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Integration of public interest objectives into the competition rules post-Lisbon: The German Facebook saga

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Two new objectives for the internal European market—the promotion of the well-being of its people and the working for a social market economy—were introduced by Article 3 Lisbon Treaty. Well-being of people comprises of economic well-being, quality of life and sustainability of systems whereas a social market economy is the economic system Europe is operating. In such a system (1) wealth is created first before (2) a social fair and equitable distribution of wealth to the people takes place. Thus, the economic system that prevails in Europe integrates both, economic and non-economic factors, for the well-being of its people. To make markets workable, a social market economy requires government action in the form of competition law. Since the prevailing economic system integrates economic and non-economic considerations, these are the objectives in EU competition law post-Lisbon too. The German Facebook case is an example of this post-Lisbon approach. The German Federal Court of Justice ruled that Facebook as a dominant company has under Article 102 TFEU a special responsibility with respect to the treatment of personal data and service offers. Next to this the freedom of choice of people, the conditions providing access to a social network and the provision of public communication services as such need to be coherent with EU competition law. The alleged abuse by Facebook might affect the personal autonomy of people and the preservation of their right to informational self-sentiment. All those aspects relate to the well-being of people in the EU as defined in Article 3 Lisbon Treaty. Next stop of the German Facebook case is the European Court of Justice that is asked to rule in particular on the treatment of personal data by a dominant company.

I. Introduction

1. The COVID-19 pandemic has triggered a disaster threatening health, disrupting economic activity, and hurting the well-being of people worldwide. The handling of the pandemic in the three largest economic regions—namely, the EU, the US and China representing together a share of about 55% in the global economy—differs. Whereas China applies a strict crisis policy, the US approach is more lenient. The treatment of the pandemic in Europe is in-between these two extreme positions. The point is that these three important economic regions diverge in their handling of the COVID-19 pandemic crisis. One reason for this is their different underlying economic systems.

2. Whereas the US economic system stands for laissez-faire capitalism opposing government intervention and represents in fact a "true" free market economy requiring that all property be owned by private individuals and that all goods and services be privately provided, China in contrast is characterised by state-owned enterprises and public ownership guided by a Marxism–Leninism philosophy and a strong commitment to socialism. In the US, prices can freely fluctuate based on supply and demand, and all transactions are voluntary, not compelled, or restricted by government action. On the other hand, the Chinese socialist market economy entails economic control by the government although the boundary between public and private enterprises is already blurring. In the COVID-19 pandemic, both regions apply the same thinking as in their economic systems: the US approach is a more lenient one whereas China applies a controlled approach.

3. Both economic systems, the US and the Chinese one, have antitrust laws. The interpretation of these antitrust laws depends on the respective applied economic system as described above. The same is true for the EU. Any

interpretation of EU competition law must be coherent with the prevailing economic system. Post-Lisbon, the goal of the EU is to work for a social market economy and to promote the well-being of its people. The application of Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU) needs to respect these objectives as defined in the Treaty on the European Union (TEU). The result is a European approach or school of thought that integrates post-Lisbon economic and non-economic considerations in EU competition law. The same is true for the European way to handle the COVID-19 pandemic: the search for a balance between health and economic issues for well-being of its people.

4. This article discusses first the concept of well-being. The linkage between the term well-being and competition law is the economic system that prevails in Europe: a social market economy. To make markets workable, a social market economy requires government action in the form of competition law. Next to this, a social market economy integrates economic and non-economic considerations. Consequently, they are applied in EU competition law post-Lisbon too. The *German* Facebook case is presented as an example of integrating public interest objectives in the assessment of dominance demonstrating that courts accept non-economic factors in competition law post-Lisbon. This development also supports the French-German initiative that demands an adequate consideration of industrial policy considerations in EU competition law.[1]

II. The Well-being of people in Article 3(1) TEU

5. Since the Treaty of Rome for more than fifty years the provision that the Community shall include a system ensuring that competition in the internal market is not distorted was enshrined in Article 3.[2] In 2009, this provision was removed.[3] Whereas this change might at first sight be considered of minor importance, the real consequences for the application of EU competition law are significant. The new Article 3(1) TEU states that the Union's aim is to promote the well-being of its peoples. Article 3(3) TEU continues by declaring that the Union shall establish an internal market and shall work for a highly competitive social market economy. The two new terms in the TEU—the promotion of well-being and the working for a social market economy—determine the frame in which EU competition law is applied post-Lisbon. The focus on the well-being of people and the introduction of the social market economy concept broaden consumer interests post-Lisbon since they consist of economic and non-economic factors. Non-economic factors do not include the "usual" parameters of competition such as price, output, product quality, product variety and innovation. As the German *Facebook* case demonstrates, the new non-economic competition factors are an appropriate treatment of personal data, freedom of choice, access and use of public communication services (even when they are owned by private companies) in accordance with fundamental law objectives, and the refusal of unappropriated offers, etc. All these "new" non-economic factors in EU competition law have their roots in the well-being concept of people as defined in Article 3(1) TEU.

6. Well-being of people is a broad concept. The OECD (2011)[4] identifies three pillars for understanding and measuring people's well-being:

- Material living conditions (or economic well-being), which determine people's consumption possibilities and their command over resources.
- Quality of life, which is defined as the set of non-monetary attributes of individuals that shapes their opportunities and life chances and has intrinsic value under different cultures and contexts.
- The sustainability of the socio-economic and natural systems where people live and work, which is important for well-being to last over time.

7. Courts started to integrate the concept of well-being into their competition law judgements since a few years. By stating that the function of the competition rules is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union, the term well-being "arrived" in EU competition law already in 2011.[5] Post-Lisbon this reference to the well-being of people is even mandatory since well-being is an objective of the Union as defined in Article 3 (1) TEU. Today case law on the meaning of well-being in competition law is further developing. In a request for a preliminary ruling case, in *Servizio Elettrico Nazionale* (Case C-377/20), the European Court of Justice (ECJ) is asked to clarify with respect to Article 102 TFEU the distinction between the concept of well-being of people and the concept of preserving a competitive market structure as such.[6] The Düsseldorf Higher

1 BMWi (2019), A Franco-German manifesto for a European industrial policy fit for the 21st Century.

2 Article 3(g) Nice Treaty.

3 After discussions Protocol (No. 27) on the internal market and competition was added to the Lisbon Treaty. The Protocol says that the internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted.

4 OECD (2011), How's Life? Measuring Well-being.

5 ECJ, 17 February 2011, *Konkurrensverket v. TeliaSonera Sverige*, Case C-52/09, para. 22: "*The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.*" Slightly different in Case C-94/00 *Roquette Frères*, para. 42, thereby ensuring economic well-being in the Community.

6 Request for a preliminary ruling, 29 July 2020, *Servizio Elettrico Nazionale SpA and Others v. Autorità Garante della Concorrenza e del Mercato and Others*, Case C-377/20: "*Is the purpose of the concept of abuse to maximise the well-being of consumers, with the court being responsible for determining whether that well-being has been (or could be) reduced, or does the concept of an infringement of competition law have the function of preserving in itself the competitive structure of the market, in order to avoid the creation of economic power groupings that are, in any case, considered harmful for the community?*"

Regional Court in the German Facebook case issued in March 2021 a preliminary request to the ECJ on the relationship between personal data protection and dominance too. In both cases, the ECJ has now the possibility to clarify the linkage between the well-being concept and EU competition law.

8. Before Lisbon, courts derived from the wording of Article 101 TFEU that the ultimate purpose of the EU competition rules is to increase the economic situation of consumers and not the well-being of people in general. The prohibition laid down in Article 101(1) TFEU can be declared inapplicable in case cartels contribute to improving the production or distribution of the goods in question or to promoting technical or economic progress. This exemption, for which provision is made in Article 101(3) TFEU, is inter alia subject to the condition that a fair share of the economic benefits resulting from the cartel is shared with consumers of the cartelised products. In this logic, courts frequently confirmed that competition law and competition policy have an undeniable impact on the specific economic interests of final customers who purchase the cartelised goods or services.[7] By applying a more general well-being concept, Post-Lisbon the provision in Article 101(3) TFEU includes not just economic benefits of specific consumers but is extended to non-economic interests. The reason for the inclusion of these non-economic interests in Article 101(3) TFEU is the economic system that is named in the Lisbon Treaty: a social market economy (SME). Thus, post-Lisbon any application of EU competition law needs to respect the elements of a social market economy as defined in Article 3(3) TEU, namely economic and non-economic factors.

III. Social market economy in Article 3(3) TEU

9. Europe is based on a social market economy (SME). The first reference to the SME-concept in the EU Treaties can be found in the draft of the 2004 Rome Treaty and was later retained in the 2009 Lisbon Treaty.

10. SME is a third way between the socialist market economy concept that is applied, e.g., in China, and a free-market economy system as known from the US. The well-being of people depends on the prevailing economic system. "*Where no wealth is created in the first place, none can be re-distributed.*"[8] Thus, the SME-concept recognises that a functioning economy is indispensable to produce the material basis without which human society with all its non-economic—human and cultural—dimensions cannot exist. Next to the production of wealth, social constituents such as equality and fairness are part of the European SME-concept.[9] Whereas a free-market system like in the US is based on the idea that market liberalisation is the best way to ensure economic efficiency and, ultimately, consumer well-being, the European SME-concept integrates both, economic growth and social sustainability: The two are compatible notions. Thus, in the European system (1) wealth is created first before (2) a social fair and equitable distribution of wealth to the people takes place. A focus on economic efficiency only in EU competition law, as requested by some economists, would fall short of the European school of thought that is based on the TEU.

11. With respect to the creation of wealth, there is consensus worldwide. A market system is an effective instrument to meet the demand from consumers for goods and services. It motivates profit-maximising companies to increase productivity, to expand, to innovate and to create jobs. These exposed market forces are the generator of prosperity thereby creating wealth. However, with respect to the distribution of wealth the three economic systems—capitalism, socialism, and SME—diverge. Liberalism focuses on efficiency only without an equitable share for all market participants. On the other hand, pure socialism is about equitable development without the generation of efficiencies. The treasure of the European SME-concept is that it combines the efficiency of a market process with social determinants that relate to equality and fairness.

12. In fact the European SME-concept is a true European approach by integrating French and German perspectives. Whereas the SME-concept became known as the German economic miracle after the Second World War (WWII), the equality thinking has since centuries its roots in the French term *égalité*. The reference to Germany is that scholars[10] post-WWII identified that peace, economic and social well-being of people are strongly correlated. It is less likely that a society with a high level of employment and social protection, with a rising standard of living and quality of life, is vulnerable to an ideology as experienced prior to WWII. Another observation was that a market should be embedded in a constitutional framework that protects the process of competition and minimises state intervention in the economy. The German founders of the SME-concept thought that a socialist planned economy ultimately destroys people's legitimate pursuit of happiness, their

7 CFI, 7 June 2006, *Österreichische Postsparkasse v. Commission*, Joined Cases T-213/01 and T-214/01, para. 115.

8 M. Monti (2000), Competition in a Social Market economy, speech at the Conference of the European Parliament and the European Commission on "Reform of European Competition law."

9 One example of this development is the increasing use of FRAND terms in Article 102 TFEU cases, e.g., in licensing agreements. FRAND is the acronym for fair, reasonable and non-discriminatory compensation. The basic idea of the FRAND approach is to balance the interests of the parties. In the FRAND context, parties consider something appropriate/reasonable if it is acceptable on business terms for all parties involved.

10 The Freiburg Ordoliberal School was founded in the 1930s in Germany by the economist Walter Eucken (1891–1950) and two lawyers, Franz Böhm (1895–1977) and Hans Großmann-Doerth (1894–1944). "*As Böhm later said in retrospect, the founders of the school were united in their common concern for the question of the constitutional foundations of a free economy and society*" (V. J. Vanberg (2004), The Freiburg School: Walter Eucken and Ordoliberalism, *Freiburger Diskussionspapiere zur Ordnungsökonomik*, No. 04/11, p. 1).

freedom of choice and right to self-determination. On the other hand, they did not underestimate the consequences and the excesses of a weak state, which is unable to guarantee the rules of free competition and to safeguard the rule of law and social justice. Thus, a "third way" in-between the two extreme notions was developed in Germany first, which became a European wide objective in the Lisbon Treaty in 2009.

13. To seek wealth as well as a fair distribution of this wealth throughout society lies at the heart of the SME-concept. The society should consist of equally free people with equal rights. Ludwig Erhard stated that: "[a] *social and economic policy faces the task of providing all individuals in the economic process with the greatest possible equality of opportunity. It is also the duty of policy makers to eliminate economic privilege and power-concentration*."[11] In this thinking, a functioning competition law is mandatory for a working SME-concept to protect the liberty of action by individuals as well as by the government. Competition law in fact needs to ensure that the market is safeguarded from the destructive influences of political and economic power.[12] The logic is that economic freedom entails the potential for its own destruction. The inherent and unavoidable tendency of private businesses to restrict competition for the sake of monopoly profits induces companies to agree on cartels, on tying arrangements, on exclusive dealership clauses and other restrictive practices. Consequently, companies tend to use their liberty to narrow their own and their competitor's freedom of contract. Such decomposition of the market economy needs to be prevented by competition law. For this very reason, the European idea is not to leave a market economy alone to any development it might take, but to create a strong legal framework, the competition rules, that ensures:

– first, that social standards and other objectives of the society are respected; and

– second, that the beneficial workings of the market forces are not blocked, restrained or distorted by short-sighted actions of the market actors themselves.

That is why post-Lisbon a strong EU competition law framework that includes next to the economic elements also non-economic elements is crucial for the success of the European SME-concept. The legal framework and the well-being concept of people are the ingredients of the European school of thought in competition law.[13]

14. Rooted in the German and the French traditions, the SME-concept is based on values EU Member States share and that are predefined in the TEU making the SME-concept a normative system. The values enshrined in the TEU by the European society provide orientation and express a philosophy committed to a society that aims at human dignity, well-being, self-determination, freedom, and the rule of law. The economic-focused SME-concept unifies these principles with the objectives of social equality and social fairness. However, the most important social principle in the SME-concept is the protection of free competition based on equality.[14] Social equality and social fairness mean that wealth gains because of a competitive market process are distributed equally and thereby fairly between all market actors, producers and consumers alike. The principles of equality (*égalité*) and fairness make that a market economy operates in a social way thereby ensuring the well-being of its people as defined in Article 3(1) TEU.

15. Technically a fair distribution of created wealth means that every market participant receives an equal split of the available gains. But what matters is not the amount of the gains. What matters is how market participants value their shares. In contrast to companies that are clearly profit—and thereby price—driven, consumers or citizens are not that rational behaving entities. Their benefits or utilities derive from multiple sources. This means that the satisfaction consumers receive from consuming a good or service depends on various attributes. One of them is price. Price-related aspects are easy to observe, measure and analyse. That is why in the past economic theory focused on prices thereby neglecting other non-price elements that are more difficult to measure such as product quality, product variety, innovation or even protection of personal data. Modern economic theory suggests that a focus on prices in the assessment of well-being does not value the whole set of consumer benefits. That is why a combination of price and other dimensions is the appropriate benchmark measuring consumer/well-being interests. In the SME-concept these broadly defined interests not only are difficult to measure, but they also need to be balanced with the profit-oriented efficiency enhancing interests of companies that are easier to measure and to observe.

11 Further research on the meaning of *égalité* is on its way by the author.

12 When competition cannot generate the expected results due to market failures like natural monopolies, external effects, or asymmetric information of the parties, legislation regulating specific economic sectors can be used.

13 It seems that then-Commissioner Mario Monti was the first one who explicitly pronounced the link between the European model of a social market economy and EU competition law in 2000, quite some time before the European model of a social market economy was declared as a European Union objective in Article 3 TEU. *See* Monti, 2000.

14 A. Müller-Armack (1989), The Meaning of the Social Market Economy, in *Germany's Social Market Economy: Origins and Evolution*, A. T. Peacock and H. Willgerodt (eds.), Palgrave Macmillan. pp. 82–84.

16. The equality principle inherent in the SME-concept as outlined above is implemented in Article 101(3) TFEU. Where an agreement restricts competition but, on the other hand, improves the production or distribution of goods or promotes technical or economic progress, the resulting benefits/wealth gains should be redistributed fairly and on an equal footing between the market participants, producers and consumers alike. In coherence with the well-being concept, the benefits should include economic benefits as well as benefits related to the quality of life or to the sustainability of systems. Thus, post-Lisbon the interpretation of what is a fair share for consumers is broader than before Lisbon. When it comes to Article 102 TFEU cases, monopolies or dominant positions themselves are not a problem. However, EU competition law demands that the behaviour of companies should be on an equal footing: A dominant company is supposed to behave in the same manner as a non-dominant company ("as-if" competition). The key aspect in this regard is the assessment of performance competition or "competition on the merits." This type of competition translates directly into benefits to the consumer: better goods, lower prices, better services, and an increase in innovation. However, performance competition needs to be distinguished from non-performance competition. This latter competition is not in the long-term consumer interest but takes place for other reasons such as the hindrance of competitors or undue enrichment. Non-performance competition is about improving one's own relative performance (but without an absolute improvement). And it is also about unduly increasing one's own profits at the expense of others, which clearly contradicts the SME-concept. That element is addressed in the *Facebook* case by the Federal Court of Justice further below. The logic of equality implies that since non-performance competition is not a type of competition a firm would engage in as normal business conduct, a firm holding economic power should refrain from such a type of competition. This is consistent with the pre-defined "rules of the game"—namely, that firms with and without economic market power need to behave equally. Some cases are not that clear-cut. A dominant company might apply a conduct that when performed by a non-dominant company is legitimate. However, the same conduct might produce negative competitive effects when applied by a dominant company. Again, the dominant company should refrain from such conduct. In this context, the implementation of the equality principle requires the assessment of the conduct first to identify whether the behaviour of a dominant company is abusive or not. Thus, competitive actions which are the result of normal competition are acceptable for both dominant and non-dominant companies. In fact, the economic order in EU competition law requires equality between the market actors in this regard. Abusive behaviour, as non-performance competition, is an action a non-dominant company has no (economic) incentive to engage in.[15] Other applications of the equality principle relate to the EU State aid rules. Governments and companies are treated alike in EU competition law. The market investor principle, for example, requires the same treatment of subsidies no matter whether financial means are given by a government or a private investor. Competition needs to take place on an equal footing even though a recipient has received a government subsidy. Again, the protection of free competition based on this equality principle is the most important social principle in the SME-concept and, probably, has its roots in the French tradition. In the following we discuss the German Facebook saga, which is an example of integrating economic and non-economic considerations in an Article 102 TFEU case.

15 This does not rule out the efficiency argument. A dominant company can produce efficiencies as non-dominant companies do. These efficiencies can be considered in the assessment.

IV. The German Facebook saga

1. The timeline of the cases

17. In 2019, the Federal Cartel Office (FCO/Bundeskartellamt) prohibited Facebook from stipulating in its terms of service that the use of the social network Facebook.com is subject to the company being able to collect and use data generated by using Facebook-owned services or by calling up third-party websites or using mobile apps via interfaces and assign them to the user accounts of the Facebook social network without the consent of the users. The FCO prohibited the relevant parts of the terms of service and the explanatory data and cookie policies as well as the actual processing of data carried out by Facebook because of these terms. Facebook was asked to discontinue the conduct objected to within a period of twelve months. If Facebook intends to continue to combine data collected from other sources with Facebook user accounts without the consent of the users, this type of data processing should be substantially restricted.

18. Facebook appealed against the FCO decision at the Düsseldorf Higher Regional Court (DHRC). The complaint did not have a suspensive effect by law, i.e., Facebook would have been obliged to implement the decision within the twelve-month period. Thus, Facebook applied for a temporary injunction. Such a temporary injunction is justified if there are serious doubts as to the legality of the decision under appeal. Serious doubts mean that the annulment of the FCO decision is predominantly probable. According to the Düsseldorf court, these conditions were met. The temporary injunction judgement of the DHRC expressed serious doubts about the legality of the FCO decision. The judges did not see any anti-competitive result from Facebook's data collection and processing. As a result, the Düsseldorf court ordered the suspensive effect of the Facebook complaint.

19. The FCO appealed against the temporary injunction judgement of the DHRC. Next in the saga, the German Federal Court of Justice (FCJ) in its June 23, 2020, ruling held that Facebook needs to comply with the decision of the FCO prohibiting Facebook's data collection

policy until the appeal is decided. The FCJ provisionally confirmed the allegation that Facebook abuses a dominant position thereby annulling the decision of the DHRC and rejected the request of Facebook to order the suspensive effect of the appeal. The FCJ used a clear language supporting the FCO: "*There are no serious doubts as to Facebook's dominant position in the German market for social networks nor can it be doubted that Facebook abuses this dominant position by using the terms of service prohibited by the* [FCO]." A key aspect in the FCJ judgement is that terms of service are abusive if they deny private Facebook users of any choice as "*to whether they wish to use the network in a more personalised way linking the user experience to Facebook's potentially unlimited access to characteristics also relating to the users' 'off-Facebook' use of the internet; or as to whether they want to agree to a level of personalisation which is based on data they themselves share on facebook.com only*." Thus, users should have a choice whether to receive a service in form of extensive online ads or not. The oral hearing in the main proceedings took place at the DHRC on March 24, 2021. The FCO submitted in the main proceedings' additional arguments of the FCJ, that in fact deviate from the initial FCO approach. The FCO based its decision on provisions of the General Data Protection Regulation (GDPR). At the hearing, the DHRC discussed at length the relationship between the GDPR and competition law and announced a request for a preliminary ruling to the ECJ on this matter. The DHRC also mentioned that the submission of the additional arguments by the FCO might belatedly. The FCJ judgement deviates from the approach taken by the FCO as discussed in a more detailed way in the following.

2. Decision of the Federal Cartel Office

20. In 2019, the FCO, as German competition authority, imposed on Facebook far-reaching restrictions in the processing of user data.[16] Facebook was combining and assigning to the Facebook user account of its respective customers all data collected on the Facebook website, on Facebook-owned services such as, e.g., WhatsApp and Instagram and even from outside Facebook services on the internet or on smartphone apps. At the time of registration users of Facebook had the only choice either to accept such a comprehensive data collection, On-Facebook and Off-Facebook, or to refrain from using the social network Facebook at all. The authority ruled that an obligatory tick on the box to agree to Facebook's terms of use is in breach of competition law. Users should have at least a choice.

21. According to settled case law, a decision requires both the determination of adverse effects on the markets concerned and a balance between all the interests involved. Facebook operates a social network in two markets. On the one hand, it offers private users the platform as a medium for representing the user's person in their social relationships and communication. On the other hand, it enables advertising on the network and finances the user platform, for which users do not pay (monetary) fees. However, by promising to provide its users with personalised experiences and thus communication content beyond the mere platform function, there are fluid transitions and entanglements between services to users and the refinancing of platform provision through different forms of online advertising.

22. The authority defined the relevant market as the German market for social networks, in which Facebook had in 2018 market shares between 95% (daily active users) and 80% (monthly active users), and ruled that Facebook is a dominant company in such a defined market. As a dominant company Facebook is subject to special obligations under competition law. The FCO found that the extent to which Facebook collects, merges and uses data in user accounts constitutes an abuse of a dominant position. To comply with competition law, the practice of combining all data in a Facebook user account should be subject to the voluntary consent given by the users. Where consent is not given, the data must remain with the respective service or third-party websites and cannot be processed in combination with Facebook data. In the situation where consent is not given by the user, Facebook would need to substantially restrict its collection and combining of data.

23. The FCO decision is not about how the processing of data generated by using Facebook's own website must be assessed under competition law. This is an essential component of a social network and its data-based business model. The issue is that many users are not aware that Facebook was able to collect an almost unlimited amount of any type of user data on the individual user device from third-party sources and to allocate these to the users' Facebook accounts and use them for numerous data processing processes, one of them offering Facebook advertising clients improved profiles about the users. Even just calling up a website with an embedded "Like" button started the data flow. This happened too if the website operator uses the "Facebook Analytics" service in the background to carry out user analyses. Thus, by combining data from its own website, company-owned services and the analysis of third-party websites, Facebook obtained very detailed profiles of its users and knows exactly what they are doing online.

24. In the authority's assessment, Facebook's conduct represented an exploitative abuse. Dominant companies may not use exploitative practices to the detriment of the opposite side of the market, i.e., in this case the Facebook users. This applies above all if the exploitative practice also impedes competitors that are not able to collect such a huge amount of data. The selected approach of the FCO corresponds to the case law of the FCJ on German competition law under which not only excessive prices but also inappropriate contractual terms and conditions constitute exploitative abuse. Because of the extensive

16 FCO, 6 February 2019, *Facebook*, Case B6-22/16, p. 12.

German case law on this issue, the FCO applied German competition law that is, according to the FCO, stricter (and therefore more favourable for the case) than EU competition law.

25. According to the FCO, data are a decisive factor in competition. In the case of Facebook, data are the essential factor for establishing the company's dominant position. On the one hand, there is a service provided to users free of charge. On the other hand, the attractiveness and value of the advertising spaces increase with the amount and detail of user data. It is therefore precisely in data collection and data use where Facebook, as a dominant company, must comply with the (German) competition rules. Next to this, access to data is an essential competition parameter not only in the advertising market but also in the market for social networks. Facebook's access to a considerably larger database increases the already distinct "lock-in effects" in the network. The larger database enhanced also for Facebook the possibilities to finance the social network using the profits generated from advertising contracts which depend on the scope and quality of the data available too.

3. Judgement of the Düsseldorf Higher Regional Court

26. In August 2019, the DHRC[17] granted interim relief to Facebook. The order of the FCO should not take effect until the final judgement in the main proceedings. The Düsseldorf court ruled in its temporary injunction judgement against the alleged exploitative abuse to the detriment of Facebook users and the alleged exclusionary abuse to the detriment of a current or potential competitor of Facebook. The court found that the submission of excessive data to Facebook does not weaken the consumer economically or result in a loss of control about these data because users knowingly and willingly submit them. By focusing in its judgement on the economic well-being of users, the court did not consider the broader perspective of consumer well-being as defined in Article 3 TEU discussed previously. One reason could be that the FCO was handling its case under German competition law that does not have a similar objective to Article 3 TEU. Based on such a narrow interpretation of economic consumer benefits, the DHRC found that the consent given by the users to Facebook at the time of registration did not damage competition.

27. Contrary to the FCO, the DHRC stated that the gathering of excessive user data to the benefit of Facebook's business model is not an exploitative abuse of its social network users. The excessive collection of data—on Facebook, on Facebook-related services and on other websites—without the explicit consent of the users does not produce economic harm to consumers. In contrast to fees paid by users, the disputed additional data can easily be duplicated by other social networks. That is why their provision to Facebook does not weaken the consumer economically. The users are free to provide these additional data to any competitor of Facebook in the market for social networks.[18] Private users of Facebook's social network do not depend on Facebook, the DHRC ruled.

28. Users of Facebook were asked to agree with the disputed terms at the time they wanted to get access to the social network. There was no indication for the DHRC that at that time private users were dependent on Facebook. Their consent was based on a free and autonomous decision. The court continued by stating that there is also no indication that Facebook obtained the user consent by coercion, pressure, exploitation of a weak will or other unfair means. There was also no evidence for the DHRC that Facebook uses the additional data outside the agreed scope. Users are not in a predicament either. The balancing users do at the time of registration is between the use of an ad-supported (and therefore free for them) social network and the benefits of Facebook's use of the additional data. Users can do this balancing according to their personal preferences and values. The DHRC found that the number of Facebook users (approximately 32 million per month) is less than the number of Facebook German non-users (approximately 50 million), which demonstrates that the results of the user assessment vary. More people refuse to use Facebook, indicating, for the court, that the transfer of data of Facebook users is voluntary. The DHRC concluded that extensive data processing by Facebook is carried out with the knowledge and wish of the Facebook users.[19]

29. According to the DHRC, what is more important from the consumer perspective is that their use of the social network is free of charge, but advertising supported. The willingness to provide Facebook with the disputed use of more data is not relevant based on this reasoning. The decision of the users for or against Facebook is primarily determined by the expected quality and the hoped-for personal benefits of the social network as well as the personal perception of the importance and relevance of confidentiality of the personal data requested by Facebook. The court found that such an evaluation is a highly personal balance based on users' own preferences and wishes, which cannot be classified as correct or wrong from the outset. From the individual perspective any legal, economic or other disadvantages are therefore not connected with the decision for or against participation in the Facebook social network. There is no loss of data either for those who agree with Facebook's Terms of Use. On the contrary, users can continue to provide their data in question even after registering with Facebook without restriction to any other third party. The users also do not ask Facebook for services necessary to meet their general needs of life. It is just about the ability to communicate with friends or other third parties via Facebook. The very fact that 50 million inhabitants of

17 DHRC, 26 August 2019, *Facebook*, Case VI-Kart 1/19 (V).

18 Ibid., para. 31.

19 Ibid., para. 71.

Germany show no interest in using Facebook is evidence that it is not about the satisfaction of a basic need or of the only way to communicate with others. Based on this reasoning the DHRC ruled that the consent given by a Facebook prospect in the Terms of Use is not the outflow of Facebook's market power, but the result of an individual balancing of the pros and cons associated with a Facebook registration.[20]

30. The DHRC found that Facebook is not engaging in an exploitative abuse either. An abuse of market power would occur when a dominant undertaking demands fees or other terms and conditions that deviate from those that would be highly likely to result from effective competition. The "Terms of Use" provided by Facebook, including the "Data Directive" and the "Cookie Directive," are qualified by the DHRC as usual conditions and terms of business. The court also criticised that the FCO did not carry out sufficient investigations into an "as-if" competition and, as a result, has not made any meaningful findings on the question of which terms of use would have been formed under circumstances of competition.

4. Judgement of the Federal Court of Justice (FCJ)

31. The FCJ[21] annulled the temporary injunction judgement of the DHRC by an interim judgement. The FCJ has no doubts with respect to Facebook's dominant position on the German social networking market or with respect to Facebook's abuse of that dominant position by the "Terms of Use" as prohibited by the FCO. The abuse is that Facebook makes at the time of registration the private use of the network dependent on the linkage of Facebook user- and user-device-related data ("off-Facebook" data). Users cannot freely decide whether to agree or to object to this Facebook business model. The FCJ refused to accept the logic of the DHRC—namely, that the alleged "Terms of Use" do not represent a loss of control for the user and that they are not a predicament for the user either. The argument that the complained conditions are a simple balancing of the consumer benefits using an advertising-supported (and then free) social network and the benefits of Facebook's use of the additional data was rejected as well. The fact that there is a considerable number of non-Facebook users (about 50 million) in Germany does not prove either that Facebook users are not exploited.

32. The FCJ criticised that the DHRC did not take into account the interests of those users who do not wish to give up the use of the social network, but who also attach importance to the fact that the collection and processing of their data is limited to what is necessary for the use and financing of a social network. By extending the typical range of services of a social platform to include the "provision of a personalised experience" based on data generated by the user's activity outside the network, users are being forced to receive a service content that they may not wish to receive and for which, in any event, they may not accept Facebook's access to all their personal data. This argument of the FCJ means that users have the right to a non-provision of services even if they are free for them. The FCJ ruled in favour of user autonomy of freedom to choose, which is clearly a non-economic benefit.

33. The FCJ continued by discussing the economics of multi-sided markets. First, the FCJ confirmed that data have a significant economic value, which is illustrated by the market capitalisation of companies such as Facebook and Google. Data are intangible and characterised by non-rivalry, non-exclusivity and non-wearability. Contrary to the view of the DHRC, the FCJ ruled that the competition law assessment does not stop at this point. Users provide an economically valuable contribution to Facebook, by enabling Facebook to collect and commercially exploit all user-related data. Thus, users provide, according to the economic consideration necessary for an antitrust assessment, Facebook a value, which is increased for Facebook by the extension of the "personalised experience" with the help of "off-Facebook" data. Consumers use the Facebook network without monetary compensation and in this respect free of charge, while the advertising companies pay Facebook as a network operator for the placement of their advertisements, including the analysis of the data. This revenue is used by Facebook to run the operation of the network. However, since advertising is preferably tailored to users and that is the particular attractiveness of advertising in and via a social network for Facebook customers, it is the users who enable such a "cross-subsidisation" by their extensive personal data, which in turn Facebook can monetise on the other side of the two-sided market. Thus, the quality and quantity of the user-related data are a decisive factor in determining the price to be paid by the advertising partners to Facebook, which also affects the relationship of users to Facebook as the operator of the network in view of the interdependences described above. The fact that the usability of the data and its value can be increased with its combination and linkage with patterns is of particular importance for the Facebook business model. The value for Facebook from each individual data element increases with the existence of other data available. The consideration of the DHRC that the user is not prevented from making his data available to as many companies as desired does not get, according to the FCJ, the economic core: The user contributes to a database created by Facebook and therefore only available to Facebook and the customers of its services on the second market side.[22]

34. According to the FCJ, the DHRC has also failed to consider the fact that users' access to the social network Facebook, in any event for some consumers, decides to a considerable extent on their participation in social life,

20 Ibid., para. 77.

21 FCJ, 23 June 2020, *Facebook*, Case KVR 69/19.

22 Ibid., para. 62.

so that they cannot be expected to abandon it. Again, the FCJ focused on a non-economic element that is part of the well-being concept. The FCJ found that a social network is an important form of social communication. The use of a social network for the purpose of mutual exchange and expression is of particular importance because of the high number of users and the network effects. A dominant company has a special responsibility from the point of view of informational self-determination of users when determining the conditions for platform use.[23]

35. The right of informational self-determination does not contain a general or comprehensive right of self-determination over the use of one's own data. However, it guarantees individuals the possibility to influence in a differentiated way in which context and how their own data are available to others and used by them. This is a guarantee that attributions about one's own person are in the hand of the user making it a fundamental right also relevant, according to the FCJ, in the interpretation of German competition law. Again, the self-determination about one's own private data is a non-economic element the FCJ introduced in the assessment of abuse. This argument confirms that the FCJ had the well-being concept of people in mind. The FCJ moved on by clarifying that depending on the circumstances, in particular when private companies—like Facebook—move into a dominant position and take over the provision of public communication services, fundamental rights of private individuals need to be secured close to or even equivalent to the binding of fundamental rights for states and government.[24] This is probably the strongest argument in the FCJ judgement with respect to the well-being standard indicating that Facebook in a dominant position is representing such an important facet in public life—namely, public communication services—that Facebook needs to act in coherence with the fundamental rights of societies.

36. In addition, the FCJ found that Facebook provides with its social network a communication platform, which decides to a considerable extent for parts of the consumer on their participation in social affairs and is therefore essential for a public discourse on political, social, cultural and economic issues. Because of this non-economic but well-being related argument, Facebook has a special legal responsibility in determining the conditions for the use of the platform.[25] According to the findings of the FCO, significant parts of Facebook's private users want a smaller amount of disclosure of personal data. If competition in the social networking market were to work, the FCJ would expect a corresponding offer.

37. The FCJ continued by stating that the designed terms of use are also likely to hinder competition. It is true that Facebook's market position is primarily characterised by direct network effects, as the network's benefits for both private users and advertisers increase with the total number of people connected to the network. Facebook's market position can only be successfully attacked if a competitor manages to attract enough users to make the network attractive in a manageable time. The FCJ confirmed that access to data is a key competitive parameter not only in the advertising market but also in the social networking market. Facebook's access to a much larger database further enhances "lock-in effects." In addition, this larger database improves the possibilities of financing the social network to the detriment of competition.

38. To conclude, the FCJ presented an impressive judgement on an antitrust issue many other courts and countries face problems with. The FCJ went ahead in European thinking by addressing in its 102 TFEU judgement aspects that go far beyond the usual discussion of economic effects. Many other important aspects for the well-being of people like the treatment of personal data or the freedom of choice or responsibilities associated with public communication services were ruled on. The FCJ, in this interim judgement, stressed the lack of choice of Facebook users that affects not only their personal autonomy but also their right to informational self-sentiment. The German Facebook saga goes on with the recent request for a preliminary ruling to the ECJ by the DHRC on the linkage between the GDPR and competition law. Hopefully the ECJ will use this request for clarifying the linkage between economic and non-economic elements in competition law post-Lisbon for the well-being of the people in the EU. ■

23 Ibid., paras. 102 and 124.

24 Ibid., para. 105.

25 Ibid., para. 124.