July 2023

EU Competition Law Newsletter

Highlights

— The Commission Approves Broadcom's Acquisition of VMware Subject to Remedies

— CK Telecoms (Case C-376/20): Call for Return to Orthodoxy Accepted by the Court of Justice

The Commission Approves Broadcom's Acquisition of VMware Subject to Remedies

On July 12, 2023, the Commission approved Broadcom's proposed €55 billion acquisition of VMware after a Phase II review ruling out most of its initial concerns.[1] The Commission's decision is subject to technology access and interoperability remedies.

Background

Broadcom is a technology company producing semiconductors and other hardware devices, including network interface cards ("NICs"),[2] storage adapters,[3] and fiber channel host bus adapters ("FC HBAs").[4] VMware offers virtualization software[5] that interoperates with a wide range of hardware, including Broadcom's and other hardware manufacturers' NICs, storage adapters, and FC HBAs. VMware has also recently been collaborating with other companies to develop SmartNICs.[6] According to Broadcom, the proposed acquisition of VMware will only increase competition and innovation in cloud computing.

The transaction was notified to the Commission on November 15, 2022. The Commission opened an in-depth investigation into the transaction on December 20, 2022, and issued a Statement of Objections on April 12, 2023.[7] For the first time in EU merger proceedings, the Commission issued a press release on the issuance of a Statement of Objections as part of its initiative to "increase

[1] *See* Commission Press Release IP/23/3777, "Mergers: Commission clears acquisition of VMware by Broadcom, subject to conditions," July 12, 2023.

[2] NICs are server components that interface between a server and other networked computers and equipment.

[3] Storage adapters connect the server central processing unit to storage directly.

[4] FC HBAs are storage adapters that connect servers to outside storage using a fiber-channel protocol, typically through a switch.

[5] VMware's virtualization software allows the running of multiple operating systems and applications simultaneously on a single server.

[6] SmartNICs are type of NIC card that includes a programmable accelerator to increase the efficiency and flexibility of data-center networking, security, and storage.

[7] A Statement of Objections is a formal step in a merger control investigation, where the Commission informs the companies concerned of the preliminary objections.

transparency" on complex merger investigations.[8]

The Commission's Investigation

The Commission concluded that Broadcom's and VMware's product portfolios were "largely complementary" and investigated whether the acquisition of VMware would allow Broadcom to:

— Restrict competition in the global markets for the supply of NICs, storage adapters, and FC HBAs by delaying or degrading access to VMware's server virtualization software;

— Hinder the development of SmartNICs; and

— Anti-competitively bundle VMware's virtualization software with Broadcom's software.

After an in-depth investigation of over six months, the Commission excluded all of its theories of harm except for the concern that the combined entity may restrict or degrade the interoperability between VMware's server virtualization software and FC HBAs offered by Broadcom's only rival Marvell.

Remedies

To address the Commission's only concern in relation to the FC HBAs market, Broadcom offered technology access commitments to preserve interoperability, a core principle that Broadcom stated would not have changed as a result of this transaction. These commitments consist of:

— Access to interoperability application programming interfaces ("APIs") of VMware's server virtualization software, as well as the materials, tools, and technical support necessary for the development and certification of third-party FC HBAs on an equal footing with Broadcom's.

— Access to the source code of Broadcom's FC HBAs in order to allow Marvell and any future new FC HBAs to reuse and modify Broadcom's FC HBA drivers that interoperate with VMware's virtualization software.

— An organizational separation between Broadcom's FC HBAs team and the VMware server virtualization software team in charge of certifying and providing technical support for FC HBA vendors.

Takeaways

The Commission's decision reaffirms its readiness to consider, on a case-by-case basis, non-divestiture remedies. Despite its preference for divestiture remedies as set out in the Remedies Notice,[9] the Commission has accepted non-divestiture commitments in recent technology-sector transactions, including *Google/Fitbit*,[10] *Meta/Kustomer*,[11] and *Microsoft/Activision*,[12] and recently accepted network access commitments in the acquisition of VOO and Brutélé by telecommunications provider Orange.[13]

In addition to the Commission's decision, Broadcom's acquisition of VMware had received legal merger clearance in Australia, Brazil, Canada, Israel, South Africa, Taiwan, and the UK.[14] In the US, the Hart-Scott-Rodino pre-merger waiting period has also expired.

---

[8] *See* Commission Press Release IP/23/2146, "Mergers: Commission send Broadcom Statement of Objections over proposed acquisition of VMware," April 12, 2023.

[9] *See* Commission Notice on remedies acceptable under the Council Regulation (EC) No. 139/2004 and under Commission Regulation (the "Remedies Notice"), OJ 2008 C 267/1 (22.10.2008), para. 13.

[10] *Google/Fitbit* (Case M.9660), Commission decision of December 17, 2020 (in which Google committed for 10 years inter alia: (1) not to use certain health data for Google Ads; (2) to maintain APIs enabling third party access to certain health data; and (3) to license certain APIs used for interoperability between Android smartphones and third-party wrist-worn wearable devices on a non-discriminatory basis).

[11] *Meta/Kustomer* (Case M.10262), Commission decision of January 1, 2022 (in which Meta committed to providing Kustomer's current and future rivals fair and equal access to its messaging services for ten years). For additional information, see our December-January 2022 EU Competition Law Newsletter.

[12] *Microsoft/Activision* (Case M.10646), Commission decision of May 15, 2023 (in which Microsoft committed to provide ten-year access to Activision's games to competing cloud gaming providers). For additional information, see our May 2023 EU Competition Law Newsletter.

[13] *See* Commission Press Release IP/23/1722, "Commission clears the acquisition of VOO and Brutélé by Orange, subject to conditions," March 20, 2023 (in which Orange, a provider and wholesaler of mobile and fixed telecommunications services agreed *inter alia* to provide competitors access to the existing fixed network infrastructure of VOO and Brutélé, and Orange's future fiber-to-the-Premises network). For additional information, see our February-March 2023 EU Competition Law Newsletter.

[14] The UK Competition and Markets Authority (CMA) cleared the acquisition on August 21, 2023 finding that the transaction would not weaken competition in the supply of critical computer server products. *See* CMA's Press Release, 'CMA clears Broadcom's deal to buy VMware,' August 21, 2023.

CK Telecoms (Case C-376/20): Call for Return to Orthodoxy Accepted by the Court of Justice

On July 13, 2023, the Court of Justice delivered its much anticipated judgment in *Commission v. CK Telecoms*,[15] setting aside the General Court's landmark judgment that annulled the Commission's 2016 prohibition of the proposed 4-to-3 merger between Telefónica Europe Plc ("O2") and Hutchinson 3G UK Investments Limited ("Three"), the second and fourth largest mobile network operators in the UK, that would have created a new market leader with a combined share above 40%.[16]

In its judgment, the Court of Justice, following Advocate General Kokott's opinion,[17] restored the "balance of probabilities" standard of proof and previous interpretation of the "significant impact to effective competition" ("SIEC") test under the 2004 EU Merger Regulation.[18] It upheld the Commission's appeal on all main grounds, annulled the General Court's judgment, and referred the case back to the General Court for reconsideration.

Background

In 2016, the Commission prohibited Three's proposed acquisition of O2,[19] finding that the combined entity would have a "strong position" (although falling short of creating or strengthening a dominant position) on the oligopolistic UK mobile telecommunications market.[20] The Commission's theory of harm focused on non-coordinated (unilateral) effects, concluding that the parties "compete[d] closely with each other"[21] and the merger would eliminate Three as an "important competitive force".[22]

In May 2020, the General Court annulled the Commission's decision in its entirety, essentially on the ground that the Commission did not provide "sufficient evidence to demonstrate with a strong probability" that the transaction would lead to a SIEC based on the loss of competition between the merging companies.[23] The Commission appealed the General Court's judgment to the Court of Justice. In October 2022, Advocate General Kokott issued an opinion advising the Court of Justice to uphold the Commission's appeal on all main grounds.[24]

Judgment

The Court of Justice followed Advocate General Kokott's opinion and provided guidance on key legal concepts, including:

— **Standard of proof.** The Court of Justice reaffirmed the balance of probabilities standard of proof established in *Bertelsmann and Sony*,[25] which requires the Commission to show it is "more likely than not" that the concentration would (or would not) lead to a

[15] *Commission v. CK Telecoms UK Investments Ltd* (Case C-376/20 P), EU:C:2023:561.

[16] *Hutchinson 3G UK / Telefonica UK* (Case COMP/M.7612), Commission decision of May 11, 2016, paras. 335, 343 and 1176. *See* our July-September 2016 EU Competition Quarterly Report, pp. 15–16.

[17] *Commission v. CK Telecoms UK Investments Ltd* (Case C-376/20 P), opinion of Advocate General Kokott, EU:C:2022:817.

[18] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EU Merger Regulation"), OJ 2004 L 24/1

[19] *Hutchinson 3G UK / Telefonica UK* (Case COMP/M.7612), Commission decision of May 11, 2016.

[20] *Ibid.*, para. 406.

[21] *Ibid.*, para. 438.

[22] *Ibid.*, para. 2126.

[23] *CK Telecoms UK Investments Ltd v. Commission* (Case T-399-16), EU:T:2020:217. *See* our July 2020 Alert Memorandum, "The General Court Raises The EC's Bar For Mergers In Concentrated Markets".

[24] *Commission v. CK Telecoms UK Investments Ltd* (Case C-376/20 P), opinion of Advocate General Kokott, EU:C:2022:817. *See* our October 2022 EU Competition Law Newsletter and our October 2022 Cleary Antitrust Watch blog post.

[25] *Bertelsmann and Sony Corporation of America v. Impala* (Case C-413/06 P), EU:C:2008:392, para. 52.

SIEC.[26] Accordingly, the General Court erred by requiring the Commission to demonstrate a SIEC with a "strong probability" that a concentration would give rise to harm.[27] Importantly, the Court of Justice also clarified that the standard of proof does not change whether the transaction raises conglomerate, vertical, and/or horizontal concerns.[28]

— **SIEC in oligopolistic markets.** The General Court erred by holding that the Commission can only establish a SIEC by satisfying two cumulative conditions: (i) the elimination of important competitive constraints that the merging parties had exerted upon each other; and (ii) the reduction of competitive pressure on the remaining competitors.[29] This restrictive interpretation is "incompatible" with the EU Merger Regulation's objective to effectively control concentrations that are liable to significantly impede effective competition.[30]

— **Important competitive force.** An undertaking can be an "important competitive force" if it has "more of an influence on the competitive process than its market share or similar measures would suggest".[31] The General Court, therefore, erred in finding that an undertaking can only be so classified if it stands out from its rivals and competes "particularly aggressively" in terms of price.[32]

— **Closeness of competition.** The General Court erred in requiring the Commission to show that the merging parties are not only close competitors, but rather "particularly close" competitors.[33] In assessing closeness of competition, a very high level of substitution between the parties' products is "not necessarily required".[34] The Court of Justice, however, clarified that not every firm within an oligopolistic market qualified as a close competitor; each industry has its own dynamics and it is possible that the products offered by two undertakings could have a relatively low degree of substitutability.[35]

— **Efficiencies.** Contrary to the General Court's finding, the Court of Justice held that there is no presumption that all concentrations give rise to "standard" efficiencies that the Commission must take into account in its quantitative analysis and it is for the parties to establish any efficiencies.[36]

Discussion

The judgment was the first opportunity for the Court of Justice to clarify when transactions that do not create or strengthen a dominant position may give rise to a SIEC, precisely the sort of "gap" cases the EU Merger Regulation's 2004 reform was intended to cover. EU Commissioner for Competition Margrethe Vestager welcomed the Court of Justice's judgment, stating that it "validates [the Commission's] approach to merger assessment" and "confirmed [the Commission's] interpretation of several crucial elements on [its] approach to [the "gap"] cases".[37]

The reversion to the previously settled state of the law by the Court of Justice was, to some extent, anticipated. Pending the Court of Justice's judgment, the General Court had another

[26] *Commission v. CK Telecoms UK Investments Ltd* (Case C-376/20 P), EU:C:2023:561, paras. 70, 73, and 87.

[27] *Ibid*, paras. 86–89.

[28] *Ibid*, para. 79.

[29] *Ibid*, paras. 110-111.

[30] *Ibid*, paras. 112-116.

[31] *Ibid*, para. 167.

[32] *Ibid*, paras. 162, 166 and 168.

[33] *Ibid*, para. 191.

[34] *Ibid*, paras. 188-189.

[35] *Ibid*, para. 173.

[36] *Ibid.*, paras. 238–241.

[37] *See* Commission Press Release STATEMENT/23/3852, "Statement by Executive Vice-President Margrethe Vestager on today's Court of Justice judgment on the Hutchison/O2 UK merger prohibition decision," July 13, 2023.

opportunity in June 2022 to consider similar legal issues through Thyssenkrupp's challenge of the Commission's 2019 prohibition decision in *Tata Steel/Thyssenkrupp*.[38] In upholding the Commission's prohibition decision in its entirety, the General Court made no reference to the heightened standard of proof it had set out in *Three/O2*.[39]

As is apparent from the EU Commissioner for Competition's statement, the Court of Justice's judgment encourages the Commission to continue pursuing rigorous merger control assessment of transactions that give rise to a SIEC. In this connection, the Commission is currently conducting an in-depth investigation into the proposed joint venture between Orange and MasMovil, the second and fourth largest fixed and mobile operators in Spain, and it has already sent a Statement of Objections to the parties.[40] The Commission's approach and the outcome of this case will be closely watched for signs of what companies should expect going forward.

News

Commission Updates

Commission Approves Advent's Acquisition of GfK Subject to Divestment of GfK's CPS Business

On July 4, 2023, the Commission conditionally approved, in Phase I, Advent's acquisition of market research provider GfK through its subsidiary NielsenIQ, after Advent pulled and refiled the merger notification.[41] The approval is subject to the divestment of GfK's global consumer panel services ("CPS") business, excluding Russia.[42]

Background

NielsenIQ is the EEA market leader for retail measurement services ("RMS") for fast moving consumer goods. NielsenIQ also provides CPS in competition with GfK, the leading provider of CPS in the EEA. RMS and CPS are market research services aiming to identify purchasing patterns in the retail sector. RMS show sales trends based on point-of-sale date, while CPS provide insights into consumer behavior.

NielsenIQ announced its plan to merge with GfK in July 2022.[43] Following months of pre-notification, the transaction was notified on March 20, 2023, then withdrawn on April 20, 2023, and refiled on May 11, 2023.

The Commission's Concerns

The Commission considered that the transaction would raise concerns in both the market for CPS and the market for RMS for fast moving consumer goods. In particular, the Commission's investigation found that: (i) the merged entity would be the sole provider of CPS in Germany and Italy; (ii) NielsenIQ would likely not have provided CPS to competitors; and (iii) NielsenIQ would likely have bundled its CPS across several EEA countries and its CPS with RMS for fast moving consumer goods, thus foreclosing competitors in both markets.

Advent's Commitments

To address the Commission's concerns, Advent committed to sell GfK's global CPS business—excluding Russia—to ensure prompt execution

[38] *Tata Steel/Thyssenkrupp/JV*, Case COMP/M.8713, Commission decision of June 11, 2019.

[39] T*hyssenkrupp AG v. Commission* (Case T-584/19), EU:T:2022:386.

[40] Commission Press Release IP/23/3421, "Mergers: Commission sends Orange and MasMovil Statement of Objections over their proposed joint venture in Spain," June 27, 2023.

[41] Commission Press Release IP/23/3621, "Mergers: Commission clears Advent's acquisition of GfK subject to conditions," July 4, 2023.

[42] GfK's Russian operations were excluded in order to facilitate the execution of the divestiture.

[43] *See* Advent press release, "NielsenIQ and GfK to combine, creating a leading global provider of information and analytics in consumer and retail measurement," July 1, 2022, available here.

of the divestiture. Advent also agreed to provide transition services to the purchaser of the CPS business, such as rebranding and access to IT services and support functions, during a one year period, with a possible extension of up to two additional years.

The Commission considered that the remedies proposed will enable any purchaser to run the divested business as a viable competitor on a lasting basis. In particular, the divesture eliminates NielsenIQ's and GfK's overlap in the CPS market in Germany and Italy, and precludes NielsenIQ from foreclosing competitors in the markets for CPS and RMS for fast-moving consumer goods.

Implications

Advent's acquisition of GfK is another example of the ever more frequently used pull-and-refile tactic, particularly in complicated deals which are likely to lead to a four month-long Phase II investigation by the Commission. Advent notified the transaction to the Commission in March 2023, but pulled the notification after one month to work on a remedies proposal addressing the Commission's concerns. The transaction was refiled three weeks later, and approved with conditions in Phase I. Although the pull-and-refile tactic was commonly used in recent cases, for example in *Sika/MBCC*[44] and *Securitas/Stanley Security*[45] last year, well prepared pre-notification discussions with the Commission remain a key strategy to avoid in-depth investigations.

The EU Foreign Subsidies Regulation Takes Effect[46]

On July 12, 2023, the EU Foreign Subsidies Regulation ("FSR") entered into effect. The Commission can now open *ex officio* investigations. From October 12, 2023, companies must notify M&A deals[47] and public procurement tenders meeting the relevant thresholds.

Background

The FSR enables the Commission to scrutinize subsidies granted by non-EU countries to companies active in the EU, irrespective of where these companies are headquartered. The Commission will assess if there is a "foreign subsidy", which is defined as: (i) a financial contribution; (ii) which is provided by a non-EU state; (iii) which confers a benefit on the recipient; and (iv) which is selective, *i.e.*, limited to one or more undertakings or industries. The Commission may intervene against foreign subsidies that create competitive distortions in the internal market, unless such distortive effects are counterbalanced by positive effects for the development of the relevant economic activity or other policy objectives.

The aim of the FSR is to fill a perceived regulatory gap concerning foreign subsidies that is not addressed by EU State aid, merger control, antitrust, trade defense, and public procurement regimes.

The three modules

The FSR consists of three modules.

— ***Ex officio* review of foreign subsidies.** The FSR empowers the Commission to proactively investigate foreign subsidies distorting the internal market and to require repayment of the foreign subsidy or impose other redressive measures.

— ***Ex ante* notification regime for mergers.** The FSR imposes a filing obligation for concentrations where: (i) the acquired undertaking, one of the merging undertakings,

[44] Sika pulled the notification of the proposed acquisition of MBCC after one month, refiled six months later and obtained a conditional Phase I approval. *See* Commission Press Release IP/23/598, "Mergers: Commission clears the acquisition of MBCC by Sika, subject to conditions," February 8, 2023.

[45] Securitas pulled the notification of the proposed acquisition of Stanley Security in April, refiled in June and obtained unconditional approval in July. *See* Case COMP/M.10594, Commission decision of July 7, 2022, available here.

[46] This article summarizes the FSR's main rules. For a more detailed overview of the rules and procedures and guidance on how to prepare for filings, *see* our Alert Memorandum, "EU Foreign Subsidies Regulation Takes Effect and Filing Forms Adopted," July 12, 2023.

[47] The notification obligation applies to M&A deals signed on or after July 12, 2023, but not yet implemented by October 12, 2023.

or the joint venture has an EU turnover of at least €500 million in the preceding year; and (ii) the parties received foreign subsidies exceeding € 50 million in the last three years preceding the transaction.

— ***Ex ante* notification regime for public procurement procedures.** The FSR imposes a filing obligation for public procurement tenders in the EU where: (i) the overall contract value of the tender is at least €250 million (or the aggregate value of the various lots of a tender is at least €125 million); and (ii) the bidding party and any main subcontractors and suppliers involved in the same tender received at least €4 million in financial contributions from a single non-EU country in the last three years prior to notification.

Implications

The wide scope of the FSR and the notion of "foreign subsidy" will potentially have far-reaching consequences for companies with exposure to financial contributions from non-EU countries, which should assess *ex officio* enforcement risks. Companies that might participate in large M&A or procurement projects in Europe should start preparing for possible filings.

Court Updates

Super Bock: RPM Not Automatically a Restriction of Competition By Object

On June 29, 2023, the Court of Justice ruled on questions referred by the Lisbon Court of Appeals relating to alleged resale price maintenance ("RPM") by Super Bock, a Portuguese beverage manufacturer.[48] The Court of Justice held, *inter alia*, that a vertical agreement fixing minimum prices is not necessarily a restriction of competition by object despite its characterization as a "hardcore restriction" under the Vertical Block Exemption Regulation ("VBER")[49] and, in certain circumstances, the existence of an agreement may be inferred from "explicit or tacit acquiescence" by the distributors to an invitation to comply with minimum resale prices.[50]

Background

The Portuguese Competition Authority (Autoridade da Concorrência, "AdC") found that Super Bock fixed minimum resale prices for its distributors between at least May 15, 2006 and January 23, 2017 and imposed fines totaling €24 million on it, a member of its board, and a senior commercial director.[51] The addressees appealed against AdC's decision, and the Lisbon Court of Appeal made a reference to the Court of Justice that led to the present ruling.

Restriction of competition by object

The referring court asked whether RPM constitutes in and of itself an infringement "by object" such that it is unnecessary to examine its effects.

The Court of Justice answered this in the negative, holding that the categorization of RPM as a "hardcore" restriction under the VBER does not necessarily mean that it constitutes a restriction "by object" as the two concepts are distinct and "do not necessarily overlap."[52]

Accordingly, to determine whether a vertical agreement fixing minimum prices constitutes a restriction of competition by object, one must examine the content of its provisions, its objectives and the economic and legal context of which it forms a part (including the nature of the affected goods or services, as well as the

[48] *Super Bock Bebidas v. Autoridade da Concorrência* (Case C-211/22) EU:C:2023:529 ("Super Bock").

[49] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty of the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102 (23.04.2010), Article 4(a). Note that a new VBER came into force on June 1, 2022 (*see* Commission Regulation (EU) No 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2022 L 134/4 (11.05.2022)).

[50] *Super Bock*, para. 53.

[51] AdC Press Release 15/2019, "AdC sanctioned Super Bock for fixing minimum resale prices in hotels, restaurants and cafes," July 24, 2019. The fines imposed on the board member and the senior commercial director were €8,000 and €12,000, respectively.

[52] *Super Bock*, para. 41.

actual conditions of the functioning and structure of the market or markets in question), and its procompetitive effects (where these are put forward by the parties).[53]

The concept and proof of an "agreement"

The referring court also asked whether the necessary "agreement" within the meaning of Article 101(1) TFEU could be established on the facts of the case.[54]

The Court of Justice held that an agreement cannot be based on a "statement of a purely unilateral policy" of one party to a distribution contract.[55] However, an apparently unilateral act could constitute an agreement: (i) if the distribution contract contains an express invitation to comply with minimum resale prices or authorizes the supplier to impose those prices; or (ii) through the "explicit or tacit acquiescence" by the distributors to an invitation to comply with minimum resale prices.[56]

The Court of Justice held that RPM could be established where a supplier: (i) regularly transmitted to distributors minimum prices lists; (ii) monitored the distributors' prices; (iii) asked them to comply with those prices on pain of retaliatory measures, such as the removal of trade discounts on purchases and the refusal to supply and replenish stocks; and, crucially, (iv) where the distributors in fact applied the transmitted prices, rather than "any other prices on their own initiative."[57] These elements could be established, in the absence of direct evidence, on the basis of "objective and consistent indicia."[58]

Discussion

The Court of Justice's ruling that an agreement fixing minimum resale prices does not constitute in and of itself a restriction of competition by object under Article 101(1) TFEU represents a welcome move away from the rigid formalism mandated by *Binon*, its earlier judgment on RPM.[59] The ruling provides greater scope for businesses to justify their practices by reference to their objectives, and the wider economic and legal context.[60]

The Court of Justice ruling helpfully distinguishes between permissible resale price recommendations, and impermissible RPM. The facts of this case conform with the archetypal RPM case: the communication of minimum resale prices by the supplier to the distributors, coupled with monitoring and follow-ups backed by threats or retaliatory measures (or incentives) to enforce compliance.

In recent years, certain national competition agencies have shown an apparent willingness to pursue cases that test the limits of the law (*e.g.*, where repeated price recommendations were not accompanied by threats or incentives, and in the absence of an explicit agreement to fix prices).[61] Such an expansive approach runs counter to the VBER's clear provision that resale price recommendations are legitimate unless they are accompanied by threats or incentives.[62]

The Court of Justice's ruling indicates that an RPM finding cannot be based purely on whether

[53] *Ibid.*, paras. 34–36.

[54] *Ibid.*, para. 44.

[55] *Ibid.*, para. 48.

[56] *Ibid.*, paras. 49–50.

[57] *Ibid.*, para. 52.

[58] *Ibid.*, paras. 14 and 58.

[59] *Binon v. SA Agence et messageries de la presse* (Case 243/83) EU:C:1985:284, paras. 43–45 ("Binon").

[60] In the case of consumer electronics, for instance, where new models are frequently introduced and prices rapidly decline after introduction, resale margins may erode so quickly as to undermine resellers' incentives to invest in effective marketing of the products, depriving suppliers of effective outlets, and depriving consumers of retailers that put effort into selling the products to them. In such an environment, repeat resale price recommendations may be treated with greater understanding than in more static markets with substantial retail margins and more stable price levels.

[61] *See, e.g.*, our Cleary Antitrust Watch post "The French Competition Authority Dismisses a Retail Price Maintenance Case Against Kärcher, Closing a Ten-year-Long Investigation", June 24, 2021. In that case, ultimately, the absence of pressure exercised by Kärcher on retailers was key in the French Competition Authority's finding that Kärcher did not invite retailers to apply its recommended prices.

[62] VBER, Article 4(a): "The exemption provided for in Article 2 shall not apply to vertical agreements which […] have as their object: the restriction of the buyer's ability to determine its sale price, *without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties*." (emphasis added)

a distributor happens to consider it opportune, for whatever reasons at given moments, to apply a price in accordance with the recommendation of the supplier. As the Court of Justice held, no acquiescence to the prices communicated by the supplier could be established if the distributors are able or free to "apply other prices on their own initiative" and the case apparently involved a situation where "minimum resale prices are, in practice, followed by the distributors".[63] This suggests that only consistent and unswerving compliance, across the board or without significant deviation, can be taken as expression of consent to be bound. Any other conclusion would lead to the absurd result that a price recommendation would be lawful only if a distributor ignores it.

Meta: Court of Justice Confirms That Competition Authorities Can Assess GDPR Compliance In Abuse of Dominance Cases

On July 4, 2023, the Court of Justice delivered its judgment in *Meta Platforms Inc. v. Bundeskartellamt*,[64] following a request for a preliminary ruling from the Düsseldorf Higher Regional Court ("Düsseldorf Court") on the validity of the German Federal Cartel Office ("FCO") 2019 decision finding that Meta Platforms ("Meta")[65] abused its dominant position by collecting and processing data without users giving their consent freely.[66] The Court of Justice confirmed that competition authorities can find breach of data protection rules under the General Data Protection Regulation ("GDPR") where that finding is necessary to establish the existence of an abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). The Court of Justice however emphasized that competition authorities are required to consult and cooperate with national supervisory authorities in charge of GDPR enforcement ("GDPR authorities").

Background

On February 6, 2019, the FCO found that Meta had exploited its dominant position on the German market for social networks by making the use of Facebook conditional upon the collection and aggregation of user data from Facebook, other online services belonging to the Meta group (such as Instagram and WhatsApp), and third-party websites and apps with embedded Facebook interfaces. The FCO concluded that this practice violated the GDPR as: (i) user's consent was not freely given;[67] and (ii) the amount of data Meta collected (including outside Facebook) and combined into user profiles was not necessary. As a result, the FCO ordered Meta to adapt its terms of service and combine the data it collects from other sources with Facebook user profiles only if users have freely given consent.

Meta appealed the decision to the Düsseldorf Court, which, on March 24, 2021, decided to stay the proceedings and to refer seven questions to the Court of Justice for a preliminary ruling. In terms of the interplay of competition law with GDPR rules, the Düsseldorf Court asked whether a national competition authority can find, in the context of an abuse of dominance investigation, that an undertaking's data processing rules and the implementation thereof are not consistent with the GDPR, and, in the affirmative, whether such finding by the competition authority is also possible where the same rules are being simultaneously investigated by the competent GDPR authorities. The remaining questions sought clarifications on the interpretation of certain GDPR provisions.

In his opinion delivered on September 20, 2022, Advocate General Rantos concluded that a competition authority may examine, as an incidental question, the compliance of the practices under investigation with the GDPR

[63] *Super Bock Bebidas v. Autoridade da Concorrência* (Case C-211/22) EU:C:2023:529, para. 52.

[64] *Meta Platforms Inc. v. Bundeskartellamt* (Case C-252/21) EU:C:2023:537.

[65] Formerly Facebook Inc.

[66] Decision of the Bundeskartellamt (6th Decision Division) in Case B6-22/16. For additional information, *see* our January-February 2019 German Competition Law Newsletter.

[67] Potential users wishing to join Facebook had to either agree to the data collection/processing practice or refrain from using Facebook entirely.

rules, while taking into account relevant GDPR precedents, informing, and, where appropriate, consulting the competent GDPR authorities.[68]

The Judgment

In its judgment, the Court of Justice held that a dominant undertaking's non-compliance with the GDPR could be a "vital clue" indicating a breach of Article 102 TFEU.[69] The Court of Justice further noted that access to and the use of personal data are "of great importance" and a "significant parameter of competition" in the digital economy, in particular for online advertising.[70]

At the same time, the Court of Justice clarified that national competition authorities do not replace GDPR authorities, and should cooperate with them to avoid divergences of interpretation. The Court of Justice set out detailed guidance for the cooperation process, clarifying that competition authorities must comply with prior decisions from the competent GDPR authorities concerning the lawfulness of the conduct in question or similar conduct. The Court of Justice further explained that competition authorities should consult and seek the cooperation of GDPR authorities where: (i) there are doubts as to the scope of the GDPR authorities' prior assessment; (ii) the competition and GDPR authorities are simultaneously examining the conduct in question or similar conduct; or (iii) the relevant GDPR authorities have not started an investigation. GDPR authorities must in turn respond to requests from competition authorities within a reasonable period of time.

In this case, the Court of Justice considered that the FCO contacts with data protection authorities in Germany and Ireland,[71] and their confirmation of the absence of parallel investigation, was sufficient to meet its cooperation obligations.

Implications

The Court of Justice judgment confirms the Bundeskartellamt's reasoning, recognizing the relevance of data protection compliance in abuse of dominance investigations. It is part of a wider European enforcement strategy in the digital economy. The FCO's case inspired Article 5(2) of the Digital Markets Act ("DMA"), which formulates consent obligations for cross-service processing of personal data by gatekeeper platforms, irrespective of whether that processing complies with the GDPR. Future antitrust enforcement, in particular by the Commission, would therefore be related to data protection infringements which are not covered by the DMA, but distort competition in the internal market.

Dominant companies should carefully review their data processing policies from a competition law angle, given the possibility of investigations related to their GDPR compliance by competition authorities, in addition to investigations initiated by GDPR authorities.[72]

[68] *Meta Platforms Inc., v. Bundeskartellamt* (Case C-252/21), opinion of Advocate General Rantos, EU:C:2022:704. For additional information on the opinion, *see* our Cleary Antitrust Watch post of September 20, 2022.

[69] *Meta Platforms Inc. v. Bundeskartellamt* (Case C-252/21), para. 47.

[70] *Ibid*, paras. 50 and 51.

[71] Specifically the Bundesbeauftragte für den Datenschutz und die Informationsfreiheit (BfDI) (Federal Commissioner for Data Protection and Freedom of Information, Germany), the Hamburgische Beauftragte für Datenschutz und Informationsfreiheit (Commissioner for Data Protection and Freedom of Information, Hamburg, Germany) and the Irish Data Protection Commission ("DPC").

[72] The Court of Justice judgment was handed down shortly after the Irish DPC imposed a €1.2 billion fine on Meta regarding processing, including storage, in the US of personal data of EEA users. *See* DPC's press release of May 22, 2023, available here.

AUTHORS

Elena Chutrova
T: +32 2 287 2028
echutrova@cgsh.com

Ambroise Simon
T: +32 2 287 2042
amsimon@cgsh.com

Jon Polanec
T: +32 2 287 2165
jpolanec@cgsh.com

Rita Pimentel Torres
T: +32 2 287 2272
rpimenteltorres@cgsh.com

John Kwan

Mary Borchers
Summer Associate
July 2023

Fahira Hasic
T: +32 2 287 2303
fhasic@cgsh.com

Bronwyn Craw
Summer Associate
July 2023

Silvia Bonomelli
T: +32 2 287 2334
sbonomelli@cgsh.com

Gabriel Paulus
Summer Associate
July 2023

PARTNERS AND COUNSEL, BRUSSELS

Antoine Winckler
awinckler@cgsh.com

Patrick Bock
pbock@cgsh.com

Maurits Dolmans
mdolmans@cgsh.com

Christopher Cook
ccook@cgsh.com

Romano Subiotto KC
rsubiotto@cgsh.com

Mario Siragusa
msiragusa@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Stephan Barthelmess
sbarthelmess@cgsh.com

Nicholas Levy
nlevy@cgsh.com

Till Müller-Ibold
tmuelleribold@cgsh.com

F. Enrique González-Díaz
fgonzalez-diaz@cgsh.com

François-Charles Laprévote
fclaprevote@cgsh.com

Robbert Snelders
rsnelders@cgsh.com

Isabel Rooms
irooms@cgsh.com

Thomas Graf
tgraf@cgsh.com

Andris Rimsa
arimsa@cgsh.com

Antitrust Watch
clearyantitrustwatch.com

Cleary Antitrust Watch Blog
Click here to subscribe.

© 2023 Cleary Gottlieb Steen & Hamilton LLP
Under the rules of certain jurisdictions, this may constitute Attorney Advertising.

23.0905.09_090723