Meta Platforms Case (C-252/21): Opinion of Advocate General

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The Advocate General, Athanasios Rantos, presented his conclusion on the Meta Platforms Case (C-252/21), being this the first step to one of the procedures that will mark the European jurisprudence in competition law. The case had its origin in a request for a preliminary ruling presented by the Higher Regional Court, Düsseldorf, within the case that opposes the Federal Cartel Office to the Meta Group. *In casu,* the *Bundeskartellamt* prohibited the personal data treatment foreseen on the terms and conditions of Facebook by stating that it constituted an Abuse of Dominant Position (Article 102 TFEU) in the social media market.

There is, in this case, an essential question: knowing if a Competition Authority may, within the framework of the file related to competition infractions, examine, as an incidental question, if the conditions of data processing are in accordance with the General Data Protection Regulation (GDPR). This question is not unanimous in the doctrine, as some consider that an analysis from the point of view of competition law will not be the most adequate to deal with this type of situation. It should be preferential, for example, an analysis from the point of view of consumer law or data protection law[1], making clear the dangers of self-promoting interpretations and contradictory decisions.[2] Regarding this matter, we can see that the European Union has come forward, by stating that any concern related to data privacy would escape the scope of application of Competition Law.[3]

[1] DZHULIIA LYPALO, "Can Competition Protect Privacy? An analysis Based on the German Facebook Case", *in World Competition,* 44, no. 2, 2021, pp. 169-198(**191**). With the same position, see MASSIMILIANO KADAR, European Competition Law in the Digital Era", *in Zeitschrift fur Wettbewerbsrecht,* 4/2015, p. 342, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703062

[2] ANNE C. WITT, "Facebook v. Bundeskartellamt – May European Competition Agencies Apply the GDPR?", *Competition Policy International,* TechREG CHRONICLE, 2022, p.7, available at https://ssrn.com/abstract=4089978 . The Author advocates that the competition authorities might reach a different decision in regards to the supervision agencies in data protection law, considering, equally, that it might weaken the consecrated system in the General Data Protection Regulation.

[3] Decision of the European Commission, COMP/M.7217 – Facebook/Whatsapp, adopted on 3 October 2014, paragraphs 164-165.

The Opinion of the Advocate General regarding this preliminary ruling seems to us to be very interesting. To start, he states the necessity of a Competition Authority every time that it interprets the GDPR, fulfilling the principle of loyal cooperation[4], which implies *(i)* that it does not put away the interpretations of the Authorities whose mission is to inspect the fulfilment of the GDPR and *(ii)* that consults the national control's entity every time that there is any doubt. Furthermore, every time there is no decision, it shall contact the competent authority, cooperating with it whenever it has initiated the investigation or manifested the intention of doing it. *In casu*, the Advocate General considered that *Bundeskartellamt* respected its diligence duties, namely through the cooperation with national authorities, as well with the informal contact of the Irish authority control.

Consequentially, it argues that the Competition Authority, within the scope of its powers, may analyze – at an *incidental level*[5] - the conformity of the practices with GDPR as long as it promotes cooperation with the competent entity in regard to data protection law. The position of the Advocate General does not forget the need to have in mind the competent authorities to investigate its conformity with GDPR[6], as it reiterates that its application should occur at an incidental level, if it is necessary to the investigation at stake. Although practical questions may arise from this opinion, and not having guarantees that the Court of Justice will follow this position, it seems to us that it constitutes a very important first step. After all, we cannot ignore that, in the digital world, one evaluation, albeit incidental, of GDPR may be relevant, especially in situations where the digital platform has a dominant position[7], and it raises practical problems of competition law.

[4]According to Article 4, no. 3, of TEU, "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

[5] However, it is important to mention that the Advocate General considers, *in casu*, that this is not a situation when there was an application of GDPR at a main level, by stating that its preliminary ruling is inoperant.

[6] WOLFGANG KERBER e KARSTEN K. ZOLNA, "The German Facebook case: the law and economics of the relationship between competition and data protection law", in *European Journal of Law and Economics*, 54, 2022, 217-250(245-246) states that the cooperation between competition and data protection authorities is possible in different circumstances, by arguing that its promotion will lead to a better analysis and comprehension of different problems, as well as allowing a relevant exchange of information on different perspectives within competition and data protection law.

[7]ANCA CHIRITA, "The Rise of Big Data and the Loss of Privacy", in *Personal Data in Competition, Consumer Protection and Intellectual Property Law – Towards a Holistic Approach*? Springer, 2018, p. 153-189(168), calls our attention for this point, stating that "the EU competition authorities are sufficiently robust and equally flexible to effectively adjust the needs of the online economy and successfully protect European Citizens as online consumers."

Additionally, the Advocate General evaluated if an eventual dominant position[8] could be relevant to find out if the consent given by holders is valid and free, according to article 4, no. 11, GDPR.[9] From his point of view, the existence of a possible dominant position, although it is a factor to consider, does not remove the validity of consent. However, it has in mind that the dominant position of Grupo Meta's digital platforms might, eventually, promote an imbalance in the relations between the controller and the owner of the data (user), which must be taken into account in the appreciation of the requirement of consent's freedom.[10]

Therefore, the Court of Justice willhave the opportunity to further elaborate jurisprudence in this area. Not forgetting the challenges that this matter holds, the first struggle will be to define the relevant market[11], which is difficult because this is a *zero-price market,* as Facebook's users do noy pay any monetary counter-performance for its use. There is no "direct finance transaction between a seller service provider and the customer."[12] Thus, the type of abuse at stake is not

[8] In *United Brands* (C-27/76), paragraph 65, the European Court of Justice defines a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

[9] According to article 4º, n. º11, GDPR the consent of the data subject is "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*."

[10] Additionally, the Advocate General recognizes that this situation does not imply necessarily an equivalence to the threshold of the dominant position, according to article 102º TFEU.

[11] This is a main essential step, because, as SOFIA PAIS, *Entre Inovação e Concorrência – Em Defesa de um Modelo Europeu*, Universidade Católica Editora, 2011, p. 453, states that it is necessary to "the previous identification of the market in which might be appreciated the economic power of the company, being fundamental to determine the competition positions to which is subject." (translated)

[12] MÁRIA T. PATAKYOSA, "Competition Law in Digital Era – How to Define the Relevant Market?" in *4th International Scientific Conference – EMAN 2020* – Economics and Management: How to Cope with Disrupted Times, 2020, pp. 171-177 (**172**).

consensual, leading some to argue that the excessive collection of personal data is an excessive price[13] or unfair trading conditions[14] (Article 102, a), TFEU).

On the other hand, and still regarding the framework to be given, the Digital Markets Act (DMA)[15] foresees for gatekeepers a prohibition to *"combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services*". This *ex-ante* obligation is directly related to the theme at stake, and it might, from now on, play a crucial role in digital markets.[16] Lastly, another alternative might result from the framework within the Abuse of Economic Dependence[17], which could mitigate some of the existent difficulties.[18]

To sum up, the Meta Platforms Case (C-252/21) will assume a pioneering role in Competition Law, according to the new challenges raised by digital platforms in several areas. In anticipation of a (brief) judgment of the Court of Justice in this case,

[13] Since then, it would be necessary to consider that the personal data functions as a counter performance for the use of this social media. Still, it is also necessary to bear in mind "personal data does not disappear or expire when used for payment, it can be used again and again. If it does not exhaust, the harm of providing it as a payment is reduced, limiting the scope for excessive "prices" (OLIVER BUDZINKI et al., "The Economics of the German Investigation of Facebook's Data Colletion", in *Market and Competition Law Review*, Volume V, nº 1, 2021, 43-80). In *United Brands* (C-27/76), paragraph 252, the ECJ stated two requirements: (i) the difference between the costs actually incurred and the price charged is excessive and (ii) whether a price has been imposed which is either unfair in itself or when compared to competing products. MOURA E SILVA, *Direito da Concorrência,* AAFDL, 2020, p. 1086-1087, points out that its application will be more sustainable when it occurs in markets with higher barriers of entry, "mainly if the practice of excessive prices is accompanied of conducts that might lead to the elimination of actual or potential competitors." The application of this double test, as an analogy, might ignore fundamental aspects inherent to personal data, as it is stated by VIKTORIA ROBERTSON, "Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data*", in Common Market Law Review*, Volume 57, Issue 1, 2020, pp. 161-190.

[14] VIKTORIA ROBERTSON, cit, points out that it will imply that terms of conditions have to be qualified as real contractual terms. Besides, as the Author states, that could lead from the fact that personal data is being transferred to third parties, which goes beyond the reasonable expectations of the users when they give their consent. This presumes a tremendous importance, because, even though the service is "free", Facebook is using its users' personal data for advertising.

[15] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022.

[16] This measure was part of the Commission's initial proposal. WOLFANG KERBER and KERSTEN ZOLNA, cit., 241, considers that the European Commission recognizes the severity of the problem raised by the Federal Cartel Office.

[17] CARMEN ESTAVAN DE QUESADA, *Abuse of Market in Digital Markets,* Open Lecture, 17 of November 2022, says that this would imply a methodology and criteria use adapted to digital markets.

[18] AS ALICE RINALDI, "Re-imagining the Abuse of Economic Dependence in a Digital World", in *Lexxion The Legal Publisher*, 2020, https://www.lexxion.eu/en/coreblogpost/re-imagining-the-abuse-of-economic-dependence-in-a-digital-world/, there are two aspects that might be helpful: "First, economic dependence is found through the relative and subjective test of reasonable/sufficient alternatives. Second, as opposed to abuse of dominance, abuse of economic dependence concerns a bilateral relationship rather than a relevant market and could serve to bypass the difficult task of defining fast changing digital markets."

the opinion of the Advocate General might guide the competition authorities, within the procedures, to apply GDPR.