

July 2023 | Client Alert

Meta – EU Court of Justice confirms that abuse of dominance assessment can consider violations of data protection laws

On 4 July 2023, the Court of Justice (“CJEU”) handed down its highly anticipated judgment in Case C-252/21 *Meta v Bundeskartellamt* on the interplay between EU competition law and the EU’s General Data Protection Regulation (the “GDPR”). The CJEU held that competition authorities can analyse a dominant firm’s GDPR compliance (or non-compliance) when assessing an alleged abuse of dominant position and prohibit a dominant firm from engaging in certain data processing activities to end an Article 102 infringement. The CJEU does emphasise that competition authorities assessing the lawfulness of data processing activities must seek to cooperate with data protection supervisory authorities to avoid conflicting GDPR compliance assessments, but the effectiveness of this mechanism might be limited in practice.

BACKGROUND

In 2019, the Bundeskartellamt found that Meta had collected data from services affiliated with Facebook (e.g., Instagram and WhatsApp), as well as third-party websites and applications, and linked these data with users’ Facebook accounts, without obtaining users’ valid consent in accordance with the GDPR. Although users authorised the linking of their data when clicking the sign-up button, the Bundeskartellamt found that users could not be considered to have given their consent “freely”, as required by the GDPR, in light of Meta’s dominant position and the fact that consent to data processing was a prerequisite for using Facebook. It concluded that this violation of GDPR rules constituted an (abusive) “manifestation of Meta’s market power” and therefore infringed Article 102 TFEU.

On appeal, the Higher Regional Court of Düsseldorf requested a preliminary ruling from the CJEU on the Bundeskartellamt’s finding that Meta abused its dominant position under national competition laws in light of its data processing practices. In addition to a number of questions on the interpretation of the GDPR, the German court also asked the CJEU whether (i) in the context of an investigation of an alleged abuse of dominance, a competition authority is entitled to examine whether data processing practices comply with the GDPR, and to subsequently issue an order to end non-compliant practices; (ii) a competition authority may conduct such an analysis pending a parallel investigation by the relevant data protection supervisory authority; and (iii) users can effectively and freely give consent for data processing to a dominant undertaking.

COURT OF JUSTICE JUDGMENT

The CJEU confirmed that in the context of examining an alleged abuse of dominant position, a competition authority may also examine whether the dominant firm complies with rules other than competition laws, such as data protection rules laid down by the GDPR. Non-compliance with the GDPR can be at least a strong indication that the dominant firm's conduct is not consistent with "normal competition." In addition, as the ability to access and process personal data has become an important parameter of competition and non-compliance with the GDPR can hinder the maintenance/growth of competition, excluding GDPR considerations from competition law assessment could undermine the effectiveness of competition law enforcement.

The CJEU also emphasised that a competition authority's finding of non-compliance with non-competition rules is purely for the purpose of establishing, and putting an end to, a competition law violation. National competition authorities cannot replace supervisory authorities established by the GDPR, nor do they have GDPR enforcement powers. Moreover, in their GDPR assessment, competition authorities must not depart from previous decisions of competent supervisory authorities, and must consult and cooperate with such authorities.

Lastly, the CJEU confirmed that users may validly consent to the processing of their personal data by a data controller even if that data controller holds a dominant position. Nonetheless, the existence of a dominant position impacts users' freedom of choice and creates an imbalance as between them and the data controller, which constitutes an important factor in determining whether users' consent was in fact validly and most importantly, freely, given. In accordance with Article 7(1) of the GDPR, the data controller must prove free consent in the relevant case.

OBSERVATIONS

The Bundeskartellamt's 2019 decision finding an abuse of dominant position by Meta has been the subject of much debate, as it was the first instance of a competition authority identifying an abuse of dominant position on the basis of an infringement of data protection rules.

The *Meta* judgment has (largely) ended this debate, with the CJEU confirming an expansive interpretation of the powers of national competition authorities, allowing them to analyse non-competition rules and incorporate findings of non-compliance in their competition law analysis. While this outcome is certainly welcome by the enforcement community, a number of concerns remain.

For example, although the CJEU highlights the "duty of sincere cooperation," this might in practice not be a particularly effective mechanism to ensure consistency and substantive input from the data protection expert agencies. According to *Meta*, a competition authority must contact the relevant specialised supervisory authority, but if that authority does not react or simply replies that it will not be assessing the conduct at issue, the competition authority, without any demonstrated expertise in data protection law, has the final say on GDPR interpretation and application. There is, unfortunately, no requirement for the competition authority to request, and wait for, substantive input on potentially challenging GDPR issues from an expert agency.

The *Meta* judgment itself demonstrates the highly specialised nature of the interpretation and application of the GDPR. The majority of the questions referred to the CJEU concerned technical issues about the application of the GDPR, requiring the CJEU to opine on technical details regarding, for example, the processing of sensitive data and making data public. Leaving this task to any competition authority in the EU raises risks of inconsistencies and of questionable interpretations of the GDPR. The Van Bael & Bellis data protection team is preparing a further article focussing on the GDPR questions referred to the CJEU, which will be published imminently.

Finally, although *Meta* was focused on data protection, there are no limiting principles in the judgment that would confine its impact to digital markets and data protection rules. Whilst the CJEU does flag that access and ability to process personal data constitute an important parameter of competition, the same can presumably be said about many other regulatory frameworks governing business conduct – such as

compliance with tax laws, labour market regulations, or environmental rules. Indeed, non-compliance with such regulatory frameworks could be perceived as constituting “*methods different from those governing normal competition in products or services*” and create competitive advantages for a dominant firm.

The CJEU also does not set out any standards – such as in respect of scope, gravity, or closeness to competition policy goals – that would help structure the analysis of non-competition rules in a competition law context. Thus, there is a considerable risk that competition authorities (or courts in the context of private litigation) may be called upon to police compliance with non-competition regulatory rules in the context of their Article 102 enforcement powers.

Lawyers to contact



Andreas Reindl
Partner
areindl@vbb.com



Niharika Parshurampuria
Associate
nparshurampuria@vbb.com

BRUSSELS

Glaverbel Building
Chaussée de La Hulpe 166
B-1170 Brussels
Belgium

+32 (0)2 647 73 50

GENEVA

26, Bd des Philosophes
CH-1205
Geneva
Switzerland

+41 (0)22 320 90 20

LONDON

Holborn Gate
330 High Holborn
London, WC1V 7QH
United Kingdom

+44 (0)20 7406 1471

www.vbb.com

