Current Intelligence

Another Missed Opportunity? Case C-252/21 *Meta Platforms V. Bundeskartellamt* and the Relationship between EU Competition Law and National Laws

Or Brook* and Magali Eben**

Judgment of 4 July 2023, *Meta Platforms, Inc. and Others v. Bundeskartellamt*, C-252/21, ECLI:EU:C:2023:537

In the *Meta* preliminary ruling, the Court of Justice missed the opportunity to clarify the relationship between EU competition law and national (competition and other) laws, as codified in Article 3 of Regulation 1/2003.

I. Legal context

The relationship between EU competition law and national (competition and other) laws has been a source of controversy since the inception of the internal market. While the primacy of EU competition law clearly restricts Member States' authority to enact and enforce laws pertaining to anti-competitive agreements and abuse of dominance, it is less clear whether this primacy extends to other national measures regulating markets and market participants, such as unfair trading practices or digital market regulations.

In 2003, Regulation 1/2003 attempted to settle this matter through Article 3 (Article 3). Article 3(1) sets out the general principle of primacy of EU competition law, providing that if there is an effect on trade between Member States, national competition authorities (NCAs) and courts must apply EU competition law when they apply their national competition laws. Nevertheless, the Article contains two exceptions: First, Article 3(2) distinguishes between anti-competitive agreements that are covered by Article 101 TFEU (in which EU law has absolute primacy), and abuse of dominance that is governed by Article 102 TFEU (permitting 'stricter' national rules on unilateral conduct). Second, Article 3(3) notes that the NCAs and national courts retain the possibility to apply national rules that are not considered to be national competition law, namely rules with a 'predominantly different objective'.

In our recent research, we show that Article 3 was adopted following a heated debate, as a political compromise (Brook and Eben, 'Article3ofRegulation1/2003:ahistoricalandempiricalaccountofanunworkablecompromise' (2023) Journal of Antitrust Enforcement). As a result, its wording and meaning remain incomplete, vague, and significantly hamper the level playing field across the EU. By analysing historical political discussions, proposing a conceptual analysis, and systematically examining French and German practices, we point to the lack of clear limits for national action. Understanding the scope of Article 3 became important recently also to inform the interpretation of the DMA (see Brook and Eben, 'WhoShouldGuardthegatekeepers:DoestheDMAreplicatetheUnworkableTestofRegulation1/2003toSettleConflictsBetweenEUandnationallaws?' CPI 2022). Nevertheless, for the past twenty years, EU and national courts have avoided engaging with the thorny questions surrounding it.

The Court of Justice's *Meta* judgment offered a rare opportunity to clarify the dividing line between EU competition and national rules. Unfortunately, as this commentary shows, the ruling leaves us unsatisfied. Much of this missed opportunity has to do with the formulation of the referred questions by the German Court. Yet, the ECJ has repeatedly held that it has the power to provide full guidance on the interpretation of EU law to determine the compatibility of the national law. If questions have been improperly formulated, the Court is free to extract from all the factors provided by the national court and, in particular, from the statement of grounds in the order for reference, the elements of EU law requiring an interpretation having regard to the subject-matter of the dispute (C-384/08, paras 16–19).

* Associate Professor in Competition Law at the University of Leeds.
** Senior Lecturer in Competition Law and Co-Director of CREATe (creative economy research centre) at the University of Glasgow. In accordance with the ASCOLA Declaration of Ethics, the authors have no funding or conflicts to declare.

© The Author(s) 2023. Published by Oxford University Press.
This is an Open Access article distributed under the terms of the Creative Commons Attribution License (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.

Downloaded from https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpad047/7319218 by guest on 01 November 2023

This commentary will focus on the relationship between EU competition law and other laws, and will not discuss other interesting subjects examined by the Court. In particular, it does not engage with the questions concerning the interpretation of the GDPR.

II. Facts

The preliminary ruling request was made by the Oberlandesgericht Düsseldorf (Higher Regional Court- OLG Düsseldorf) in proceedings between the Meta Platforms group and the Bundeskartellamt (Federal Cartel Office, Germany—FCO), where the FCO prohibited Meta from processing data as provided for in the terms of service of its Facebook social network and from implementing those terms of service, and imposed measures to stop it from doing so.

The FCO held that the processing of users' data constituted an abuse of Meta's dominant position on the market for online social networks for private users in Germany, under the provisions of German competition law (19 and 32 GWB). Those terms were found to constitute abuse since the processing of the off-Facebook data was not consistent with the underlying values of the GDPR and were not justified based on that regulation.

When examining the appeal launched by Meta, OLG Düsseldorf had doubts, inter alia, about whether NCAs may, in the exercise of their powers, review whether the processing of personal data complies with the requirements set out in the GDPR.

III. Analysis

The national court referred seven questions to the Court of Justice, the majority of which focus on the interpretation of provisions of the GDPR (questions 2 to 5, and partially 6). Questions 1 and 7, which will be examined closely in this commentary ask, in essence, whether an NCA can find a breach of the GDPR for the purpose of establishing a breach of competition law, or at least consider compliance with the GDPR when assessing the balance of interests for the purpose of a finding of abuse of dominance. The referred questions particularly query the compatibility of such a finding with Article 51 of the GDPR, as well as raising the question whether there may be a problem from the perspective of the duty of sincere cooperation if the same data processing terms are at the same time being investigated by the GDPR supervisory authority. Thus, these questions combine substantive and procedural issues, opening the door to the substantive interaction between competition law and the GDPR, while raising more procedural questions about the interaction between enforcers.

In our opinion, the judgment addresses the interactions between enforcers in a more straightforward and consistent manner than it does the substantive interactions between competition law and GDPR. More details on specific scenarios are likely to be provided in the future, yet the judgment establishes quite clearly that the duty of sincere cooperation makes it incumbent upon NCAs to consult and cooperate with the national data protection supervisory authorities. NCAs cannot replace data protection supervisory authorities and, when they consider the GDPR in the exercise of their functions, they exercise different powers for different objectives than data protection supervisory authorities do when establishing breaches of the GDPR (paras 42–49). Although the rules on cooperation of the GDPR are not addressed to NCAs, NCAs who wish to consider compliance with the GDPR for the purposes of their competition law assessment, must cooperate with data protection supervisory authorities to ensure consistency in and effectiveness of the application of the GDPR (para 42 and 52–54). To reduce the risk of divergence, NCAs cannot depart from previous findings on the same or similar conduct by the competent national data protection supervisory authorities. Crucially, in case of doubt, the NCA must consult the competent national data protection supervisory authority (paras 55–59). It is the data protection supervisory authority who is the ultimate decision-maker on the interpretation of the GDPR.

The judgment engages with the substantive interactions between the GDPR and competition law, but leaves some issues unexplored.

The judgment briefly reflects on the substantive relevance of data (protection rules) for the enforcement of competition law. It indicates that non-compliance with the GDPR can be a factor *among others* in assessing a violation of competition law. The judgment notes that when competition authorities assess whether the methods used by undertakings are 'different from those governing normal competition', 'compliance or non-compliance ... with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case' (para 47). This existence of the GDPR as one of multiple factors is further emphasised by the Court's use of the word 'also', noting that NCAs can 'also' examine compliance with 'rules other than those relating to competition law, such as the GDPR (para 48). The Court does attribute particular importance to privacy and personal data protection in the context of competition law in digital markets, noting the importance of personal data to digital business models and the fact that privacy can be

Downloaded from https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpad047/7319218 by guest on 01 November 2023

a parameter of competition. As a result, it holds that not considering the rules on the protection of personal data would disregard these economic realities (paras 50–51). The judgment also considers the reverse: whether competition law concepts can be relevant to the enforcement of the GDPR itself: considering that dominance may be a relevant but not automatic factor in determining whether consent has been freely given in line with Article 4(11) of the GDPR (paras 140–149). As other commentators have noted, the judgment is by no means a comprehensive and conclusive analysis of the substantive interaction between competition law and the GDPR, leaving open the weight of non-compliance with the GDPR in a finding of abuse of dominance.

IV. Practical significance

Sometimes, what is *not* being said is as important as what is being said. The *Meta* judgment may have reflected on the GDPR as a factor for competition law assessments, but refrained from exploring how the GDPR could be used to establish breaches of competition law. In doing so, it not only refrained from further exploring the substantive interaction between two different laws. This section argues that it also left three thorny issues of Article 3 of Regulation 1/2003 unanswered.

IV.I. The obligation to 'apply' EU competition law (article 3(1))

While the FCO examined the case entirely under German law, OLG Düsseldorf stated that not applying Article 102 TFEU was a 'procedural error'. At the same time, according to OLG Düsseldorf, this error was 'irrelevant' for the purpose of the preliminary reference, because it had no bearing on the application of Section 19 GWB (Grounds, III(1)(c) on page 10).

This statement was contested neither by the ECJ nor the AG, yet is far from obvious. EU Courts have yet to clarify what the obligation to 'apply' Article 102 TFEU alongside national law implies. In our article, we point to the real implications of 'applying' the EU provisions. In terms of *substance*, for example, national prohibitions on unilateral conduct, can only apply if they are 'stricter', rather than different, than Article 102 TFEU (see next section). In terms of *procedure*, the obligation to apply Article 102 TFEU triggers a set of notification requirements and coordination mechanisms with the Commission and ECN. If the FCO had applied EU law, the Commission and 'sister' NCAs would have had a greater opportunity to influence the decision. These implications, nevertheless, were not discussed in the judgment.

IV.II. The dividing line between EU and national 'competition' rules (article 3(2))

The FCO had established abuse under the national provision based on the German 'terms and conditions' case law. In judgments such as *VBL Gegenwert* and *Pechstein*, the German Federal Court of Justice applied Section 19 GWB to prohibit a contractual party that was so powerful as to allow it to dictate the terms of the contract and the contractual autonomy of the other party was abolished. Based on this reasoning, the FCO examined the legality of Meta's data processing terms according to the GDPR. The FCO highlighted that data protection law aims to counter asymmetries of power between organisations and individuals and ensure an appropriate balancing of interests between data controllers and data subjects. Data protection laws, accordingly, provide individuals rights to decide freely and without coercion on the processing of their personal data, thereby protecting their fundamental right to informational self-determination.

According to the FCO and OLG Düsseldorf, the data processing terms were manifestations of Meta's market power, and breached the GDPR. They held that, according to the German case law, an 'additional assessment of the balance of interests with regard to competition is superfluous' (Grounds, III(1)). OLG Düsseldorf added that the causal link between abuse and market power could be established because 'if competition were functioning effectively it would not be advisable for Facebook Ireland to insist on conditions for data processing operations that are not permitted under the GDPR' (Grounds, III(1)(b)).

This line of reasoning was *not* adopted by the ECJ when it comes to the application of EU competition law. As the AG stated, the unlawful nature under Article 102 TFEU was not apparent merely from a lack of compliance with the GDPR (or other legal rules) (para 23). Rather, the ECJ called for a case-by-case analysis, in which non-compliance with the GDPR is only a '*a vital clue among the relevant circumstances* of the case in order to establish whether that conduct entails resorting to methods governing normal competition' (para 47, own emphasis).

The different approach to establishing abuse under German and EU competition laws raises the question of whether the German 'conditions' abuse under Section 19(1) GWB constitutes a 'stricter' national provision on unilateral conduct in the meaning of Article 3(2). According to Article 3, when there is an effect on trade between Member States, the 'terms and conditions' case law could only apply if it is classified as *stricter* than Article 102 TFEU, rather than an equivalent provision applied in a *different* manner.

Downloaded from https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpad047/7319218 by guest on 01 November 2023

This question is more complicated than it might first appear. Article 3(2) does not spell out what 'stricter' means. As we show in our study, various interpretations are possible, including (i) a stricter standard of what constitutes an abuse; (ii) a lower level of market power to establish a position of dominance; (iii) different degrees and types of economic power (e.g., economic dependence, or gatekeeper powers); or (iv) rules applying to conduct that was objectively justified under Article 102 TFEU.

The FCO and OLG Düsseldorf were of the opinion that the interpretation of Section 19 GWB amounts to stricter national law. They first confirmed that Section 19 GWB is a competition law provision (rather, than a law pursuing a predominately different objective in the meaning of Article 3(3)), because like Article 102 TFEU it has the objective of protecting consumers against distortion of the competition rules and exploitation (Grounds, III(1)(b)). Next, they explained that the national provision is 'stricter', because 'the concept of protection developed in the German case-law in relation to the general provision of Article 19(1) of the GWB has yet no counterpart in European case-law or practice' (page 10 of the request). The FCO and OLG Düsseldorf, therefore, appear to assume that the national provision is 'stricter' based on a different standard of what constitutes abuse.

This matter was not referred to a preliminary ruling, and was not taken up by the ECJ on its own motion. Despite the differences between the national 'conditions' abuse of Section 19(1) GWB and Article 102 TFEU, the ECJ and AG seemed to assume equivalence between the national and EU provisions. The AG noted that the FCO had exercised the powers 'conferred on it by Article 102 TFEU ... or by any other *equivalent national* provision' (para 22, footnote 16, own emphasis), and the ECJ was even more ready to conflate the national competition rule with Article 102 TFEU, assessing the powers of NCAs when examining an abuse of dominance '*within the meaning of Article 102 TFEU*' (Ruling 1, para 56, 62, ECJ Judgment).

By not engaging with the relationship between the national provision and Article 102 TFEU, the Court left open whether identical cases could be brought under *EU* competition law and national competition law.

IV.III. The dividing line between 'competition' and 'other' rules (article 3(3))

In *Meta*, the ECJ examined whether Article 51 et seq. GDPR must be interpreted as meaning that an NCA can find that a dominant undertaking's general terms of use relating to the processing of personal data and the implementation amount to an abuse because they are not consistent with the GDPR. In answering this question, the Court highlighted the differences between competition law and the GDPR.

While it did not directly address the relationship between EU competition law and 'other' national laws (but rather, 'another' EU law—the GDPR), we believe it can inform, by analogy the interpretation of the dividing lines between Articles 3(2) and (3) of Regulation 1/2003. In our article, we point to three possible benchmarks to guide this distinction based on a study of Regulation 1/2003's legislative history, of the case law of the EU Courts, and of the Commission's policy papers, namely according to the (i) objective of the national statutes; (ii) objective of the specific national provision; and (iii) the harm addressed in the enforcement of the national provision in practice. We demonstrated that each of the benchmarks represents a trade-off between formalism, legal certainty, and uniformity.

The Court and AG in *Meta* appear to follow the objective of the specific provision (benchmark II). The Court found that '[i]n view of the different objectives pursued by the rules established in competition matters, in particular Article 102 TFEU, on the one hand, and those laid down in relation to the protection of personal data under the GDPR, on the other, it must be held that, where a national competition authority identifies an infringement of that regulation in the context of the finding of an abuse of a dominant position, it does not replace the supervisory authorities' (para 49). The AG used similar, albeit slightly different terminology, referring to 'the different objectives of the two categories of provisions' (footnote 18).

The Court explained that while the primary task of the supervisory authority is to monitor and enforce the application of the GDPR, 'to protect the fundamental rights and freedoms of natural persons in relation to the processing of their personal data and to facilitate the free flow of such data within the European Union' (para 45. Also see para 38 and GDPR, Articles 51(1) and (2), 57(1)(a) and (g)), NCAs have the power to adopt decisions under Article 102 TFEU, 'whose objective is to establish a system which ensures that competition in the internal market is not distorted, having regard also to the consequences of such an abuse for consumers in that market' (para 46).

Consistent with its previous case law on the goals of EU competition law and Article 102 TFEU, the Court did not provide a clear definition as to their scope. It referred to a mix of protection of the competitive process and structure as such ('conditions of competition' 'normal

Downloaded from https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpad047/7319218 by guest on 01 November 2023

competition'), to the protection of the internal market, and consumer welfare ('consequences of such an abuse for consumers in that market').

In conclusion, the ECJ has missed an opportunity to clarify some of the fundamental questions about the interpretation of Article 3 of Regulation 1/2003, and the relationship with national laws governing unilateral conduct of powerful undertakings. Such a clarification would have been particularly timely, given the ongoing review of the Regulation.

https://doi.org/10.1093/jeclap/lpad047

Downloaded from https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpad047/7319218 by guest on 01 November 2023