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Review article

ABUSE OF A DOMINANT POSITION ON THE DIGITAL MARKETS – CASE META VS. BUNDESKARTELLAMT*

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ABSTRACT

During the previous years of the ECLIC conference series, the case of Facebook (Meta), which started at the German national competition authority Bundeskartellamt, was analysed by our (broader or narrower) author team, from different perspectives. At issue was primarily the question that links the areas of data protection and competition - and thus whether the use and linking of personal data from this social network and from third parties can be considered an abuse of a dominant position in light of the fact that the collection of this data is a condition for the use of the platform. The legal case was transferred from the administrative phase, to the German national court, which referred the case to the Court of the Justice of European union (hereafter also as "CJEU") for a preliminary ruling. Advocate General Athanasios Rantos also submitted his opinion in the case, and the CJEU in its judgment of 04 July 2023, answered the questions referred for a preliminary ruling. By answering the questions referred for a preliminary ruling in case C-252/21, CJEU drawed conclusions both in relation to the principle of sincere cooperation under Article 4(3) TEU between the competent data protection and competition authorities, and in relation to the regulation of personal data and competition. From a methodological point of view, the analysis will focus in particular on the decision in the case (C-252/21), taking into account the findings presented in professional literature with emphasis on the abuse of dominant position. The aim of this paper is to select the most relevant generally applicable conclusions of the judgement of 04 July 2023 for the application of the abuse of dominance in the context of extensive data collection.

Keywords*: Meta, Google, Bundeskartellamt, data protection, competition, abuse of dominant position*

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1. INTRODUCTION

In recent years, we have witnessed a rapid increase of market power of the digital giants. Their position is consolidating with an ever-expanding user base, and the data generated by these users are increasing exponentially every day. The innovations brought by these technological giants strengthen and stabilize their market position. With some platforms it may even appear, that it is practically impossible for them to have any relevant competitor. Naturally, the acquirement of a dominant position by deliberate business steps is not prohibited within the framework of competition, either through the standards of European law or national (Slovak) law. Ultimately, it would contradict the basic principles and rules of the competition. We generally consider abuse of a dominant position to be contrary to the law. Based on the premise that the competition itself should benefit from the competition (as a certain regulated public good, the collusion of supply and demand), at the same time, it should create natural pressure on competitors to innovate and produce the best possible products at the lowest possible prices, and finally, all of the above should be for the benefit of the consumer, who can choose the most suitable product at the best price. Naturally, in the case of free services, the typical providers of which are primarily social networks, internet browsers or comparison platforms, the determinant of choice is not the price, since it is absent, but the conditions under which the given service is provided. The pleasantness and accessibility of the user interface or the trustworthiness of a large user base can also be important for the end users. In the decision-making activities of competition authorities as well as judicial authorities, both at the national and European level, we observe several actions of online platforms that have committed restrictions on competition. For the purposes of this post, selected aspects of the Meta Platforms case will be analysed. These proceedings were initiated by the national German competition authority (Bundeskartellamt), against which the platform appealed. The preliminary national court decision essentially countered the decision of the competition authority, and finally the national court referred preliminary questions to the CJEU. In the analysed case C-252/21, the Advocate General's proposals dated September 20, 2022, as well as the judgment dated July 4, 2023, were issued. The aim of this article is the analysis of the most fundamental attributes of the decision of the Court of Justice of the EU, which intersect in the field of competition, specifically the abuse of a dominant position in the light of personal data protection, which are regulated by the GDPR regulation. From a methodological point of view, the contribution was processed primarily using the analysis of relevant legal documents in the form of decisions of competition authorities or judicial authorities, both at the national and EU law levels. In order to draw conclusions and confront the acquired knowledge with the legal doctrine

presented so far in the defined area, professional literature focusing on the defined goal of the contribution was also used.

2. TO THE GENERAL QUESTIONS OF THE REGULATION OF THE PROHIBITION OF ABUSE OF A DOMINANT POSITION

Abuse of a dominant position (Article 102 of the TFEU) is prohibited restriction of competition. Together with agreements restricting competition (Art. 101 TFEU), it represents the institute of competition law, which is incorporated into the primary law of the EU. Within the framework of the legal order of the Slovak Republic, the area of illegal restriction of competition is governed by Act No. 187/2021 Coll. Act on the Protection of Competition.[1] In the conditions of the Slovak Republic, the regulation of competition underwent a more significant change in 2021, when the original Act on the Protection of Competition (No. 136/2001 Coll.) was replaced by Act No. 187/2021 Coll. This change occurred as a result of the need to transpose the ECN+ Directive[2] into the legal system of the Slovak Republic. Instead of amending the original Act No. 136/2001 Coll., the Slovak legislator chose the path of adopting new legislation, in the form of a new Act. There is no doubt, that the Directive 2019/1 is intended to strengthen the position of national competition authorities, while the preamble of this legal act also emphasizes the factor of digital environment. As stated in the non-binding part of the Directive 2019/1 "the resulting ineffective enforcement distorts competition for law-abiding undertakings and undermines consumer confidence in the internal market, particularly in the digital environment."[3] The impact of digitalisation on competition law is further highlighted emphasising the need to extend competences of the NCAs to respond to the challenges of the digital environment including digital markets, specifically "the investigative powers of national administrative competition authorities should be adequate to meet the enforcement challenges of the digital environment, and should enable NCAs to obtain all information related to the undertaking or association of undertakings which is subject to the investigative measure in digital form."[4]

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1 Unofficial translation by the author.

2 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33 (hereafter also as "Directive 2019/1").

3 *Ibid*., point 7 of Preamble.

4 *Ibid*., point 30 of Preamble.

From the preliminary analysis of the wording of the individual key pillars of competition, to which we include agreements restricting competition, abuse of a dominant position and control of concentrations, it is possible to specify, that the institutes in question have preserved their conceptual features and have not undergone significant changes by transposing the Directive 2019/1. With regard to the thematic focus of this contribution, we state that, in our opinion, the abuse of a dominant position did not undergo any change in the transposition of the ECN+ directive into the legal order of the Slovak Republic (comparing § 8 of Act No. 136/2001 Coll. and § 5 of Act No. 187/2021 Coll.). The process of implementing the ECN+ Directive into the legal order of the Slovak Republic was analysed and subsequently summarized by *Patakyová,* who characterized this process as turbulent. [5]

Abuse of a dominant position can be described as a standard institute of competition law. The generality of the concept of the general clause on the abuse of a dominant position (§5 para. 2 of Act No. 187/2021 Coll. and Article 102 of the TFEU), as well as a demonstrative calculation of distinctive practices (§5 para. 3 of Act No. 187/2021 Coll. and Article 102 letters a) to d) TFEU), which may represent an abuse of a dominant position allows to "capture" the sophisticated practices of technological giants. This is also shown by the decision-making practice of competition authorities at the national level (the Meta Platforms case itself assessed by the German national competition authority), as well as at the EU level (for example, the decision of the European Commission in the case of Google Shopping). The case of abuse of a dominant position by Google was analysed by Kostecka-Jurczyk, who pointed out, among others, that there is radically different approach of the European Commission and the American Federal Trade Commission.[6] Problematic, "neuralgic point" is when the platform has a strong market position and represents a kind of gateway of access on a specific relevant market, but from the point of view of competition law, it does not meet the criteria of a dominant position on the relevant market. In the absence of a dominant position, the application of provisions on the prohibition of abuse of a dominant position is excluded for logical reasons.

As part of the decision-making process of the competition body, it is a rule that in order to determine whether a specific subject (enterprise) is abusing a dominant

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5 Patakyova, Maria T., Patakyova, M., *Country Report on the Implementation of Directive (EU) 2019/1– Slovak Republic. Implementation of the ECN+ Directive-Slovak Republic will the new APC improve the enforcement of competition law*, European Competition and Regulatory Law Review, Vol. 5, No. 3, 2021, p. 310.

6 Kostecka-Jurczyk, D., *Abuse of dominant position on digital market: is the European Commission going back to the old paradigm?*, European Research Studies Journal. Volume 24, Special Issue 1, 2021, p.121

position, it is necessary to first define the relevant market and then determine whether the entrepreneur has a dominant position on them. According to the Commission Notice on the definition of the relevant market „market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that involved undertakings face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85."[7] The cited provisions of the Commission's Notice also emphasize that, although market share is an important figure for assessing dominance, it is not the only or decisive figure. This fact supports the claim that, despite a higher market share, the platform does not automatically have a dominant position in terms of competition rules. National competition authorities follow in the same way when defining the relevant market, for example, the Slovak anti-monopoly authority refers to the relevant provision of the Commission's Notice in the justification of the decision, from which, among other things, implies that the relevant competition authority justified its decision by national § 5 par. 3 as well as 102 TFEU.[8]

2.1. Specifics of digital markets

Just as we distinguish relevant markets within the offline space, we also distinguish relevant markets in the online environment. The main difference between the services provided in the offline space and the online space represents that in the online space, services are (usually, but not necessarily) free of charge. Of course, this distinction can not be applied to every platform, as many services provided online are provided for a financial compensation. Despite the above, taking into account the platforms with the most significant influence in the online environment, it can be concluded that a significant part of these services is provided free of charge. We can mention, for example, the Internet search engine Google, the social network

7 Commission Notice on the definition of relevant market for the purposes of Community competition law, (OJ C 372, 9.12.1997, p. 5–13), point 2.

8 Antimonopoly Office of the Slovak republic, Slevomat.cz, s.r.o. Praha, Česká republika, available at: [https://www.antimon.gov.sk/data/att/7a6/4010.3c22fc.pdf?csrt=5775307945255658617], Accessed 4 May 2024, p. 4 and 15.

Facebook or Instagram (which still have their unpaid versions available for their end users) or TikTok. These platforms may operate free of charge to end-users due to the fact that the commercial users of these online platforms pay for the placement of advertisements to the end-users of these platforms. Naturally, the platform that collects user data and is therefore able to target advertising effectively has the best information about the most appropriate profiling of advertising (in order to sell as many goods or services as possible). Lastly, within journalistic sources, we find the statement that the paid version of Facebook and Instagram, the social networks operated by Meta, was their response to the judgment of the Court of Justice of the EU of 04.07.2023.[9]

Markets with intermediary services are also referred to as so-called multi-sided markets. These markets are often composed by legal relations between commercial users, or business partners (B2B level), as well as relations towards end users, or to consumers (B2C). At this point, the question arises whether, for the specific purposes of defining the relevant market, it would not be necessary to define a separate relevant market for the relationship between the platform and the trader and a separate relevant market for the relationship between the platform and the end user. Naturally, the answer to this question can only be answered when assessing a specific case, and it is not possible to take an unequivocal position except for specific factual circumstances. The reasoning behind the decision of the Slovak national competition authority in the case of Slevomat.cz, s.r.o. led to consideration to not divide the relevant market into two separate levels. In this case the acting authority ultimately did not divide this market for the purposes of defining the relevant market, stating that "for the purposes of the administrative procedure in question, the office preliminarily defines the relevant market as the market of online intermediary services on discount portals in the Slovak Republic for business partners and their customers. If the authority were to divide the given market into two separate markets according to the individual parties of the online portal, i.e. separately in relation to business partners and separately in relation to end customers, this would not, according to the preliminary conclusions of the authority, have an impact on the preliminary finding of the existence of a dominant position of the participant in the proceedings in relation to business partners against whom anti-competitive proceedings may be applied in the matter in question."[10] This

[9] The Guardian, Facebook and Instagram could charge for ad-free services in EU, available at: [https://www.theguardian.com/technology/2023/oct/03/facebook-instagram-charge-ad-free-eu-meta-mobile-desktop], Accessed 5 April 2024.

[10] Antimonopoly Office of the Slovak republic, Slevomat.cz, s.r.o. Praha, Česká republika, available at: [https://www.antimon.gov.sk/data/att/7a6/4010.3c22fc.pdf?csrt=5775307945255658617], Accessed 5 April 2024, p. 27-28.

essentially confirms the consideration that the division of the relevant market into two levels may not be decisive for assessing whether there has really been an abuse of a dominant position on the relevant market from the perspective of the impact of such an action.

Aware of the fact that for entities operating in the technological segment, it can be problematic when a specific platform does not have a dominant position on a specific relevant market,[11] the European legislator adopted the Digital Markets Act, which is already valid and effective at that time. It imposes specific obligations on technology giants fulfilling the qualitative and quantitative criteria, which are not in the nature of *ex post* sanctions, as in sanctioning their actions through the abuse of a dominant position, but gatekeepers must apply them automatically and their effect works *ex ante*. For this reason, it can be assumed that DMA regulation can serve as an effective means against restricting competition in digital markets. However, in our opinion, it will be possible to evaluate the very effectiveness of this regulation only certain time after its full application.

3. ABUSE OF A DOMINANT POSITION - THE CASE OF BUNDESKARTELLAMT VS. META

3.1. Case of Meta at Bundeskartellamt

As stated in the judgment of the CJEU The Federal Cartel Office brought proceedings against Meta Platforms, Meta Platforms Ireland and Facebook Deutschland, as a result of which, by decision of 6 February 2019, based on Paragraph 19(1) and Paragraph 32 of the GWB[12], it essentially prohibited those companies from making, in the general terms, the use of the social network Facebook by private users resident in Germany subject to the processing of their off-Facebook data and from processing the data without their consent on the basis of the general terms. In addition, mentioned decision required them to adapt those general terms in such a way that it is made clear that those data will neither be collected, nor linked with Facebook user accounts nor used without the consent of the user concerned, and it clarified the fact that such a consent is not valid if it is a condition for using the social network.[13]

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[11] In this regard, we refer to Art. 5 Preambles of the Digital Markets Act.

[12] Abbreviation from original Germanl wording „Gesetz gegen Wettbewerbsbeschränkungen," as Act against Restraints of Competition, German national competition Law – translation by the author.

[13] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 29.

3.2. Proceedings at national German court Oberlandesgericht Düsseldorf

On February 11, 2019, a complaint was filed to the Oberlandesgericht Düsseldorf against the Bundeskartellamt's administrative decision concerning Facebook, shifting the legal case from the administrative level to judicial proceedings. German judicial authority has clearly stated that the administrative decision issued by the Bundeskartellamt will most likely be overturned because the court did not agree with its conclusions. As the court emphasized: "...there are serious doubts about the legality of this decision by the Bundeskartellamt."[14] Currently, the aspect of doubts about the legality of the administrative decision entitles the acting court to comply with the petitioner's proposal to grant a suspensive effect. Second, the court also commented on data processing issues when it stated that "*…the data processing by Facebook does not cause any relevant competitive harm or any adverse development of competition. This applies both to exploitative abuse at the expense of consumers participating in the social network Facebook, and with regard to exclusionary abuse at the expense of an actual or potential competitor of Facebook.*"[15] However, the competent German judicial authorities have not yet issued a final decision on the merits of the case, and the decisions issued so far have been of a preliminary nature. After the hearing, which took place on 24th of March 2021, the court decided to stop the proceedings and submit preliminary questions to the CJEU pursuant to Art. 267 of the TFEU. The Oberlandesgericht Düsseldorf submitted a total of 7 questions to the CJEU, some of which consist of several partial sub-questions. According to *Graef*, it seems that the Düsseldorf Court has little room to still conclude that the Bundeskartellamt's decision should be quashed.[16]

3.3. Fundamental conclusions of the CJEU in case C-252/21

The decision of CJEU in case C-252/21 is of indisputable importance not only in terms of competition and personal data protection, but also in terms of defining the relationship between national competition law and European regulation. Professional literature concludes that the Bundeskartellamt vs. Meta Platforms case was a missed opportunity to define the relationship between the EU competition law and national (competition and other) law, as codified in Article 3 of Regula-

[14] Unofficial translation of the decision - Facebook. /. Bundeskartellamt The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 6-7.

[15] *Ibid.*

[16] Graef, Inge. Meta platforms: How the CJEU leaves competition and data protection authorities with an assignment. *Maastricht Journal of European and Comparative Law*, 2023, Volume 30, Issue 3, p.334

tion 1/2003.[17] The case of Meta (Facebook) was also pointed as the case, where stricter national rules on abuse of dominant position was used, instead of art. 102 TFEU.[18]

Firstly, the original administrative procedure started at the German competition authority as early as 02 March 2016. In a preliminary decision on 19 December 2017, the competition authority provisionally decided that Facebook was abusing its dominant position, by the imposition of "misleading" privacy policies regarding data collected from third-party websites.[19] However, we hold the opinion, that despite the considerable time lag between the initiation of the initial national administrative proceedings and the final decision of the German national court, the CJEU's decision is of particular importance for the legal doctrine in the related field of law. Also reflecting the fact that Facebook (Meta) has already taken several steps to align its practices with valid and effective law (for example multiple changes of the general terms and conditions of use of the platform, the introduction of paid versions of the platforms, etc.).

With regard to the goal of the article formulated in the abstract and specified in the introduction of this article, we will further focus on the first and seventh and then on sixth prejudicial questions, which in our view are most related to the institution of abuse of a dominant position in digital markets.

3.3.1. Regarding the first and seventh preliminary questions

The CJEU considered the first and seventh preliminary questions together. With its questions, the national German court essentially asked whether the competition authority assessing the abuse of a dominant position on the relevant market has the competence to state that the general conditions of use of the platform are not in accordance with the GDPR. Following the principle of loyal cooperation incorporated in Art. 4 par. 3 TEU, the national court also asks whether this competence of the competition authority is preserved even if the supervisory authority operating in the field of data protection simultaneously investigates these

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17 Brook, Or; Eben, Magali. Another Missed Opportunity? Case C-252/21 Meta Platforms V. Bundeskartellamt and the Relationship between EU Competition Law and National Laws. *Journal of European Competition Law & Practice,* 2024, Vol. 15, No. 1, p.25

18 Mota Delgado, Miguel; Petit, Nicolas. Article 3 of Regulation 1/2003 and the Doctrine of Pre-emption. The Transformation of EU Competition Law–Next Generation Issues'(Adina Claici, Assimakis Komninos and Denis Waelbroeck, eds.), Wolters Kluwer, 2023., p. 129

19 Bundeskartellamt,, Preliminary Assessment in Facebook Proceeding: Facebook's collection and use of data from third-party sources is abusive, available at: [http://www.bundeskartellamt.de/ SharedDocs/Publikation/EN/Pressemitteilungen/2017/19_12_2017_Facebook.pdf?__blob=publicationFile&v=3], Accessed 5 April 2024, p. 1.

conditions. Even before the analysed decision was issued, we encounter with the statement that regulating the activities of major digital platforms requires an interdisciplinary and interinstitutional approach. To this end, competition and privacy agencies should establish a system of regular dialogue and cooperation.[20]

In this context, the Court of Justice of the EU emphasized that it is necessary to differentiate the powers entrusted to the national supervisory authority and the leading supervisory authority, whose cooperation is governed by the GDPR regulation in question. As it is further emphasized: „neither the GDPR nor any other instrument of EU law provides for specific rules on cooperation between a national competition authority and the relevant national supervisory authorities concerned or the lead supervisory authority. Furthermore, there is no provision in that regulation that prevents the national competition authorities from finding, in the performance of their duties, that a data processing operation carried out by an undertaking in a dominant position and liable to constitute an abuse of that position does not comply with that regulation.[21] Both the competition rules and the GDPR regulations themselves do not explicitly define special rules for cooperation between the competition authority and the GDPR supervisory authority.

Despite the absence of explicit rules for the cooperation of these authorities, the Court of Justice of the EU states that „it follows that, in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR."[22] Incidental determination by the competition authority that the actions of the platform are in conflict with the GDPR regulation does not mean that this authority replaces the competences of the supervisory authority in the field of data protection. According to Martínez "not every intervention on the side of a competition authority considering the application of the GDPR may be justified on the basis of the ruling. The interplay is only allowed in a narrow set of cases: those where it may be necessary for the competition authority to examine in the context of an abuse of a dominant position whether the undertaking's conduct complies with rules other than those relating to competition law (para 48). Even in these cases, the competition authority's de-

[20] WITT, Anne. Facebook v. Bundeskartellamt – May European Competition Agencies Apply the GDPR? In: *Bundeskartellamt–May European Competition Agencies Apply the GDPR*, 2022., p. 9

[21] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 43

[22] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 48

cisions do not replace nor bind the investigations and findings of data protection supervisory authorities regarding the same set of facts (para 49)."[23]

As stated by the CJEU pointing to the findings of the European Commission and as emphasized in several parts of this contribution, personal data (and data in general) essentially represent one of the most important assets of online platforms. According to Kerber and Zolna from an economic angle, all negative effects on privacy can be considered in competition law as long as they can also be interpreted as a reduction of consumer welfare (consumer welfare standard).[24] Given the fact that data is a key element in the financing of online platforms, compliance with the rules of their regulation cannot be excluded from the assessment activity of the competition authority, the CJEU specifically states in this regard "as pointed out by the Commission, *inter alia*, access to personal data and the fact that it is possible to process such data have become a significant parameter of competition between undertakings in the digital economy. Therefore, excluding the rules on the protection of personal data from the legal framework to be taken into consideration by the competition authorities when examining an abuse of a dominant position would disregard the reality of this economic development and would be liable to undermine the effectiveness of competition law within the European Union."[25] As mentioned above, business models of the 21st century inherently link the use of personal data to their operations. Current practice shows that either it is possible to use the platform free of charge under the current consensus with the use of a wider range of user data, which will also allow them to "monetize", or the platform is available in paid version, where the use of personal data is limited only to the necessary extent. As emphasized by the Court of Justice of the EU, the remuneration should be proportionate.[26] Further therein, the CJEU states that if the competition authority wants to comment on the compliance of the platform's actions with the personal data protection legislation, their mutual cooperation is essential.

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[23] MARTÍNEZ, Alba Ribera, A THRESHOLD CAN TAKE YOU FURTHER THAN A STATEMENT – THE COURT OF JUSTICE'S RULING IN META PLATFORMS AND OTHERS (CASE C-252/21), available at: https://www.diritticomparati.it/a-threshold-can-take-you-further-than-a-statement-the-court-of-justices-ruling-in-meta-platforms-and-others-case-c-252-21/, visited: 20.05.2024, p. 2

[24] KERBER, Wolfgang; ZOLNA, Karsten K. The German Facebook case: The law and economics of the relationship between competition and data protection law. *European Journal of Law and Economics*, 2022, Vol. 54, No. 2, p. 231

[25] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 51

[26] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 150

At the same time, the Court of Justice emphasizes that the competition authority must consider the decision of the supervisory authority, the leading authority or the Court of Justice of the EU when making a decision, while it is not excluded that it may draw its own conclusions from this decision for them in order to apply competition law. CJEU indicated, that "it follows that, where, in the context of the examination seeking to establish whether there is an abuse of a dominant position within the meaning of Article 102 TFEU by an undertaking, a national competition authority takes the view that it is necessary to examine whether that undertaking's conduct is consistent with the provisions of the GDPR, that authority must ascertain whether that conduct or similar conduct has already been the subject of a decision by the competent national supervisory authority or the lead supervisory authority or the Court. If that is the case, the national competition authority cannot depart from it, although it remains free to draw its own conclusions from the point of view of the application of competition law."[27]

By contacting the national German authority for data protection and freedom of information, [28] Commissioner for Data Protection and Freedom of Information in Hamburg, Germany [29] having remits in relation to Facebook Deutschland and the data protection authority, Ireland [30] fulfilled its duty of loyal cooperation with the concerned national supervisory authorities as well as the leading supervisory authority. At the same time, the CJEU emphasizes that the competition authority must take into account the decision of the supervisory authority, the leading authority or the Court of Justice of the EU when making a decision, while it is not excluded that it may draw its own conclusions from them for the application of competition law. From our point of view, this means that even if the authority exercising competences in the field of personal data protection decides that the platform has committed an act in violation of the GDPR regulation, this does not automatically mean (if it has a dominant position) that it has also committed an abuse of a dominant position. At the same time, the decision that the platform did not violate the GDPR does not automatically lead to the result that it did not abuse a dominant position.

3.3.2. Regarding the sixth preliminary question

With the sixth preliminary question, the national German court asked whether the consent given to a platform that has a dominant position on the relevant market can be considered valid, taking into account the conditions set by the GDPR

27 Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 56

28 Bundesbeauftragte für den Datenschutz und die Informationsfreiheit (BfDI)

29 Hamburgische Beauftragte für Datenschutz und Informationsfreiheit

30 Data Protection Commission (DPC), Ireland

regulation in Art. 4 point 11. Significant factor is, above all, whether such consent can be considered freely given.

First of all, it is necessary to point out that according to the conclusions of the Court of Justice of the EU, the fact that the subject has a dominant position does not prevent the consent to the processing of personal data from being validly granted, specifically "in that regard, it should be noted that, admittedly, the fact that the operator of an online social network, as controller, holds a dominant position on the social network market does not, as such, prevent the users of that social network from validly giving their consent, within the meaning of Article 4(11) of the GDPR, to the processing of their personal data by that operator." [31]

In our opinion, one of the key points of the decision is that CJEU *de facto* laid the foundation for paid versions of platforms, stating that "thus, those users must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the online social network operator, which means that those users are to be offered, *if necessary for an appropriate fee*, an equivalent alternative not accompanied by such data processing operations."[32]

In summary the CJEU concluded that "in the light of the foregoing, the answer to Question 6 is that point (a) of the first subparagraph of Article 6(1) and Article 9(2)(a) of the GDPR must be interpreted as meaning that the fact that the operator of an online social network holds a dominant position on the market for online social networks does not, as such, preclude the users of such a network from being able validly to consent, within the meaning of Article 4(11) of that regulation, to the processing of their personal data by that operator. This is nevertheless an important factor in determining whether the consent was in fact validly and, in particular, freely given, which it is for that operator to prove."[33]

4. CONCLUSION

There can be no doubt that the decision of the Court of Justice of the EU in question is of fundamental importance for the development of legal doctrine for the

[31] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 147

[32] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 150

[33] Judgement of the 4th of July 2023, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2023:537, point 154

field of competition in the digital market. CJEU highlights on several places of the decision (for instance point 51 reffering to the European Commission) that the processing of personal data cannot be excluded from the competition law framework as it would not reflect the realities of the business model on which platforms such as Facebook are built. Firstly, we consider the finding of the CJEU to be particularly interesting, stating that platform users should be able to refuse consent to specific operations, unless they are necessary for the performance of the contract, or offer the user an equivalent alternative for a reasonable fee that does not involve such data processing operations. Apparently, this statement also led to the introduction of paid versions of online platforms. Secondly, from the point of view of competition law, we consider it a fundamental conclusion, that even if the platform has a dominant position in the online social network market, this does not prevent the users of such a network from validly giving their consent to the processing of their personal data in accordance with the GDPR regulation, however, the fact that the platform has a dominant position is a consistent attribute for assessing whether the consent was actually granted validly and freely, with the operator bearing the burden of proof. Thirdly, in the same way, the competition authority is entitled, as part of the review process of the abuse of a dominant position, to state that the general conditions of use are not in accordance with the GDPR, as long as it is necessary for proving the abuse of dominant position. The last fourth essential point, in our opinion constitutes defining the boundaries between the competences of data protection supervisory authorities and competition authorities supervising competition - or, better said, defining the framework for their cooperation. Taking into account the obligations of sincere cooperation with the supervisory authorities, the competition authority of a Member State may, in the context of an examination of whether there has been an abuse of a dominant position by an undertaking within the meaning of Article 102 TFEU, find that the general conditions of use drawn up by that undertaking relating to the processing of personal data and their implementation are not in conformity with the GDPR, if such a finding is necessary to establish the existence of an abuse.

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