COMPETITION LAW IN THE DIGITAL AGE

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INTERPLAY BETWEEN DATA PROTECTION AND COMPETITION LAW – THE ECJ'S RULING

On 4 July 2023, the European Court of Justice (ECJ) handed down its highly anticipated **ruling** in Case C-252/21 (*Meta Platforms and Others*), dealing with the interplay between competition law and data protection law, in particular the General Data Protection Regulation (GDPR). The ECJ held that national competition authorities (NCAs) may analyse a dominant firm's compliance with data protection law to assess an alleged abuse of a dominant position. However, according to the ECJ, the important caveat is that NCAs must cooperate with the competent data protection authorities and in particular take sincere account of any decision or pending investigation before they rule on the lawfulness of a certain data processing activity.

Facts and background of the case

In order to register on Facebook, users needed to consent to Meta's terms of service as well as its data and cookie policies. These terms granted Meta *inter alia* the right to collect and process data on activities both in and outside of Facebook and link it to a specific account. Data relating to activities outside Facebook (so-called "off-Facebook data") includes both information relating to the use of third-party services as well as to the use of other Meta services (e.g., WhatsApp, Instagram). In **February 2019**, the German Federal Cartel Office (FCO) prohibited Meta inter alia from collecting users' off-Facebook data, arguing that Meta abused its dominant position on the market for social networks since its terms of service and data processing violated GDPR rules. Although users actively agreed to the data processing, the FCO found that such consent was not "freely" given in light of Meta's dominant position and the fact that consent to data processing was a strict prerequisite to use Facebook. After Meta brought an action against this decision – and some back and forth through national instances – the Higher Regional Court of Düsseldorf suspended the proceedings and referred them to the ECJ.

Key takeaways

In its preliminary ruling, the ECJ clarified important aspects on the interplay of data and competition law:

- NCAs are entitled to consider violations of rules other than competition law, such as the GDPR, as part of their antitrust analysis. The ECJ argued that, while competition law and data protection law had different objectives, compliance or non-compliance with the GDPR may be a "vital clue" for determining whether a certain conduct involves methods of normal competition and assessing a practice's consequences in the market and for consumers.
- In that context, the ECJ held that access to and use of personal data are both of great importance in the context of the digital economy and form a significant parameter of competition between undertakings.
- The ECJ also clarified that there are some limitations. In brief, NCAs do not replace data protection authorities and they cannot interfere with their competence to supervise GDPR compliance. Where an NCA identifies a GDPR infringement, this does not replace a – potentially deviating – decision of a data protection authority. In practice, this means that an NCA must take into consideration any decision or investigation and cannot depart from it.
- The ECJ held that the principle of sincere cooperation (Art. 4(3) TEU) requires NCAs to cooperate closely with competent data protection authorities. Even when there is no pending investigation or

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decision on a given data processing activity, NCAs must actively consult and seek cooperation with data protection authorities when analysing and assessing GDPR questions.

- Finally, the ECJ held that, while a dominant position on the social network market would not exclude the voluntary nature of user consent to a specific data processing activity, it may affect an users' freedom of choice and create an imbalance. Therefore, such a position is an important factor when determining the validity and the voluntary character of the consent. A voluntary decision also includes the freedom of the user to refuse consent to data processing operations not necessary for the performance of the contract, without being obliged to refrain from using the service altogether.

Implications

The main proceedings before the Higher Regional Court of Düsseldorf will now continue in light of the ECJ's ruling. The FCO **claimed immediately after the ruling** that it sends a "*strong signal for competition law enforcement in the digital economy*".

The ruling is a prime example of a tangible interaction between competition law and data protection law, especially in digital markets. It makes clear that NCAs may not only look at the competitive effects of an undertaking, but also at the effects on the level of data protection. Where access to personal data and the possibility to process it are considered important parameters of competition between digital undertakings, they may form an integral part of antitrust analysis in such cases. The ruling also indicates an interaction between competition law and other regulatory regimes. The ECJ mentioned that it may be necessary for the NCAs to examine whether an undertaking complies with rules "*other than […] competition law, such as the rules of [the GDPR]*". Time will tell whether NCAs will also apply other laws (e.g. consumer law), but for now, the ECJ ruling will be of particular importance for digital undertakings and their data processing activities.

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THE GERMAN FCO OFFICIALLY TERMINATES ITS ANTITRUST PROBE INTO LIEFERANDO'S PRICE PARITY CLAUSE

The German FCO has **officially closed** enforcement proceedings against Lieferando without establishing any findings of anti-competitive behaviour by the online food delivery platform. The FCO was investigating an equal price guarantee, more commonly known as a most favoured nation or price parity clause, in Lieferando's general terms and conditions (T&Cs) with partner restaurants. The FCO was also investigating Lieferando's practice of setting up ''shadow websites'' for restaurants, including assessing possible market effects caused by the combined use of these websites and the parity clause in question.

A price parity clause that requires a business to offer the same price to its contracting party as offered by it to other trading partners is generally referred to as a "wide" parity clause. When the business is required to offer the same price as it charges through its own direct sales channels (for example, its website), but is free to offer lower prices through different channels, it is called a "narrow" parity clause. Lieferando includes such a "narrow" parity clause in its T&Cs to ensure that prices, including discounts and special offers, on its platform are as competitive as those offered by partner restaurants.

While some European competition authorities and courts have contended that wide parity clauses infringe competition law, many others have held that narrow parity clauses are compatible with competition law. Only a few competition authorities have ruled that narrow parity requirements can be problematic. Notably, narrow parity clauses are automatically exempted under the European Commission's revised vertical block exemption regulation (VBER), provided the criteria set out for block exemption are fulfilled. Although wide parity clauses are not block-exempted under the VBER, they can still be acceptable, for example, if the pro-competitive benefits of the agreement outweigh any anti-competitive effects. This also applies to narrow parity clauses that do not meet the conditions for block exemption under the VBER. In addition, parity clauses may fall outside the scope of the prohibition of anti-competitive agreements altogether if they are a necessary element of an agreement that is not otherwise anti-competitive ("ancillary restraints").

Considering the fragmented European approach to the competition law assessment of parity clauses, earlier this year, the Amsterdam District Court **requested** clarity from the European Court of Justice on the possibility of qualifying parity clauses as ancillary restraints and factors that should be taken into account when considering market definition in circumstance where these clauses are being used (see our **previous coverage**).

There has been considerable debate on parity clauses in Germany in relation to online travel agents (OTAs). For instance, while the FCO has always been sceptical of parity clauses (prohibiting them previously in e-commerce and online travel/ accommodation), the Dusseldorf Higher Regional Court ruled that narrow parity clauses are ancillary restraints that are required for countering free riding by hotels on the platforms of OTAs. However, Germany's Federal Court of Justice overruled the Higher Regional Court and held that even narrow party clauses can be anti-competitive.

In the present instance, the FCO was investigating if the narrow price parity clause in Lieferando's T&Cs reduces incentives for partner restaurants to use other intermediary food delivery platforms at more favourable conditions. Nevertheless, the FCO investigations revealed that restaurants are, in fact, already increasingly using alternative delivery services, which are newly entering the market and that sometimes restaurants are also multi-homing (meaning the concurrent use of several delivery services). To adequately assess the effects of the price parity clause on the market, the FCO also involved various competitors of Lieferando and several restaurant associations in its investigation.

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According to the FCO, the relevant market is dynamic, with new entrants offering restaurants options to choose from, and it cites Uber Eats and Wolt as recent market entrants.

The FCO further highlights that competition in the market for the provision of intermediary services for meal orders is determined not only by the prices charged, but also by non-price factors such as the differentiation of platforms and services. Overall, the FCO investigation did not reveal sufficient indications that the parity clause used by Lieferando represents a barrier to market entry by new platforms offering differentiated services. The FCO investigation also did not establish an alleged "pull effect" in favour of Lieferando caused by the combination of the price parity clause and "shadow websites". Shadow websites are restaurant websites set up by Lieferando at the request of its partner restaurants and involve the use of Lieferando's intermediary services for meal orders.

The termination of the probe against Lieferando indicates that despite its known discomfort with parity arrangements, the FCO is at least open to evaluating different parity cases on their respective individual merits, including a detailed investigation of the market circumstances in each case. That said, parity clauses remains an enforcement priority for the FCO, as can be seen by its **ongoing** investigation of a requirement by PayPal from its partner merchants to not offer their goods and services at lower prices if a customer uses a payment method that is cheaper than PayPal.

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FRENCH COMPETITION AUTHORITY REPORT ON CLOUD MARKET STUDY

On 29 June 2023, the French Competition Authority ("FCA") published its **final report** on competition for cloud services in France. The FCA's study looks at the structure of the market, competitive dynamics and key competition risks in the sector. The report also discusses the extent to which existing competition tools, combined with new regulatory initiatives at the national and European level, may address the issues identified. Overall, the FCA appears satisfied that the issues can be addressed by existing competition tools and current regulatory initiatives.

Key Features of the Market

- **A highly concentrated market, led by major digital players and subject to further consolidation**. The FCA notes that the market for cloud services in France is highly concentrated – particularly with respect to IaaS and PaaS services - with Amazon, Microsoft and Google being the largest players. Consolidation has been a trend of the market, which is likely to be subject to close scrutiny by competition authorities.
- **Possible multi-cloud strategy but no multi-homing.** While companies may use different service providers for each workload (i.e. multi-cloud), they generally use only one cloud service provider per workload (i.e. no multi-homing). The FCA found this is due to the necessary investments both in time and money, pricing structures and the inherent complexity of the projects involved.
- **Competition *for the market* between ecosystems**. The FCA found that the absence of multi-homing means that competition tends to be structured around users' initial choice of ecosystems, with limited switching between ecosystems thereafter.

Key Competition Risks

The FCA identifies the following competition risks:

- **Supplier power.** The FCA notes that the market is characterised by an imbalance in supplier/customer relationships. Further, there is a general lack of clarity and transparency in pricing which can often make it difficult for customers to anticipate costs of services.
- **Pricing practices: cloud credits and egress fees**.
  - **Cloud credits** can either be short-term free trials or longer-term support programmes. In both cases, the FCA notes that these can be of real benefit to customers to avoid the need for a significant investment upfront and to service providers to encourage the use of their technology. However, the FCA is concerned that longer-term targeted support programmes - which represent a significant investment and are generally offered by larger providers to high-potential clients - may not be offered profitably by all cloud service providers, possibly leading to the foreclosure of equally efficient competitors.
  - **Exit or egress fees** are levied by certain cloud service providers upon the transferring of data, either to a competing provider or to the company's on-premise infrastructure. The FCA identifies these as a cause for concern in the sector - first, because their pricing structure, which is based on the volume of data to be transferred, is often disconnected from the costs incurred by the supplier and is difficult for customers to anticipate; and second, because these transfer fees may have an impact on customers' incentives and ability to switch and either change from their primary provider or multi-home and use several providers in a multi-cloud environment.
- **Incumbency advantage and vendor lock-in.** The FCA found that switching is a complex and costly operation that may lead customers to favour their incumbent IT service provider. The FCA's investigation also found other practices which may further re-enforce barriers to switching, including tying and loyalty-inducing pricing practices. Several complaints are currently pending before the European Commission in this respect.
- **Interoperability and data portability.** While many companies are still in the initial process of migrating to the cloud and have not yet envisaged subsequent switching between cloud service providers, the FCA found that poor interoperability currently limits multi-homing and that data portability issues may be a significant risk to switching between cloud service providers in the future.

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- **Neighbouring markets.** The FCA's study also considers risks arising from the presence of certain cloud service providers on neighbouring markets, including: risk that a dominant cloud software editor may leverage its dominant position to foreclose competitors from a necessary input; risk that hyperscalers may cross-subsidise the development of their cloud services; and risk of distortion of competition through hyperscalers' unmatched access to data, enabling them to better target customers' needs and develop higher performing services, including through the use of AI.

Regulatory Response and Next Steps

The FCA's market study is one of several recent regulatory initiatives addressing competition in the cloud sector in Europe, including: the Digital Markets Act and Data Act at EU level and the French bill to Secure and Regulate the French Digital Space at the national level (which both address data portability issues). It also follows a similar study by the Dutch Authority for Consumers & Markets (ACM), published in September 2022 (see our **previous coverage**), as well as an ongoing investigation by the UK Communications regulator, Ofcom. The ACM further conducted a follow-up investigation into competitive risks resulting from obstacles to switching between cloud services. The ACM closed its investigation in April 2023 without taking any action.

Although the FCA for now appears satisfied that existing competition tools and current regulatory initiatives can address the issues raised, its report nonetheless serves to highlight the attention points that the FCA will be watching closely as the cloud economy develops. In a further recent development, on 27 September 2023, the FCA announced it had raided a company in the graphics cards sector, as part of its wider focus on cloud computing.

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THE SPANISH COMPETITION AUTHORITY FINES APPLE AND AMAZON FOR RESTRICTING COMPETITION ON AMAZON MARKETPLACE

On 18 July 2023, the Spanish Competition Authority (CNMC) **fined** Apple EUR 143.6 million and Amazon EUR 50.5 million for including anticompetitive clauses in their distribution agreements, that were found to have breached Article 101 of the TFEU and its equivalent in Spanish law. These included:

- "brand-gating" clauses, under which only Apple-authorised resellers could sell Apple-branded products on Amazon marketplace in Spain;
- advertising clauses that precluded competing brands from purchasing space on Amazon's Spanish website to display advertising when Apple products are searched for or bought; and
- marketing limitation clauses that prevented Amazon from conducting marketing and advertising campaigns to specifically target customers who had purchased Apple products on Amazon's Spanish website and encourage them to switch to a competing product without Apple's consent.

The CNMC concluded that as a result of the brand-gating clauses: (i) more than 90% of the resellers who had been using Amazon's website in Spain were excluded; (ii) competition among resellers significantly decreased as Apple-branded product sales in the online marketplace were concentrated on Amazon itself, and (iii) consumers paid higher relative prices to purchase Apple products. The advertising and marketing limitation clauses reduced competitive pressure on Apple by restricting competitor advertising and Amazon marketing campaigns. The CNMC considered that the clauses negatively affected consumers also because they limited their ability to discover new brands or alternative products to those of Apple; they increased their costs of searching for those products; and they reduced their capacity to switch products.

Similar investigations in other jurisdictions

Brand-gating clauses and related limitations on advertising or marketing campaigns at Amazon marketplace have also been carefully reviewed by other European competition authorities. The Italian Competition Authority fined Amazon and Apple EUR 173.3 million in November 2021 for allegedly restricting competition in respect of the sale of certain Apple and Beats products on Amazon's Italian marketplace. However, the Lazio Regional Administrative Court overturned the decision in November 2022 on procedural grounds. In October 2020, the German Competition Authority investigated Amazon's brand-gating agreements with specific manufacturers in the German market for an alleged breach of competition law. The investigation was extended in November 2022 to also apply the new powers granted by Article 19(a) of the German Competition Act.

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DIGITAL REGULATION IN THE EU AND UK

On 6 September, the European Commission (EC) **designated** six gatekeepers, namely Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft, and 22 core platform services under the DMA. Meanwhile, across the Channel, the UK's proposed digital regulation regime is continuing to make its way through the legislative process. The **Digital Markets, Competition and Consumers Bill** (the Bill) passed the Parliament Committee stage in July and is now expected to become law within the next year. This article provides a brief overview of the UK regime and highlights some of the key differences with the DMA.

The UK's pro-competition regime for digital markets

The UK's regime will be overseen by the Digital Markets Unit (DMU) within the Competition and Markets Authority (CMA). The DMU has already been established on a non-statutory basis and is currently preparing for the new regime. The regime will only apply to undertakings designated as having strategic market status (SMS) in respect of a digital activity. The CMA will be able to designate an undertaking as having SMS where, following an investigation, it establishes that the following criteria are met:

- the digital activity carried out by the undertaking is linked to the UK
- the undertaking has, in respect of that digital activity, both substantial and entrenched market power and a position of strategic influence
- the undertaking's global turnover in the relevant period exceeds £25 billion, or its UK turnover exceeds £1 billion within this period.

The CMA will be able to impose conduct requirements on a designated undertaking for the purposes of fair dealing; open choices; and/or trust and transparency. These requirements may be framed as either obligations or restrictions (for example, preventing undertakings from using data in a certain way, or mandating that they keep types of data separate). The CMA will be under an ongoing duty to consider the effectiveness of and compliance with these conduct requirements and may impose enforcement orders on undertakings for the purpose of remedying breaches

Comparison with the DMA

While the overall goals of the EU and UK regimes are similar, there are some important differences between the two approaches.

FEATURES	DMCC	DMA
Designation criteria	The CMA will assess whether an undertaking has SMS based on its market power, strategic significance, turnover and UK activity nexus.	Gatekeepers are determined by quantitative thresholds such as number of users and turnover. Gatekeepers may challenge this designation if they can show exceptional circumstances.
Obligations	The CMA will create tailored conduct requirements addressing the specific activities of SMS undertakings.	Standard obligations apply to all gatekeepers.
Non-compliance	The CMA may impose penalties of up to 10% of worldwide turnover, with additional periodic fines of up to 5% of daily worldwide turnover.	The EC may impose a fine of up to 10% of worldwide turnover. Fines up to 20% of worldwide turnover may be imposed for repeat infringements.

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FEATURES	DMCC	DMA
Exemptions	SMS undertakings may seek to avoid penalties by pleading for a countervailing benefits exemption. To do so, the breach must benefit consumers more than it harms competition, and the conduct must be proportional and indispensable	No such exemptions are available.
Additional remedies	The CMA will make pro-competition interventions (PCIs) where it considers that this would help remedy an adverse effect on competition. A PCI may take the form of a conduct order or a non-binding recommendation to the government/other regulators.	If a gatekeeper systematically fails to comply with the DMA, the EC can open a market investigation and, if necessary, impose behavioural or structural remedies.
Appeals	Decisions may be reviewed by the Competition Appeal Tribunal on a judicial review basis.	EC decisions may be reviewed by the General Court on a merits basis.
Merger control	SMS undertakings must report transactions if they meet certain criteria: at least £25 million consideration, percentage thresholds of shares or voting rights, and a link to the UK.	Gatekeepers must report transactions to the EC where the merging entities or the target provide core platform services or any other services in the digital sector or enable the collection of data.

Next steps

In the EU, the six gatekeepers now have until 6 March 2024 to ensure compliance with their DMA obligations. The Commission has opened investigations into claims by Microsoft and Apple that some of their core services do not qualify as gateways; despite meeting the thresholds. In addition, the Commission has opened a market investigation to further assess whether - despite not meeting the thresholds - Apple's iPadOS should be designated as gatekeeper.

In the UK, the Bill is expected to come into force in 2024 but the new provisions are unlikely to become fully applicable until 2025. The SMS designation process has a timeframe of nine months, which may be extended by three months. The CMA will also develop and consult on bespoke conduct requirements for each designated undertaking. In the meantime, the CMA is continuing with its internal preparations for the new regime, including the establishment of a dedicated Data, Technology and Analytics (DaTA) unit and the appointment of external 'digital experts' from industry, academia and other regulators.

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