Higher Regional Court was wrong to doubt that the alleged infringement of GDPR rules would have resulted in competitive harm, the pre-condition for an antitrust infringement. After all, the court considers that Facebook as a dominant company has a special responsibility for ensuring that the remaining competition in the social networks market is not further reduced. In this regard, the economic value of data is considered by the FCJ as being of particular importance. In the court's view, effectively depriving users of their free choice to agree or disagree to the broad collection of their data also increases Facebook's data trove and the lock-in effects from which the network benefits—to the detriment of its remaining competitors.

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As Facebook is now under an enforceable obligation to adjust its terms and conditions and substantially restrict the collection and processing of data, the appeal before the Higher Regional Court will continue to focus on the substantive question: is it abusive if Facebook conditions users' access to the platform on their consent to have their data collected also outside the Facebook website? The issue is as complex as the way in which Facebook collects and processes data.

For one, there are the data that Facebook gathers on the Facebook website. In this respect, the FCO concedes that users know that such data are collected and processed, as this is “an essential component of a social network and its data-based business model.” However, Facebook also collects data through its other platforms, including WhatsApp and Instagram. In the FCO's view, users are not always aware that such data are gathered and linked back to their Facebook accounts for targeted advertising. According to the regulator, Facebook should not process the data in this way without a specific and voluntary agreement by the user. The FCO's most serious concerns relate to data that Facebook collects on third party websites where Facebook collects data as soon as a user visits a site where a Facebook 'Like' or 'Share' button is embedded or where the website operator uses the Facebook Analytics service in the background. In the FCO's view, Facebook users are not aware of such data collection practices and are (unwittingly) agreeing to them under the company's terms and conditions only because they are otherwise barred from using the social network.

Not only did the FCO consult with various data protection authorities to conclude that Facebook's practices infringe GDPR rules, the agency also considered those practices as exploitative abuses of market power within the meaning of German competition law. Drawing parallels to established case law on excessive pricing and inappropriate contractual terms, the FCO found that Facebook's practices were equally exploitative. Considering that users' data effectively serve as currency for accessing the otherwise free social network, the argument is that excessive data collection should be treated the same way as excessive pricing. We will have to wait and see whether the appeal court agrees with this finding. A judgement is expected for later this year or early 2021.

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<sup>1</sup> According to Article 83(5) GDPR, infringements are subject to administrative fines of up to EUR 20 million or up to 4 % of a company's total worldwide annual turnover, whichever is higher. By contrast, breaches of EU competition laws, for example, have reached billions of Euros in the past as they are capped only at 10% of a company's total worldwide annual turnover according to Article 23(2) of EU Regulation 1/2003.

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