Inofficial Translation by Apollo Lingua GbR based on the public version of the court order, available at http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-_V.pdf.

DÜSSELDORF COURT OF APPEALS
DECISION

VI-Kart 1/19 (V)

In the antitrust administrative case

1. **Facebook Inc.,**

2. **Facebook Ireland Ltd.,**

3. **Facebook Deutschland GmbH,**

Complainants and Appellants,

Attorneys of record: …

vs.

Federal Cartel Office [Bundeskartellamt],

Respondent and Appellee,

Other parties involved in the proceedings:

Verbraucherzentrale Bundesverband e.V.,

Admitted party,

The First Cartel Senate of the Düsseldorf Court of Appeals on 26 August 2019, through the Presiding Judge at the Court of Appeals Prof. Dr. Kühnen, the Judge Lingrün at the Court of Appeals, and the Judge at the Court of Appeals Prof. Dr. Lohse has

decided:

I. At Complainants' request, the suspensive effect of their appeals against the orders in clauses 1 to 3 of the Federal Cartel Office order of 6 February 2019 *(B6-22/16)* is ordered.

II. The appeal is admitted.

Reasons

I.

The Facebook Group develops and operates various digital products, Internet services and applications for smartphones ("apps"). The parent company is Complainant 1); Complainants 2) and 3) are wholly-owned subsidiaries of Complainant 1) (all Complainants together hereinafter also: *Facebook*).

The core product of Facebook is the social network *Facebook.com*, which has been available in Germany since 2008 and in 2018 has been used daily by around 23 million users and monthly by around 32 million users. The network can be used by private users at *www.facebook.com* or facebook.de or via a mobile app. It offers private users a range of functions which they can use to network with friends and acquaintances and "share" these contents. To do so, the user creates a "user profile" under his/her real name when registering with the network, which he/she can use to provide information about him-/herself and a variety of other personal circumstances and upload a profile photo. On this basis, the user will be provided with his/her own Facebook page which is subdivided into further sub-pages; for further details, e.g. on displaying messages from other private or commercial users or on functions relating to real-time communication with third parties, reference is made to the order of the Federal Cartel Office.

Facebook.com can be used not only by private users, but also by companies, associations or individuals who can post their own content to the social network in order to increase their reach. These "content providers" can set up their own pages, distribute their content on them and associate with private users via "subscriptions" or a "like me" function.

Facebook Group furthermore offers a variety of free tools and products as *"Facebook Business Tools"*, which are aimed at website operators and other companies who can integrate the "tools" into their own websites, apps and online offerings via programming interfaces predefined by Facebook. In addition to so-called "social plug-ins" such as the function buttons "Like" or "Share", these include other functionalities and analysis services.

Facebook offers services in addition to and independent of the social network. These include, among others, *Instagram*, which provides a medium for "sharing" photos and short video clips, as well as *WhatsApp*, which supports sending and

receiving a variety of media such as text messages, images, videos, contacts, documents, locations, and voice messages and calls. *Facebook* also offers *Masquerade* for editing and "sharing" photos and *Oculus*, which is used to sell "virtual reality" headsets and software.

Facebook finances its social network *Facebook.com* through online advertising, which is offered to content providers and other companies. This advertising is tailored towards the individual social network user and aims to show the user ads that might be of interest to him/her based on his/her personal consumer behavior, interests, purchasing power and life situation.

Private users do not have to pay a fee to use the social network. For these users, however, participation in the network depends on their acceptance of *Facebook's* Terms of Service when registering for the service. The consent serves the conclusion of the user agreement, under inclusion of the Terms of Service. According to the Terms of Service, *Facebook* processes personal data; as for their explanation, reference is made in particular to the data or cookie policy provided by *Facebook*. According to these policies, *Facebook* collects user and device-related information about user activity inside and outside the social network. The user activities taking place outside the social network involve, on the one hand, visiting websites or using mobile apps from third party providers that are associated to *Facebook* via programming interfaces (Facebook Business Tools) and, on the other hand, using other services belonging to the Facebook Group, such as the above-mentioned services, in relation to which data processing takes place "across the other *Facebook* companies and products".

By order of 6 February 2019, the Federal Cartel Office prohibited the data processing provided for in the Terms of Service and its implementation pursuant to Sections 19 para. 1, 32 GWB and imposed measures to stop it. The prohibition covers the conditions for the processing of personal data expressly laid down in the Terms of Service and explained in detail in the data and cookie policy, insofar as they concern the collection of user and device-related data from the other group-owned services and the *Facebook Business Tools* and their combination with *Facebook* data for the purposes of the social network (hereinafter also referred to as "additional data") without the users' consent (No. 1 of the order)). Moreover, the Federal Cartel Office has prohibited the implementation of these conditions through the actual data processing operations that *Facebook* carries out on the basis of the

data and cookie policy (No. 2 of the order)) and granted Facebook a twelve-month implementation period in order to adapt the Terms of Service and their implementation and to clarify the data and cookie policy accordingly (No. 3 of the order)). It has furthermore requested an implementation plan for the adaptation within four months (No. 3 of the order)). The Federal Cartel Office has also ordered that the time limits for implementation referred to in the statement in paragraph 3 be suspended for the duration of preliminary proceedings at first instance (No. 5 of the order)). Finally, in No. 4 of its order, the Federal Cartel Office has clarified that there is no consent of the user if the provision of *Facebook.com* is made dependent on the granting of consent.

The Federal Cartel Office essentially explained the reasons for its order as follows: *Facebook* is a dominant company on the market for social networks for private users in Germany and thus an addressee of the prohibition of abuse of dominance. In any event, the company infringed the prohibition of abuse under cartel law in this respect (Section 19 para. 1 GWB), as it requires private users to agree to contractual conditions when registering for its network that were inappropriate with regard to principles enshrined in data protection law under the General Data Protection Regulation (GDPR) and which granted Facebook the right to collect, associate and use additional data generated outside the network. In this context, *Facebook* is accused of abusing conditions to the detriment of private network users, who suffered damage in the form of a loss of control, as they could no longer dispose of their personal data in a self-determined manner with regard to the conditions of such data. Moreover, the abuse has impeding effects to the detriment of competitors on the market for social networks and on third markets.

Complainants have appealed against the order of the Federal Cartel Office in due time and form; the appeal proceedings are pending before the Senate under file number *Vl-Kart 2/19 (V)*.

In the present case, Complainants assert preliminary relief and request that

> the suspensive effect of the appeal be ordered,
>
> In the alternative:
>
> the suspensive effect of the appeal be ordered until the end of possible preliminary proceedings before the Federal Court of Justice in the context of a legal complaint against the rejection of the aforementioned application or a non-admission complaint if the legal complaint has not been admitted.

The Federal Cartel Office requests that

Complainants' above applications be rejected.

In view of the further details of the facts and dispute, reference is made to the content of the file, including the statements made in the appealed order.

II.

The preliminary applications are successful with the main petition.

Pursuant to Section 65 para. 3 sentence 3, sentence 1 no. 2 GWB, it is to be ordered as requested that Complainants' appeals have suspensive effect insofar as the appeals are directed against the - in this respect only relevant - No. 1 to 3 of the appealed official order. There are serious doubts as to the legality of these orders.

A. As follows in reverse from Section 64 para. 1 GWB, the order based on Section 32 para. 1 GWB does not have a suspensive effect. However, under Section 65 para. 3, sentence 1 and Section 65 para. 3, sentence 3 GWB, the Appellate Court may, upon request, order the suspensive effect of the appeal if there are serious doubts as to the legality of the appealed order (Section 65 para. 3, sentence 1 no. 2 GWB) or if enforcement would result in unreasonable hardship for the party concerned which would not be required by overriding public interests (Section 65 para. 3 sentence 1 no. 3 GWB). In any case, under the first aspect, the preliminary applications have merit.

According to established Senate case law (cf. Higher Regional Court Düsseldorf, order of 12 July 2016 - *VI-Kart 3/16 (V),* NZKart 2016, 380 = WuW 2016, 372, margin no. 42 at juris - *Ministererlaubnis EDEKA/Kaiser's Tengelmann*; order of 4 May 2016, *VI- Kart 1/16 (V),* NZKart 2016, 291 = WuW 2016, 378, margin no. 39 at juris - *Enge Bestpreisklausel*; order of 25 October 2006 - *VI-Kart 14/06 (V),* WuW/E DE-R 2081, margin no. 6 at juris - *Kalksandsteinwerk;* order of 8 May 2007 - *VI-Kart 5/07 (V),* WuW/E DE-R 1993, 1994 - *Außenwerbeflächen;* order of 5 March 2007 - *VI-Kart 3/07 (V),* WuW/E DE-R 1931, 1932, margin no. 12 at juris - *Sulzer/Kelmix*; order of 23 October 2006 - *VI-Kart 15/06 (V),* WuW/E DE-R 1869, 1871, margin no. 41 at juris - *Deutscher Lotto- und Totoblock*; order of 13 April 2005 - *VI-Kart 3/05 (V),* WuW/E DE-R 1473, margin no. 16 at juris – *Konsolidierer;* order of 8 December 2003 - *VI-Kart 35/03 (V),* WuW/E DE-R 1246, 1247 margin no. 7 at juris - *GETEC net;* order of 27 March 2002 - *VI-Kart 7/02 (V),* WuW/E DE-R 867, 868 margin no. 12 at juris - *Germania*; order of 11 April 2001 - *VI-Kart 22/01 (V),* WuW/E DE-R 665, 666 - *Net*

Cologne I) there are serious doubts as to the legality within the meaning of Section 65 para. 3 sentence 1 no. 2 GWB if, in a summary review, the revocation of the appealed order is predominantly probable. It is irrelevant, whether the concerns about the legality of the order arise from actual reasons (e.g. insufficient factual clarification) or due to legal (procedural or substantive) considerations. It is, however, not sufficient if the factual and legal situation is open at the time of the necessary preliminary assessment.

B. Measured against this, there are serious doubts as to the legality of the order. Even a summary examination of the factual and legal situation leads to the conclusion that the appealed order must in any event be revoked for the reasons set out below. Contrary to the view held by the Federal Cartel Office, the data processing by *Facebook*, which the Federal Cartel Office has objected to, does not give rise to any relevant damage to competition, nor does it give cause for concern about any undesirable development in competition. This applies both with regard to exploitative abuse to the detriment of consumers participating in the social network of *Facebook* (see 1 below) and with regard to current or potential competitors of *Facebook* impairing exclusionary abuse (see 2 below).

1. Upon summary examination, the assumption of an abuse of exploitation in the form of an abuse of conditions to the detriment of the users of the social network of *Facebook* already meets far-reaching legal concerns.

a) There is no exploitative abuse according to Section 19 para. 2 no. 2 GWB. Under said provision, abuse of market power occurs in particular where a dominant undertaking requests charges or other terms and conditions which differ from those which would be highly likely to result from effective competition. It can be assumed that the Federal Cartel Office has correctly defined the relevant product and geographic market and that *Facebook* is an addressee of the abuse prohibition pursuant to Section 19 GWB on that market for social networks for private users in Germany. It may also be assumed that the Federal Cartel Office's assessment is correct that the "Terms of Service" provided by *Facebook*, including the "data policy" and the "cookie policy", are terms and conditions within the meaning of Section 19 para. 2 no. 2 GWB. However, a violation by *Facebook* of the abuse prohibition in Section 19 para. 2 no. 2 GWB cannot be established. The Federal Cartel Office did not carry out adequate investigations into "as-if-competition" and, consequently, did

not make any meaningful findings on the question of what conditions of use had been established in the competition.

b) Based on the Federal Cartel Office's findings, *Facebook* cannot be accused of having abused its dominant market position within the meaning of Section 19 para. 1 GWB either. Under this general clause, the abuse of a dominant position is prohibited.

aa. However, it cannot be ruled out from the outset that damage to consumer protection may be regarded as a damage to competition within the meaning of Section 19 para. 1 GWB. On the one hand, this is based on the desired synchronization of national competition law with that of the European Union (cf. Federal Court of Justice of 7 December 2010 - *KZR 5/10,* WuW/E DE-R 3145, margin no. 55 - *Entega II)* and the notion of consumer protection implemented there in Art. 102 TFEU (cf. e.g. ECJ, judgment of 13 February 1979 - *C-85/76,* Coll. 1979, 461 margin no. 125 - *Hoffmann-La Roche* [on Art. 86 EEC Treaty, old version]). On the other hand, examples of national prohibition of abuse also have a consumer-protecting function, such as the prohibition on excessive pricing and abusive business terms pursuant to Section 19 para. 2 no. 2 GWB and the prohibition of price discrimination pursuant to Section 19 para. 2 no. 3 GWB (cf. Federal Court of Justice, judgment of 7 December 2010 - *KZR 5/10,* WuW/E DE-R 3145, margin no. 24 and 55 - *Entega II).* In the case at hand, there is no need to decide on the conditions under which excessive pricing and abusive business terms fall as an exception under Section 19 para. 1 GWB and assessed in deviation from the standard of "as-if-competition" prescribed by law in Section 19 para. 2 no. 2 GWB.

bb. In the dispute at hand, the conduct prohibited by the Federal Cartel Office does not in itself give rise to an anti-competitive result. This involves the collection of user and device-related data from the company's other services (*Instagram, WhatsApp, Masquerade, and Oculus*) and the *Facebook Business Tools*, and the association of this additional data with the *Facebook* data for social networking purposes. Only these additional data are the subject of the Federal Cartel Office's orders.

(1) The input of additional data does not lead to any exploitation of private network users. In contrast to a fee paid, the data in dispute can be easily duplicated, which is why their provision to *Facebook* does not weaken the consumer economically. The consumer is also free to make the data in question available to

any third party as often as he/she likes including *Facebook* competitors on the market for social networks.

(2) Under the aspect of "excessive" disclosure of data, each of which can be assigned a certain market value (cf. *Körber,* NZKart 2019, 187 [191]), no exploitation of a *Facebook* user can be justified. This is the case already due to the fact that the Federal Cartel Office order does not contain any meaningful findings in this respect on nature, origin and quantity of the additional data in dispute.

Notwithstanding the foregoing, the consideration of "excessive" data disclosure could also not support the appealed order because it prohibits, without any differentiation whatsoever, collection, associating and use of any additional data from the group's other services (*Instagram, WhatsApp, Masquerade and Oculus*) and the websites or mobile apps associated with *Facebook.com* via programming interfaces, to the extent that participation by private users in the social network provided by *Facebook* is dependent on such data processing. Such a far-reaching prohibition could at best be justified if *all* additional data mentioned without exception fall under the verdict of excessiveness. The Federal Cartel Office has not found anything in this regard. Moreover, the accusation of an abuse of a dominant market position requires a considerable gap between the terms and conditions demanded of the opposing side of the market and those in conformity with competition (cf. Federal Court of Justice, order of 15 May 2012 - KVR 51/11, NZKart 2013, 34 = WuW/E DE-R 3632 margin no. 26 with further references - Wasserpreise Calw I; decision of 14 July 2015 - KVR 77/13, BGHZ 206, 229 = NZKart 2015, 448 = WuW/E DE-R 4871 margin no. 63 with further references - Wasserpreise Calw II), which is why not every excess of what is still permissible according to competitive standards leads to the assumption of an abuse of market power. In this respect, findings by the cartel authorities are all missing.

3) The Federal Cartel Office rather sees the user damage as a "loss of control" (cf. Federal Cartel Office, Background information on the Facebook proceedings before the Federal Cartel Office of 19 December 2017, p. 4 and of 7 February 2019, p. 5; Response to the Stay Statement of Reasons of 29 May 2019, p. 35) and, in this context, focuses on collection and processing of additional data - which it considers to be in breach of data protection law - and the associated violation of the right of Facebook users to informational self-determination which is protected by fundamental rights. This consideration fails to convince.

(3.1) In the appealed order, the Federal Cartel Office has accused *Facebook* of anti-competitive behavior only because it makes the provision of its network service contingent upon the permission to associate the additional data from the other services owned by the group or from third-party pages with programming interfaces *(Facebook Business Tools)* with *Facebook* data and using them. However, collection and processing of such additional data are done based on the Terms of Service provided by *Facebook*, hence with the consent of the *Facebook* user. Given this situation, there can be no question of the user's "loss of control" over his/her data. Instead, data processing takes place with his/her knowledge and consent and thus very much under his/her "control". Even the Federal Cartel Office does not contend that in its Terms of Service, *Facebook* does not fully, understandably and accurately inform users of the content, scope and purpose of the data processing at issue. There furthermore is no indication whatsoever to assume that *Facebook* obtains the users' consent through coercion, pressure, exploitation of a weakness of will or other unfair means, or that the company uses the additional data in violation of the agreement beyond the agreed scope. The fact that the use of the *Facebook* network is linked to the consent to the use of additional data does not mean a loss of control on the part of the user and does not constitute a situation of duress for the user. It merely requires weighing the benefits of using a social network financed through advertising (which hence is free) against the consequences associated with the use of the additional data by *Facebook*. The user can make such balancing without being influenced and completely independently according to his/her personal preferences and values. The fact that it can turn out differently - as shown by the considerable number of Facebook users (around 32 million per month) and *Facebook* non-users (around 50 million) - does not even remotely demonstrate any exploitation of the user. It provides especially no evidence of a loss of control over the data.

(3.2) Likewise, the argument of the Federal Cartel Office that the collection of data might threaten tangible and intangible assets of the network's users, e.g. with regard to any property offences ("identity theft", fraud, extortion) or from the perspective of the disclosure of income, whereabouts, health conditions, political views or sexual orientation, fails to convince (cf. Order para. 910). Apart from the fact that this view ignores the scope of the appealed order of the Federal Cartel Office, as it covers all the additional data, irrespective of the above-mentioned aspects, the Federal Cartel Office' statements are without substance and meaningless. On the one hand, the Federal Cartel Office order does not clearly show the dangers that are caused for

the social network's users only through the collection and processing of the additional data that are of sole interest here. On the other hand, in the present context, the Federal Cartel Office is merely discussing a data protection issue, and not a competition problem.

(3.3) Finally, the sweeping assertion made by the Federal Cartel Office - i.e. that private *Facebook* users, when submitting and disclosing personal data, find it difficult to get an overview over which data are collected to what extent by which companies, and where the data are passed on to, and what the implications of their consent to data processing are - is insufficient (Order para. 384; Response to the Stay Statement of Reasons of 29 May 2019, p. 34). This is for two reasons. On the one hand, it has neither been shown nor is it otherwise evident that and in which text passages the *Facebook* Terms of Service at issue should in fact show any such information deficits. The argument of the Federal Cartel Office that the customer is uninformed as he/she does not read the Terms of Service (Order para. 385) is not valid in this context because - as will be explained in more detail below - the failure to take notice is not due to *Facebook's* market power, but - when assessed realistically - to the indifference or convenience of the *Facebook* user. On the other hand, the aspect of a "lack of clarity and control over the processing of personal data" ignores the orders of the appealed order. They do not ban *Facebook* from processing and associating the additional data because and to the extent that this is done without sufficient information for the *Facebook* user and without the user being able to control the processing of the data, but solely due to the fact this is done out without the separate consent of the *Facebook* customer.

(4) Given the above, an abuse of market power by *Facebook* can be based solely on the assumption of the Federal Cartel Office that the Terms of Service at issue and collection, associating and further processing of the additional data done when implementing such Terms, violate mandatory provisions of data protection law. From Federal Court of Justice case law in *VBL-Gegenwert I* and *VBL-Gegenwert II*, the Federal Cartel Office follows that the inadmissibility of contractual terms under the balancing of interests carried out in accordance with legal principles (e.g. in the law on general terms and conditions) also implies an abuse under the balancing of interests to be carried out according to the GWB in case of sufficient reference to market power (Order para. 528) and that this approach - in case of sufficient reference to market power - is to be applied to all principles of the legal system in so

far as they concern the appropriateness of Terms in an imbalanced negotiation situation (Order para. 529). This view is incorrect.

(4.1) It may be left open whether the Terms of Service used by *Facebook* and the data processing based on them comply with GDPR requirements.

(4.2) At any rate, there are serious concerns about the view of the Federal Cartel Office that collection, associating and further processing – presumed to be in breach of data protection law - of user data generated from other group-owned services or the use of *Facebook Business Tools* constitutes a cartel law relevant exploitation of consumers participating in the *Facebook* social network.

(a) The abuse of market dominance finding presupposes anticompetitive conduct. This also applies within the scope of application of the general clause of Section 19 para. 1 GWB, in fact, in general and hence also in the case of relevance here, i.e. of exploitative abuse to the consumer's detriment.

(aa) The requirement of anticompetitive conduct is already contained in the wording of Section 19 para. 1 GWB *("abusive* exploitation of a *dominant market position")* and also follows from the objective of the entire competition law as a whole, which aims at the freedom of competition, namely safeguarding competition and openness of market access (cf. BGH, judgment of 24 October 2011 - *KZR 7/10,* WuW/E DE-R 3446 margin no. 37 - *Grossistenkündigung)*. In the area of abuse of Terms, the finding is confirmed by the "as-if-competition" standard defined in Section 19 para. 2 no. 2 GWB (cf. Monopoly Commission, XXII. Main Report 2018, margin no. 675; *Körber,* NZKart 2019, 187 [190 et seq.]). Moreover, the abuse covered by the general clause of Section 19 para. 1 GWB also presupposes a verdict of abusiveness, which - as is also the case with the examples of Section 19 para. 2 GWB - must be made on the basis of a comprehensive balancing of interests (cf. BGH, judgment of 7 June 2016 -*KZR 6/15,* BGHZ 210, 292 = NZKart 2016, 328 = WuW 2016, 364 margin no. 48 - *Pechstein/International Skating Union).* Since according to established case law, such balancing of interests must be carried out taking into account the objective of the GWB directed towards the freedom of competition (cf. for example BGH, order of 23 January 2018 - *KVR 3/17,* NZKart 2018, 136 = WuW 2018, 209 margin no. 92 - *Hochzeitsrabatte*; judgment of 7 June 2016 - *KZR 6/15,* BGHZ 210, 292 = NZKart 2016, 328 = WuW 2016, 364 margin no. 47 – *Pechstein/International Skating Union*; judgment of 24 October 2011 - *KZR 7/10,* WuW/E DE-R 3446 margin no. 37 - *Grossistenkündigung),* the abuse of market

power in the entire scope of application of Section 19 GWB must presuppose an anticompetitive conduct of the dominant undertaking, rendering an infringement under non-constitutional law insufficient to constitute an abuse.

(bb) Nothing else follows from the decisions of the Federal Court of Justice in the "*VBL-Gegenwert*" cases.

In the view of the Federal Court of Justice, *not every* use of an invalid provision in general terms and conditions by a norm addressee constitutes an abuse of market power (BGH, judgment of 24 January 2017 - *KZR 47/14,* NZKart 2017, 242 = WuW 2017, 283 margin no. 35 - *VBL- Gegenwert* //). The open wording of this passage of the judgment does not indicate that any contractual term provided by a dominant undertaking contrary to the law on general terms and conditions inevitably also is an abusive contractual term within the meaning of Section 19 para. 1 GWB, i.e. that abusive terms under Section 19 GWB in case of invalid general terms and conditions of the dominant undertaking may only be denied on the basis of lack of causality and not also due to an actual lack of *exploitation* of the other market side. This must be the case already due to the fact that the dominant undertaking has a special responsibility *only* for the competition, but not also for compliance with the law by avoiding any infringement of it (see correctly: *Körber,* NZKart 2019, 187 [190 et seq.]). It cannot be assumed that the Federal Court of Justice intended to abandon its above established case law on the necessity of anticompetitive conduct with the cited open wording *("not every")* and without further legal explanation. This applies especially, since the case did not at all give rise for this. The anti-competitive effect of the market conduct practiced by the dominant undertaking was evident in both *VBL-Gegenwert* cases. The clause on which the decisions were based made it unreasonably difficult for the competitor to terminate the contractual relationship with the target of the legislation and hence led to a considerable disadvantage of the end customers' freedom of economic disposition (exploitation). Moreover, the clause impaired horizontal competition, as it made it unduly difficult for alternative providers of insurance services to establish their own contractual relations with the customers concerned (exclusion). Against this background, the guiding principle of the Federal Court of Justice decision in *VBL-Gegenwert II*, i.e. that unreasonable business terms and conditions that make it more difficult to terminate a long-term contractual relationship with a norm addressee of Section 19 para. 1 GWB regularly lead to an abuse of market power, obviously does not support the assumption that the Federal Court of Justice has abandoned the requirement of anti-competitive conduct within

the context of Section 19 par. 1 GWB. In particular, this cannot be derived from the earlier decision *VBL-Gegenwert I* (BGH, judgment of 6 November 2013 - *KZR 58/11,* NZKart 2014, 31 = WuW/ DE-R 4037 margin no. 65 - *VBL-Gegenwert I)*.

(b) Any anti-competitive exploitation of the users of the *Facebook* network based on the Terms through collection, associating and further processing of the additional data does not follow from the data protection violation assumed by the Federal Cartel Office.

(aa) The use of contractual terms that are inadmissible based on the legal system's principles does not, in and of itself, indicate a threat to interests protected under the Cartel Act (freedom of competition and openness of market access). Insofar, contractual terms must be treated like payments charged for goods or services , which are invalid (as a whole or in part) for reasons laid down in the legal system. Section 138 of the German Civil Code (*Bürgerliches Gesetzbuch* - BGB) denies the legal validity of any agreement on payments under the aspect of immorality (*contra bonos mores*), if its content is contrary to public policy (Section 138 para. 1 BGB) or if it is based on the exploitation of a structural inferiority of the business partner (Section 138 para. 2 BGB). Such excessive fees or fees that have been agreed on unreasonable terms do not in and of themselves give rise to competition issues which the Cartel Act aims to prevent. This also is the case if a fee agreement was determined by a dominant undertaking. Given the competition-related objective of the GWB, fees contrary to public policy are abusive only if agreed by a dominant undertaking *and* if it is clear that they would not have applied in a hypothetical competitive scenario (arg. Section 19 para. 2 no. 2 GWB). In regards to general legal principles, said benchmark claims validity not only for fee agreements, but for all contractual terms as well as for business terms and conditions. According to the legal concept of Section 19 GWB, fee agreements are nothing other than (main) cases of application of business terms and conditions. Thus, already according to its wording, Section 19 para. 2 no. 2 GWB subjects fees and *other* business terms and conditions to the same criterion under cartel law, i.e. "as-if-competition". Contractual terms that are incompatible with the legal system (such as Section 138 para. 2 BGB or the law of general terms and conditions) as such only point to a *bilateral* imbalance between contractual partners (see *Körber*, NZKart 2019, 187 [191]), but not readily to a market with a competitive structure that has already been weakened by market dominance, where such undesirable development continues or threatens to continue due to such terms (cf. ECJ, judgment of 13

February 1979 - *C-85/76,* Coll. 1979, 461 margin no. 123 - *Hoffmann-La Roche*; judgment of 6 December 2012 - *C-457/10 P,* NZKart 2013, 113, margin no. 98 and 150 - *Astra Zeneca/Commission).*

The fact that the unlawfulness of a contractual term as such cannot justify the allegation of abuse of market power within the meaning of Section 19 GWB follows from a further consideration. There is no objectively justified reason not to leave unlawful contractual terms to private prosecution or to the supervision of the respective specialized authority - as in the case of a breach of data protection law -, but, in addition, to subject them to abuse control by the cartel authorities if the contractual term has been provided or agreed by a dominant undertaking. For the contracting party affected by the breach is no less worthy of protection if the unlawful contractual term is used by a non-dominant undertaking or by a private third party (see *Körber,* NZKart 2019, 187 [191/193]; likewise, cf. also *Franck,* ZWeR 2016, 137 [152 et seq.]).

(bb) Nothing else can be followed from the Federal Court of Justice decision cited by the Federal Cartel Office. In all decisions, the violations of the law deliberated by the Federal Court of Justice are associated with obvious anti-competitive effects.

In the *VBL-Gegenwert* case, the anti-competitive effect of the contractual term under review was evident. As already stated, the termination clause at issue made access to the customers of the dominant company unreasonably difficult for its competitors; moreover, the dominant undertaking's customers were abusively restricted in their freedom to terminate a long-term contractual relationship.

In the *Pechstein* case, the Federal Court of Justice assessed the challenged arbitration agreement based on Section 19 para. 1 GWB and examined it in the context of weighing the interests for a possible conflict with the plaintiff's fundamental rights. However, this does not mean that any neglect of fundamental rights of the contracting partner of a dominant undertaking is, in and of itself, anti-competitive, promotes undesirable development in competition and hence must be corrected under Section 19 GWB as a general civil-law clause (cf. BGH, judgment of 7 June 2016 - *KZR 6/15,* BGHZ 210, 292 = NZKart 2016, 328 = WuW 2016, 364 margin no. 57 *Pechstein/International Skating Union)* (in this sense also see *Körber,* NZKart 2019,187 [193]). It must be considered that the reviewed arbitration agreement affected the freedom to exercise a profession which is protected as a fundamental right under Article 12 para. 1 of the German Constitution (*Grundgesetz* - GG), since

the plaintiff was professional speed skater. The competitive element of the arbitration agreement concluded by the plaintiff with the monopolistic Ice Skating Union hence was obvious, since the conclusion of the arbitration agreement was a prerequisite for the plaintiff's freedom of economic activity as a professional athlete. It therefore is not possible to infer for the case at hand from the *Pechstein* decision of the Federal Court of Justice that an - assumed: existing - breach of data protection law by *Facebook* and an associated violation of the right of *Facebook* users to informational self-determination which is protected by the German Constitution, inherently includes an accusation of abuse of market power.

(cc) Likewise, it is also not justifiable to subject violations of the law by a dominant undertaking to the disadvantage of consumers to the prohibition of abuse under Section 19 para. 1 GWB, simply because such violation was committed by a dominant company, without taking into account any anti-competitive effect. The provided reasoning of "normative" damage to competition in such cases is driven by the result and not covered by the objective of the Cartel Act, i.e. to ensure freedom of competition.

(c) To be distinguished from this is the question whether competition damage and abuse of exploitation under Section 19 para. 1 GWB can be assumed if the violation is due to the dominant position of the acting undertaking (cf. *Franck,* ZWeR 2016, 137 [153 et seqq.]). This question may be left open and does not make the appealed Federal Cartel Office order lawful. For the necessary causal relationship between the market-dominating position of *Facebook* assumed by the Federal Cartel Office and the breach of data protection law assumed by the Federal Cartel Office cannot be established.

(aa) Both European law (Article 102 TFEU) and German law (Section 19 GWB) require a causal relationship of abusive conduct and market power for abuse.

(1) This necessarily follows from the wording of the aforementioned provisions on abuse (also see Monopoly Commission, XXII. Main Report 2018, margin no. 677). Section 19 para. 1 GWB prohibits the "abusive *exploitation* of a dominant market position"; Article 102 TFEU states: *"Any abuse ... of a dominant position* ..."). Accordingly, abusive conduct by dominant undertakings is not generally prohibited by cartel law, but only conduct of the norm addressee that is attributable to the dominant position (correctly: *Eilmansberger/Bien* in Münchener Kommentar

Europäisches und Deutsches Wettbewerbsrecht [MüKoWettbR], Vol. 1, 2nd edition [2015], Art. 102 TFEU margin no. 135; cf. also *Franck,* ZWeR 2016, 137 [144]).

(2) Moreover, the causality requirement corresponds to the purpose of the prohibitions of abuse (correctly: MüKoWettbR- *Eilmansberger/Bien*, Art. 102 TFEU margin no. 137). Market dominance is problematic under competition law, because and to the extent that it enables the dominant undertaking to essentially conduct its business independently of its competitors and customers, thereby preventing or distorting effective competition in the relevant market (cf. ECJ, judgment of 13 February 1979 - *C-85/76*, Coll. 1979, 461 margin no. 38 - *Hoffmann-La Roche).* The prohibition of abuse is intended to prevent a dominant undertaking from using non-competitive means to impair existing competition or to hinder the development of competition on a market which is already weakened in its competitive structure (cf. ECJ, judgment of 13 February 1979 - C- *85/76,* Coll. 1979, 461 margin no. 91 - *Hoffmann-La Roche*; judgment of 6 December 2012 - C- *457/10 P*, NZKart 2013, 113, margin no. 74 and 150 - *Astra Zeneca/Commission).* On the other hand, abuse control does not aim to prosecute any violations of the law without a competitive relevance under cartel law (cf. Monopoly Commission, XXII. Main Report 2018, margin no. 676; also see *Körber,* NZKart 2019, 187 [193]). Given this background, a causal relationship between the market power of the dominant undertaking and its abusive conduct, or at least the anti-competitive effects of its conduct, is absolutely required (cf. Monopoly Commission, XXII. Main Report 2018, margin no. 677 at the end).

Nothing else can apply to the national prohibition of abuse, given the deliberate and intentional link to EU law (see BGH, judgment of 7 December 2010 - *KZR 5/10,* WuW/E DE-R 3145, margin no. 55 – *Entega II)*, The requirement of a causal relationship between market dominance and disapproved conduct or its anti-competitive effect has already been established by the Federal Court of Justice in its case law (cf. BGH, judgment of 4 November 2003 - *KZR 16/02,* BGHZ 156, 379 = WuW/E DE-R 1206, margin no. 21 at juris - *Strom und Telefon I).*

(bb) If - as in the case at hand - the issue is an allegation of exploitative abuse, causative conduct is required. Only market power must have enabled the dominant undertaking to enforce against its contracting partner the terms and conditions which are deemed to be abusive (also see *Franck,* ZWeR 2016, 137 [151 et seqq.]; MüKoWettbR-Eilmansberger/Bien, Art. 102 TFEU margin no. 139, 150 et seq.;

Körber, NZKart 2019, 187 [193]; *Schröter/Bartl* in *Schröter/Jakob/Klotz/Mederer,* Europäisches Wettbewerbsrecht, 2nd edition [2014], Art. 102 TFEU margin no. 26 and 168; cf. also ECJ, judgment of 14 February 1978 - *C 27/76,* Coll. 1978, 207 margin no. 248 = NJW 1978, 2439 [2443] - *United Brands*; BGH, order of 16 December 1976 - *KVR 2/76,* BGHZ 68, 23 = WuW/E BGH 1445, margin no. 51 at juris - *Valium).* This applies to the entire scope of application of Section 19 GWB and hence also to the scope of application of the general clause of Section 19 para. 1 GWB. Contrary to the view of the Federal Cartel Office (Order para. 873), no exception can be made in cases of consumer exploitation. In particular, a results causality ("normative causality") is not sufficient in such cases.

(1) Case law and legal literature have recognized (cf. e.g. ECJ, judgment of 13 February 1979 - *C-85/76,* Coll. 1979, 461 margin no. 91 - *Hoffmann-La Roche*; judgment of 6 December 2012 - *C-457/10 P,* NZKart 2013, 113, margin no. 74 - *Astra Zeneca/Commission*; BGH, judgment of 4 November 2003 - *KZR 16/02,* BGHZ 156, 379 = WuW/E DE-R 1206, margin no. 21 at juris - *Strom und Telefon* /; Monopoly Commission, XXII. Main Report 2018, margin no. 677; *Wiedemann* in *Wiedemann,* Kartellrecht, 3rd edition [2016], Section 23 margin no. 55; *Fuchs* in *Immenga/Mestmäcker,* Wettbewerbsrecht, Vol. 2, GWB, 5th edition [2014], Section 19 GWB margin no. 82b; MüKo-Eilmansberger/Bien, Art. 102 TFEU margin no. 131 et seqq.) that abuse of a dominant position can also be assumed if the dominant undertaking does not leverage its market power to enforce a certain conduct of other market participants (conduct causality), but if its abusive conduct - indeed due to its already existing market power - leads to the strengthening of its market position or (further) weakening of the competitive structure (results causality). Especially under EU case law, the structural weakening of competition refers to abusive practices which lead to a strengthening of the market position of the dominant undertaking at the expense of actual or potential competitors. To the extent that a relationship between abuse and market power is considered sufficient in such cases in terms of results causality, this assessment is typically tailored to the constellation of exclusionary abuse (cf. *Franck,* ZWeR 2016, 137 [148 et seq.]; also: Monopoly Commission, XXII. Main Report 2018, margin no. 678). On the other hand, a conduct suspected to amount to exploitative abuse usually does not affect the market structure (see correctly: *Franck,* loc. cit.).

(2) This also applies in cases of abusive exploitation of consumers. The situation here is fundamentally different from the structural weakening of competition at the

disadvantage of competing undertakings. The exploitation of a consumer does not lead to a market outcome that is unfavorable for the consumer because the abusive conduct is practiced by a dominant undertaking. The reason for exploitation rather is that the agreed terms are disadvantageous to the consumer because of their content. Whether the terms in such a case are provided by a dominant undertaking or by an undertaking that is not dominant on the relevant market is of no relevance for the burden on the consumer. This finding leads to the conclusion that the required causal relationship between abuse and market dominance for exploitative abuse cannot be justified by results causality. The sole suitable benchmark is that of conduct causality (cf. in this sense already ECJ, judgment of 14 February 1978 – *C-27/76*, Coll. 1978, 207 margin no. 248 = NJW 1978, 2439 [2443] - *United Brands*; BGH, order of 16 December 1976 - *KVR 2/76*, BGHZ 68, 23 = WuW/E BGH 1445, margin no. 51 at juris - *Valium).*

The benchmark for assessing whether market power is used to impose disadvantageous business terms and conditions on the opposite side of the market is also appropriate. This applies especially within the scope of application of Section 19 para. 1 GWB. If conduct causality is confirmed, an undesirable anti-competitive development is shown, since the dominant undertaking succeeds in imposing its market intentions by means of its market power and consequently by means outside of competition on the merits (cf. ECJ, judgment of 13 February 1979 - *C-85/76,* Coll. 1979, 461 margin no. 91 - *Hoffmann-La Roche)* and to a significant extent acting independently not only of its competitors but also of its customers (consumers) (cf. ECJ, loc. cit., margin no. 38). This is in line with the intent and purpose of the prohibition of abuse, which is to prevent a dominant undertaking from impairing existing competition or hindering the development of competition on a dominated market by means other than competition. On the other hand, in cases of exploitative abuse, results causality does not provide meaningful results. This applies in particular to consumer exploitation. The fact that a dominant undertaking imposes unlawful or unreasonable contractual conditions on consumers does not mean that its conduct also leads to a strengthening of its own market position or a weakening of the competitive structure. Negative effects on the competitive structure arise only if the exploitation of consumers at the same time has a negative impact on the possible competitive actions on the market dominated by the addressee of the prohibition of abuse of dominance. They do not apply if the measure to be assessed is limited to an impairment of the consumer.

Moreover, the use of unlawful or unreasonable terms may be considered abusive, regardless of whether it results in anti-competitive market effects. However, in such a case, the requirement of causality cannot be dispensed with. It is required to avoid an application of cartel law that goes beyond the regulatory purpose of abuse control and to prevent that the cartel authorities prosecute violations of the law that are not relevant to competitive processes simply because they are committed by a dominant undertaking (see correctly *Franck*, ZWeR 2016, 137 [151 et seqq.]). Moreover, without conduct causality, there is also no legitimate reason for intervention. Unreasonably disadvantageous terms can also be agreed to in markets with "fierce price competition", whereby exploitation does not necessarily have to be attributable to the exercise of market power, but can also be based on "informational market failure" and the resulting "systematic asymmetry of information" to the disadvantage of consumers, with such asymmetry in turn giving rise to unlawfulness or inadequacy, justifying the right to control general terms and conditions under civil law and the application of large parts of consumer protection law (see correctly *Franck*, ZWeR 2016, 137 [151 et seqq.]).

(3) The Federal Court of Justice decisions in *VBL-Gegenwert* (BGH, judgment of 6 November 2013 - *KZR 58/11,* BGHZ 199, 1 =NZKart 2014, 31 = WuW/E DE-R 4037 margin no. 65 - *VBL-Gegenwert* /; judgment of 24 January 2017 - *KZR 47/14,* NZKart 2017, 242 = WuW 2017, 283 margin no. 35 - *VBL-Gegenwert II)* and *Hochzeitsrabatte* (BGH, order of 23 January 2018 - *KVR 3/17,* NZKart 2018, 136 = WuW 2018, 209 margin no. 83-86 - *Hochzeitsrabatte)* do not lead to any other assessment. In contrast to the view of the Federal Cartel Office (Order para. 872 et seq.), the aforementioned decisions do not indicate either a waiver of the requirement of conduct causality or a complete waiver of causal relationship of market power and abuse of market power (in this sense, also see *Körber,* NZKart 2019, 187 [193] regarding the judgments in *VBL-Gegenwert).*

(3.1) In the judgment *VBL-Gegenwert I,* the Federal Court of Justice in connection with the use of inadmissible general terms and conditions elaborates on the requirements of abuse under Section 19 GWB:

> *"The use of inadmissible general terms and conditions by an enterprise with a dominant market position can generally constitute an abuse in terms of Sec. 19 GWB. This applies in particular if agreement of the invalid clause is based on an outflow of market power or a great superiority of power of the user. An unreasonable claim for payment of consideration according to Sec. 23 para. 2 VBLS 2001 could be*

> *deemed to be exploitative abuse in the form of abusive terms of use subject to the general clause of Sec. 19 para. 1 GWB. When reviewing this offence, the statutory value decision underlying the test of reasonableness of content under Sections 307 et seqq. BGB must be taken into consideration (cf. Möschel in Immenga/Mestmäcker, GWB, 4th ed., Sec. 19 para. 174; left unanswered in FCJ ruling of 6 November 1984 - KVR 13/83, WuW/E FCJ 2103, 2107- Favorit)."*

The fact that the Federal Court of Justice finds it to be possible to qualify the use of inadmissible general terms and conditions by enterprises with a dominant market position to be abuse of market power in terms of Section 19 GWB specifically if agreement of the invalid clause is “an outflow of market power or a great superiority of power of the user” does not permit a conclusion regarding the dispensability of causality or causality based on conduct. With reasonable consideration, all the evidence instead suggests that (1) the terms “market power“ and “great superiority of power“ are a linguistic description of a dominant market position, (2) the formulation “outflow of…” addresses the necessary causality based on conduct between the market dominant position and agreement of the disputed terms, and (3) based on this assumption (“in particular if”) in any case a violation of the prohibition of abuse in the form of abuse of conditions pursuant to Section 19 para. 1 GWB can be taken into consideration even if the conduct of the market dominant party is not objectionable under aspects (e.g. obstructing competitors).

The statements of the Federal Court of Justice in its decision *VBL-Gegenwert II* do not oppose such an understanding. In the decision, the Federal Court of Justice initially repeats the passage cited above and subsequently arrives at the conclusion that “the use of terms and conditions unreasonably obstructing a termination or withdrawal from a contractual relationship with the standard recipient“ [“die Verwendung von Geschäftsbedingungen, die eine Kündigung der oder den Austritt aus einer Vertragsbeziehung mit dem Normadressaten unangemessen erschweren"] must be assessed as a case in which the agreement of an invalid clause is based on an outflow of the market power or great superiority of power of the user and therefore represents abuse of market power. The dispensability of causality or causality based on conduct cannot be derived from this. It already opposes the interpretation of the Federal Cartel Office that the Federal Court of Justice would have answered the central question of the causal connection necessary for exploitative abuse between the lines, without any legal elaborations in this regard and without addressing the opinions represented in case law and literature. Such an approach would be exceptional to an extent that it must be

excluded. It is much more likely that the abuse of market power determined by the Federal Court of Justice is based on the consideration that such disadvantageous business terms, like those disputed at the time, would commonly be accepted by the opposing market side only due to the strong market position of the opposing contractual party. This would also explain why the Federal Court of Justice despite existing competitors of VBL did not review whether competitors use a similar clause (cf. Order para. 874). Ultimately, the *VBL-Gegenwert II* decision describes the causality based on conduct between the market power of the user and the agreement of the unreasonable contractual terms.

It is irrelevant in the present context whether the Federal Court of Justice, as is the opinion of the Federal Cartel Office, ascribed an inherent risk to the clause on the payment of consideration to enhance the market power of VBL by creating an market entry barrier (Order para. 874). This aspect does not describe exploitative abuse but exclusionary abuse. There is no question that results causality between abuse and market dominance suffices for exclusionary conduct. With this finding nothing is gained with regard to the question that is relevant in the present matter, of which causal connection is necessary to determine abuse of terms.

(3.2) The decision of the Federal Court of Justice *Hochzeitsrabatte* (“wedding rebate”) (FCJ, resolution of 23 January 2018 - KVR 3/17, NZKart 2018, 136 = WuW 2018, 209 para. 83-86 - *Hochzeitsrabatte*) also does not justify the assumption that a causality or causality based on conduct of the market dominant position is dispensable for exploitative abuse.

Section 19 para. 2 no. 5 GWB 2013 was the starting point for the legal reasoning in that resolution, which reads: “abuse exists in particular if a market dominant enterprise … *exploits* its market position by requesting or initiating other enterprises to grant advantages to it without actual justified grounds”. With regard to this provision, the Federal Court of Justice has ruled that independent meaning is not ascribed to the term of exploitation, the connection between superior market power and the conduct contested in Section 19 para. 2 no. 5 GWB 2013 is already ensured by limiting the norm to powerful enterprises, and the reference to the exploitation of the market position in the example of Section 19 para. 2 no. 5 GWB 2013 exhausts itself in clarifying that the example is an expression of the general clause of Section 19 para. 1 GWB. It is irrelevant whether this opinion is acceptable. Legal consequences already do not follow from the decision for the abuse of terms under

Section 19 para. 1 GWB because both standards pertain to inherently different market situations. The “tapping prohibition” [“Anzapfverbot"] in Section 19 para. 2 no. 5 GWB serves to restrict the unreasonable exercise of *buying power*; the prohibition of abusive terms under Section 19 para. 1 GWB aims to restrict the inadmissible exercise of *supply power*.

The following must be added: the tapping prohibition introduced with the 4th GWB amendment 1980 chiefly had a horizontal protective purpose; it focused chiefly on preventing unfair competition through the inadmissible exercise of supply power (cf. FCJ, loc. cit., para. 55). The offense of “*requesting*” [“Auffordern”] inserted with the 7th GWB amendment 2005 in Sec. 20 para. 2 GWB furthermore was intended to counter a reinforcement of retailer’s buying power against manufacturers, so that the tapping prohibition since then serves to protect competition horizontally as well as vertically (cf. FCJ, loc. cit., para. 56 et seq). The vertical protection is to protect enterprises regardless of their size from requesting preferential terms if they are *dependent* on the demanding enterprise (cf. FCJ, loc. cit., para. 56 et seq). In light of this, the Federal Court of Justice in the *wedding rebate* ruling already found the request for unjustified preferential terms to suffice for the requirements of Section 19 para. 2 no. 5 GWB 2013 and as a reason has stated that this request already expresses the market dominance of the standard enterprise vis-à-vis the supplier *dependent on it* (cf. FCJ, loc. cit., para. 85).

The principles of the decision cannot be transferred to the present dispute. On the one hand, the present case does not address the exploitation of the buying power but supply power. On the other hand (and in particular), facts that speak to a dependency of the private user of the *Facebook* network on *Facebook* are not apparent. The time of provision of the network by *Facebook* is relevant here because the company already ties access to its social network to the private user’s consent to the disputed terms of use. Nothing speaks for the fact that the users at the time of consent are dependent on the terms of use of *Facebook*. It has already been demonstrated that data processing takes place with the knowledge and consent of the *Facebook* user and consent is based on a free and independent user decision. Any indicators that *Facebook* obtains the user’s consent by force, pressure, exploitation of weakness of will, or other unfair methods or that the company, contrary to the agreement, uses the additional data in excess of the negotiated scope are lacking. The fact that the use of the *Facebook* network is tied to consent to use additional data does not constitute force and also does not substantiate coercion of

the user (cf. also *Körber,* NZKart 2019, 187 [191], who refers to the assumption of "coercion" as "*far-fetched*" ["recht weit hergeholt")]. It requires only a weighing of the advantages resulting from the use of an advertisement financed (and thus gratuitous) social network and the consequences associated with *Facebook's* use of the additional data. The user can do this without influence and completely independently based on its personal preferences and values. The result of this weighing can differ, as is demonstrated by the enormous number of *Facebook* users (approximately 32 million per month) and the significantly greater number of people not using *Facebook* (approximately 50 million). The fact that many more people decide not to use *Facebook* is not indicative of an involuntary transfer of data but on the contrary confirms the voluntary nature of the user's decision.

(cc) The causality based on conduct between the disputed data processing and *Facebook*'s market power that is necessary for the assumption of exploitative abuse therefore does not exist.

(1) Exclusively the processing of additional data on the basis of the terms of use required by *Facebook* are subject to a cause causality test because only these terms of use are the subject matter of the appealed order. Other data processing that possibly takes place is therefore excluded from consideration from the start. Incidentally, such processes would constitute nothing but "hidden" violations of data protection law for which *Facebook*'s market position can clearly in any case not be causal (in this context, applicably *Franck,* ZWeR 2016, 137 [160]).

(2) The required causality test must not be aligned toward the standard of data protection law provisions but the principles of antitrust law (cf. specifically Monopoly Commission, XXII. Main Report 2018, para. 681-683). *Facebook* is not only accused of violating data protection law but also antitrust law and thus an assessment of suspicious conduct with regard to abuse of terms in terms of Section 19 para. 1 GWB is relevant. Contrary to the opinion of the Federal Cartel Office it is therefore irrelevant whether (1.) the consent demanded from users upon registering for Facebook social network meets the requirements of a *voluntary* consent to the processing of personal data in terms of Article 4 no. 11, 6 para. 1 clause 1 let. a GDPR, (2.) *Facebook*'s violation of the tying prohibition in terms of Article 7 paragraph 4 GDPR (making the performance of a contract conditional on consent to the processing of data that is not necessary for the performance of that contract) opposes voluntary consent of network users in terms of data protection law, (3.) the

violation of the above listed tying prohibition in light of Recital 43 GDPR requires a “clear imbalance” between the participating parties, (4.) a “clear imbalance” in terms of the stated Recital can be assumed only if the person responsible for processing the data is a market dominant enterprise, and (5.) a violation of the tying prohibition can be committed only by a market dominant enterprise although such understanding is in any case not suggested by the wording of this provision.

The conclusion of the Federal Cartel Office that the data protection violation of *Facebook* to be evaluated could “*not in this manner*” be committed by competitors without a market dominant position, wherefore the “market dominance reference” manifesting in the violation of the tying prohibition also meets the requirement of strict causality (cf. Order para. 880) cannot be followed. The consideration is shortsighted. With regard to causality based on conduct, only the question of whether the *legal violation* allegedly implying abuse (here: the collection, association and use of additional data provided in the terms of use requiring consent) can causally be based on market dominance. In contrast, the question of whether justification of data processing excluding abuse (here: the user’s consent pursuant to Article 6 paragraph 1 clause 1 letter a GDPR) can in turn be excluded in terms of a reverse exception due to a fact that can possibly be realized only by a market dominant enterprise (here: violation of the tying prohibition pursuant to Section 7 paragraph 4 GDPR) is irrelevant, because these considerations do not pertain to the causality between the market power of *Facebook* and the acceptance of disputed terms of use by the *Facebook* user. A normative causality based on behavior in terms of antitrust law can also not be derived from the tying prohibition of Article 7 paragraph 4 GDPR. The stated provision is a provision pertaining exclusively to data protection law, not antitrust law. Any indicators that the European Union legislators in Article 7 paragraph 4 GDPR nevertheless wished to also regulate the causal connection between market power and user consent necessary for antitrust law under Article 6 paragraph 1 clause 1 letter a GDPR is lacking.

(3) From competitive aspects it is therefore solely relevant whether the consent to processing and association of additional data demanded from consumers upon registration for the social network is imposed by outside forces on the basis of *Facebook*‘s market dominant position to a degree that the declaration of consent can no longer be deemed to be based on an independent decision of the user. The Federal Cartel Office, which in this regard bears the burden of proof, has not verified that this is the case.

(3.1) As demonstrated, the private interested parties of the social network at the relevant time of registration are not in any way dependent on the provider *Facebook*. The functions of the network represent an offer that anyone can autonomously and independently accept subject to the terms stipulated by *Facebook* in connection with user registration, or reject, as does the majority of Germany's population. Each user can reach this decision freely and without influence exclusively on the basis of its own values and in consideration of all circumstances. The decision for or against *Facebook* is chiefly affected by the expected quality and desired personal use of the network as well as the personal opinion regarding the significance and importance of confidentiality of the requested personal data as well as one's own willingness to allow the disputed processing and use of the additional data by *Facebook* in order to be able to use the social network financed through advertisement gratuitously. Therefore, it is always a very personal consideration exclusively on the basis of one's own preferences and desires, which already from the start cannot be classified as right or wrong. No legal, economic, or other disadvantages are connected to the decision for or against participation in the social network for the individual person. A data loss is also not incurred by the persons consenting to *Facebook's* terms of use. Rather, users can transfer their respective data without restrictions to any other third party even after registering at *Facebook*. In this regard, the facts are principally different from the cases underlying the Federal Court of Justice decisions considered by the Federal Cartel Office in the matter *VBL-Gegenwert* (claim for payment of consideration in case of a termination) and *Pechstein* (no admission of a professional athlete to competitions without consenting to the arbitration clause). The parties interested in the network also do not ask *Facebook* for any goods necessary for everyday life. It is solely about the possibility of communicating with friends or other third parties through *Facebook*. Already the fact that 50 million residents in Germany do not use the *Facebook* network demonstrates that it is not about satisfying a basic need or is the only possibility of communicating with others. Under these circumstances, the consent to the terms of use granted by a party interested in *Facebook* is not the outflow of *Facebook's* market power but the result of individual consideration of those advantages and disadvantages associated with a *Facebook* registration.

(3.2) This cannot successfully be countered by the fact that the users of the *Facebook* network accept the use and processing of their additional data only because network providers are lacking who offer a fee-based and thus not

advertisement-financed social network and accordingly do not make participation dependent on the user‘s transfer of data. A prerequisite for the Federal Cartel Office’s conclusion would be that the average network user prefers a fee-based network over a gratuitous but advertisement-financed network accordingly based on the transfer of personal data. The Federal Cartel Office has not issued any valid and comprehensive findings. In contrast, the Federal Cartel Office itself assumes that users of a private network had a “*rather low willingness to pay*” wherefore most social networks are free to use for the user and are financed by advertisement (cf. Order para. 270). Investigations and findings of the Federal Cartel Office regarding the processing and association of only the disputed additional data are specifically lacking.

The Federal Cartel Office also did not ascertain whether and how many persons find *Facebook*‘s network offer to be interesting but rejected it due to the processing and association of the additional data. Such rejections with increasing numbers would also speak against a market-power based determination of those interested parties choosing to register at *Facebook*.

(3.3) The phenomenon of the so-called “privacy paradox” invoked by the Federal Cartel Office (cf. Order para. 384) also does not change the above assessment (doubting also Kö*rber,* NZKart 201 9, 187 [192]).

The phenomenon describes a posited contradiction between Internet users’ concerns about insufficient protection of their privacy on the Internet and actual careless handling of their own personal data in Internet traffic. The Federal Cartel Office objects that the private users of the social network provided by *Facebook* are largely data sensitive and states that according to the result of a consumer poll ordered by it, approximately three quarters of users of social media list the (responsible) handling of data (data processing terms) to be a (very) important matter in the selection of a social network (Order para. 427 [Fn. 415], 883). Nevertheless, the user poll also showed that four fifths of users do not read the general terms and conditions because they must accept them anyway (Order para. 385 [Fn. 382]).

Contrary to the opinion of the Federal Cartel Office, the results of the user survey invoked by them do not demonstrate a sustainable indicator for a causal connection between consent to the terms of use and the market position of *Facebook* on the market for social networks.

(3.3.1) The above considerations initially speak against such a reference, which were used to justify that each user can decide to use or not use *Facebook* completely freely, independently, and autonomously, exclusively based on its own preferences. These considerations are already not addressed by the Federal Cartel Office's elaborations regarding the so-called "privacy paradox".

(3.3.2) Aside from this, the conclusions of the Federal Cartel Office are also not justified.

The fact that 80% of *Facebook* users do not read the disputed terms of use because they must accept them anyway only describes the fact that *Facebook* offers an advertisement financed network and accordingly makes access to the network in terms of a charge dependent on the user's consent to process and connect the users' additional data. In this context, only the chargeability of the network access and the resulting synallagma between performance and consideration are relevant. This does not allow a conclusion as to *Facebook's* exploitation of market power. This applies even more because the unread acceptance of terms of use for additional data can equally - and realistically more likely - be explained simply by the user's lack of interest in *Facebook's* processing and connecting additional data in connection with the advertisement financing of the social network. It is irrelevant whether users act out of indifference or because they do not wish to spend the necessary time and effort to understand the content of the terms and their significance (applicability *Franck,* ZWeR 2016, 137 [157]). In either case, the unread acceptance of terms of use of additional data is not an expression of the user's dependency or of the market power of the network operator but only the result of an individual consideration of the user with the result that participation in the social network is more important to the user than the question of whether and which additional data is processed and connected to the *Facebook* data. Not a single finding of the Federal Cartel Office excludes that users consent to the terms of use of additional data without reading them for *this* reason - not due to *Facebook's* market power.

The fact that nearly 75% of users of social media list the responsible handling of data as an important matter for choosing the social network also does not uphold the conclusion drawn by the Federal Cartel Office. It already misses the point of the privacy paradox problem because the responsible *handling* of data and data processing terms does not pertain to the relevant data collection for the social network *Facebook* but the contractual processing and use of collected data. In this

regard, the Federal Cartel Office does not even accuse *Facebook* of misconduct. Aside from this, the question regarding the “handling of data” is formulated in an overly broad manner and does not allow reliable conclusions to be drawn from the answers in the case. It is unclear whether the polled consumers listing the “handling of data” as an important criterion in the selection of the social network even understood only the disputed additional data under the term “data”. This is questionable because at least insofar as the additional data pertains to user and device related data from the other *Facebook* group services (*Instagram, WhatsApp, Masquerade*, and *Oculus*) is data which *Facebook* is already authorized to use with the consent of the *Facebook* user within the scope of the other service and where it is exclusively about an excess use for the purposes of the social network *Facebook*. The “handling” of data, which the relevant consumers find to be critical is also unclear. As neither the question nor the appealed provides insight, it can only be assumed that the contractual use of data by the network operator is an important selection criterion from the perspective of consumers. It cannot be further concluded from the result of the user survey that already the contractual use of data contradicts the wish of the respondents and that consent to *Facebook’s* terms of use for the additional data must be based on the market power of the network operator.

2. The appealed order can also not be based on the allegation of exclusionary conduct to the disadvantage of *Facebook’s* competitors (Section 19 para. 1, para. 2 no. 1 GWB). Pursuant to the stated provision, an abuse of market power applies in particular if another enterprise is directly or indirectly unfairly obstructed.

a) Under the aspect of unfair obstruction, the order is already unlawful because its legal consequences are not suited to remedy the exclusionary conduct assumed by the Federal Cartel Office (Section 32 para. 1 and 2 GWB). This is substantiated in the fact that the *Facebook* order does not generally prohibit collection, association, and use of the disputed additional data but prohibits such only in the event that the private user of the *Facebook* network does not separately consent to this processing and association of additional data for the purposes of the *Facebook* network. It is clear that the impediment of *Facebook*’s horizontal competition - assuming such is based on the processing and association of additional data - can simply not be dependent on whether private *Facebook* customers consent to this data processing or not. An exclusion of *Facebook’s* competitors on the basis of processing of additional data can also be excluded if private *Facebook* users consent to this impediment of the market. The Federal Cartel Office’s order is thus an unsuitable

remedy. As such, it interferes unreasonably with the rights of *Facebook* and for this reason alone is already unlawful.

b) Furthermore, the statements of the Federal Cartel Office do not suffice to substantiate an admissible and viable exploitative abuse of *Facebook*.

aa) An impediment in terms of Section 19 para. 2 no. 1 GWB means any objective restriction of competition of another enterprise. However, not every economic disadvantage inflicted on another enterprise constitutes an impediment in terms of antitrust law. Rather, a restriction of the competitive and entrepreneurial options for action and decision-making are necessary. The mere suitability of a measure to obstruct or the unsuccessful attempt of impediment however does not suffice to realize an offense; the impediment must in fact have occurred (Senate, judgment of 30 March 2016, *VI-U (Kart) 10/15,* para. 150, juris, with further references). Case law and literature chiefly agree in this regard.

Insofar as the Federal Cartel Office apparently wishes that the mere suitability of obstructing competitors suffices (unclear in this regard: Response to the Stay Statement of Reasons of 29 May 2019, page 35 et seq.), this cannot be followed. Already the wording of Section 19 para. 2 no. 1 GWB ("*obstructed*") clarifies that a restriction of competition must occur. The rulings of the Federal Court of Justice and of the Senate cited by the Federal Cartel Office in this regard do not indicate anything regarding an opposing legal opinion. It can only be inferred from those rulings that exploitative abuse requires restriction of competitors and not also the determination of noticeable or significant effects on the *competitive structure* but that suitability to restrict the market suffices *in this regard* (cf. FCJ, resolution of 6 November 2012 - *KVR 54/11,* WuW/E DE-R 3879 para. 38-41 - *Gasversorgung Ahrensburg;* Senate, resolution of 6 April 2016 - *VI-Kart 9/15 (V),* N&R 2016, 313, para. 103, juris).

bb) It cannot be determined that the terms of use for additional data on the markets defined by the Federal Cartel Office result in an impediment of current or potential competitors of *Facebook*. Neither the statements in the order (there margin number 885 et seq.) in this regard nor the supplementary statements in the Response to the Stay Statement of Reasons (there page 35 et seq.) indicate impediment of competition in a plausible and comprehensible manner.

(1) The opinion of the Federal Cartel Office that the processing of the disputed additional data increases market access barriers for *Facebook*'s competitors on the

market for social networks is not comprehensible. While it cannot be excluded from the outset that the processing of additional data reinforces *Facebook*'s market position because the network is advertisement financed and the scope and quality of user data is relevant for generating advertisement income, it requires closer review and more detailed demonstrations whether a market entry barrier does in fact exist or is reinforced in the specific case. This applies ultimately not only because the market position of *Facebook* - also pursuant to the opinion of the Federal Cartel Office - is chiefly characterized by direct network effects on the side of private users (e.g. at the starting point rightly also the Monopoly Commission, XXII. Main Report 2018, para. 678, which in this connection recommends a "threshold of appreciability" ["Spürbarkeitsgrenze"]; doubting an increase of market access barriers *Körber,* NZKart 2019, 187 [192]). The term "direct network effects" describes the circumstance that the increase or decrease of the number of users has direct "positive or negative" effects on the usefulness of the product or its benefits for the individual user. This is also relevant in the present case. The benefit of the *Facebook* network for its users increases with the total number of persons connected to the network, because with an increasing number of users the communication possibilities increase for each individual user. Consequently, the market position of *Facebook* as a provider of a social network can be challenged successfully only if the competitor is able to acquire a sufficient number of users over a reasonable time for the attractiveness of its network, which in turn depends on whether it can offer an attractive social network compared to *Facebook.com*. This is the decisive market entry barrier, and *Facebook* in light of approximately 32 million users monthly has an enormous advantage in this regard. The fact and the extent to which the processing and association of the disputed additional data is to also obstruct or hinder a market access of *Facebook* competitors is not self-understood but requires review and conclusive demonstration by the Cartel Office. This is lacking. The Federal Cartel Office in the appealed order already did not substantiate and comprehensively demonstrate the relevant specific additional data - exceeding the *Facebook* data - and the influence of processing and association of *these* additional data for the purposes of the social network on the possibility of market access for competing network providers. Reliable statements regarding the scope and magnitude of the use of disputed additional data that is to enable *Facebook* to noticeably increase advertisement income to finance the social network and the extent to which *Facebook's* market position is to be secured against future market access are also lacking. Such findings are indispensable because the key for successful market access is not in generating the highest possible

advertisement income but indisputably in quickly gaining a sufficient number of users for the competing social network. This is even more necessary because the data quantity is obviously irrelevant for the operation of a social network. This is confirmed by the investigations of the European Commission (cf. European Commission, resolution of 3 October 2014 - *M.7217* para. 188 - *Facebook/WhatsApp),* according to which in the reference period there, January through March 2013, the Google group, which operated the competing social network Google+ and ultimately had to leave the market, held a share of 33% of the data collection on the Internet while Facebook held only 6.39%. They are also necessary because the Federal Cartel Office does not find an advantage of a large quantity of data in the collection of individual data but in deriving the interests and future behavior of consumers with the help of algorithms (Order para. 496). For verification of a practical, effective entry barrier on the market for social networks, findings (1) regarding the specific additional data - at least by type -, which *Facebook* accesses through the disputed terms of use, (2) whether and the extent to which this additional data noticeably improves the quality of the already existing data inventory of *Facebook* in light of its algorithm based evaluation, and (3) the extent to which *Facebook* can thus secure its market position against potential competitors are indispensable.

(2) Contrary to the opinion of the Federal Cartel Office, the “risk of transfer of market power” from the market for social networks to a third market for online advertisement for social media does also not exist. A transfer of market power is already opposed by the fact that the Federal Cartel Office itself does not define and determine a market for online advertisement for social media but only finds it to be possible (“*indicated by…”)* (cf. Order para. 451). With regard to this third market for online advertisement, the appealed order therefore already has a drastic lack of reasoning. Simultaneously, the complainant’s right to a fair hearing is infringed because, due to a lack of a comprehensible market definition, they cannot reasonably defend themselves against the allegation of exploitative abuse on the market for online advertisement in the area of social media.

(3) The findings of the Federal Cartel Office equally do not uphold the assumption of a restriction of competition on other third markets in which *Facebook* participates with its own services *WhatsApp* (messenger services) or *Instagram* (photo services). The Federal Cartel Office in this regard did not plausibly and comprehensibly verify the “*risk of transfer of market power*”. Although it grants that the market position of *WhatsApp* and *Instagram* is chiefly decided by direct network effects, valid and comprehensible statements regarding the extent to which the

disputed additional data processing nevertheless are to obstruct a market access on these markets is lacking. In this regard, reference can be made to the above statements regarding market entry barriers on the market for social networks. The statements of the Federal Cartel Office in the Response to the Stay Statement of Reasons (there page 37) "*in particular the user data of WhatsApp and Instagram in combination with the data generated on Facebook.com offer the foundation to control use and traffic by the functionalities and Facebook.com that refer to the use of WhatsApp or Instagram (e.g. suggestions by Facebook that point out that the respective user is now on Instagram) and through an integration of functionalities (e.g. a proposed direct sending of messages from WhatsApp to Facebook messenger) resulting in a tying effect to the detriment of competitors - e.g. Snapchat as a competitor of WhatsApp and Instagram*)" do not provide the necessary information to determine a relevant effect of the disputed processing and association of additional data to the market position of *WhatsApp* and *Instagram*.

(4) A transfer of market power on the market for offering online advertisement can also be excluded. While the Federal Cartel Office has defined such a market (Order para. 352 et seqq.), it did not find a market dominant position of Facebook on this market.

III.

A separate cost ruling is not required. It shall be issued with the complaint ruling pursuant to the provisions of Section 78 GWB (case law of the Senate, cf. Senate, resolution of 2 November 2018- *VI-Kart 3/16 (V),* reprint p. 5).

Prof. Dr. Kühnen Lingrün Judge at the Court of Appeals Prof. Dr. Lohse is absent and thus prevented from signing

Prof. Dr. Kühnen

Instruction on legal remedies

The ruling can be contested by way of appeal. The appeal must be filed in writing before the Düsseldorf Court of Appeals, Cecilienallee 3, 40474 Düsseldorf, Germany

within a period of one month upon service of this appeal ruling. The appeal must be substantiated within 2 months by way of a pleading submitted to the Court of Appeals or the appeals court (Federal Court of Justice). This period commences upon service of the appealed injunction and may be extended upon request of the Presiding Judge of the appellate court. The substantiation of the appeal must include an explanation as to the extent to which the decision is challenged and insofar as modification or withdrawal is requested. The filing and substantiation of the appeal must be signed by an attorney admitted to practice before a German court; this does not apply in case of an appeal by the antitrust authority.