# The Court of Justice Kicks Around the Dichotomy Between Data Protection and Competition Law

## Case Comment of the Preliminary Ruling in Case C-252/21 *Meta Platforms v. Bundeskartellamt*

by

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## *Abstract*

Data protection and competition law have been at a crossroads in terms of their integration. Antitrust authorities as well as data protection supervisory authorities have grappled with the question of whether both fields of law should be combined into the same analysis. The German competition authority, the Bundeskartellamt, was the first to fuse them in its landmark case against Facebook's data processing terms and conditions.

The exploitative theory of harm put forward by the German NCA is the first of its kind to integrate data protection considerations into the antitrust analysis, namely by drawing a line between an infringement with the General Data Protection Regulation (GDPR) and anti-competitive harm. This case comment outlines its key developments at the national level, to then address the questions that have been answered by the Court of Justice of the European Union, CJEU, in Case *C-252/21* concerning the interpretation of the GDPR in the context of competition law.



## *Resumé*

La protection des données et le droit de la concurrence sont à la croisée des chemins en ce qui concerne leur intégration. Les autorités antitrust et les autorités de contrôle de la protection des données ont été confrontées à la question de savoir si les deux domaines du droit devaient être repris dans la même analyse. L'autorité allemande de la concurrence a été la première à les fusionner dans le cadre de l'affaire qui a fait jurisprudence contre les conditions générales de traitement des données de Facebook.

La théorie du préjudice d'exploitation avancée par le Bundeskartellamt est la première du genre à intégrer des considérations relatives à la protection des données dans l'analyse antitrust, notamment en établissant une distinction entre une infraction au règlement général sur la protection des données (RGPD) et un préjudice anticoncurrentiel. Ce commentaire d'affaire présente les principaux développements au niveau national pour ensuite aborder les questions qui ont été repondues par la Cour de justice de l'Union européenne dans l'affaire C-252/21 concernant l'interprétation du GDPR dans le contexte du droit de la concurrence.



**Key words:** Competition Law; Exploitative Abuse; Data Protection; GDPR.

**JEL:** K21, K23, K42

## I. Introduction

The collection, processing, and cross-use of personal and non-personal data in the hands of a few players in the digital market has posed major questions in the realm of antitrust, namely whether an undertaking may gain a competitive advantage via the exploitation of user data.[1] Public enforcement of competition law responded negatively in a twofold manner, through analysis under merger control and via the scrutiny of unilateral conduct exerted by dominant players.

Up until this moment, the European Commission and the US Federal Trade Commission have followed this idea but have made efforts to avoid drawing inferences between the fields of data protection and competition law.[2] Even though prominent players amassing great troves of data might be problematic under antitrust, an infringement in the field of data protection may not automatically entail anti-competitive harm. Competition authorities have not yet struck the right balance in terms of integrating data protection considerations into the antitrust analysis, without incurring an extra limitation

[1] A range of competition authorities and reports have been issued and analysed this topic, namely Competition and data protection in digital markets: a joint statement between the CMA and the ICO, Competition & Markets Authority and Information Commissioner's Office (2021), Competition Law and Data, Autorité de la Concurrence and Bundeskartellamt (2016), and Julie Brill, 'The Intersection of Consumer Protection and Competition in the New World of Privacy' (2011) 7(1) Competition Policy International 7.

[2] On the side of the European Commission, these efforts have focused on merger control in *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 7239 final, *Microsoft/LinkedIn* (Case M.8124) Commission Decision C(2016) 8404 final, *Apple/Shazam* (Case M.8788) Commission Decision C(2018) 5748 final and *Google/Fitbit* (Case M.9660) Commission Decision [2021] OJ C194/7. Regarding the prohibition contained in Article 101 TFEU (Article 81 EC), the Court of Justice of the European Union resolved in Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125. On the side of the Federal Trade Commission, the endeavours have also been centred on merger control, especially in *Google/DoubleClick* (FTC File No. 071-0170). Statement of Federal Trade Commission. Renewed efforts in the US agencies attempt to find infringements of competition of the Big Tech regarding their data processing activities, such as Department of Justice, 'Justice Department Sues Monopolist Google For Violating Antitrust Laws' (*The United States Department of Justice*, 20 October 2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 8 March 2023; 'FTC Sues Facebook for Illegal Monopolization' (*Federal Trade Commission*, 9 December 2020) <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> accessed 9 March 2023, and 'Justice Department Sues Google for Monopolizing Digital Advertising Technologies: Through Serial Acquisitions and Anticompetitive Auction Manipulation, Google Subverted Competition in Internet Advertising Technologies' (*The United States Department of Justice*, 24 January 2023) <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies> accessed 9 March 2023.

on their competences.[3] Recently, there have also been attempts from the side of private enforcement to make these associations in light of user exploitation in the UK and the US.[4]

Against this background, the German competition authority (hereinafter: the German NCA or the Bundeskartellamt)[5] faced the challenge and performed an analysis integrating data protection and competition considerations under the same analysis.[6] The Bundeskartellamt found that Facebook (hereinafter: Facebook or FB) had infringed its national competition regime through the imposition of exploitative data processing terms and conditions upon its users.[7] The singularity of the case at hand has influenced the subsequent analysis of the decisions of the appealing courts in the stage of assessing whether interim measures were to be imposed suspending the FCO's decision's effects. The case was resolved based on the application of the competition rules of the national competition law regime,[8] rather than on the basis of Article 102 TFEU.[9] The decision of the German NCA did not base its finding of abuse of a dominant position on an exclusionary theory of harm. Instead, it chose to build its case on the exploitation of FB's users when they consented to use the social network upon their registration, by analysing whether those terms and conditions complied with the legal requirements set out in the General Data Protection Regulation (hereinafter: GDPR).[10] Finally, the Bundeskartellamt exerted its wide margin

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[3] Wolfgang Kerber, 'Taming Tech Giants: The Neglected Interplay Between Competition Law and Data Protection (Privacy) Law' (2022) 67(2) The Antitrust Bulletin 280 and Torsten Körber, 'Is Knowledge (Market) Power? – On the Relationship Between Data Protection, 'Data Power' and Competition Law' (2018) Social Science Research Network.

[4] In the UK, *Dr Liza Lovdahl Gormsen v. Meta Platforms, Inc. and Others* [2022] CAT 1433. Although the Competition Appeal Tribunal did not certify the case at first, on 15 February 2024, the case was finally certified based on a completely different theory of harm in Dr Liza Lovdahl Gormsen v. Meta Platforms Inc. [2024] CAT 11. In the US, *Societe Du Figaro, SAS v. Apple Inc.*, 22-cv-04437-YGR (TSH) (N.D. Cal. Jan. 17, 2023).

[5] The German competition authority is addressed as the Federal Cartel Office (hereinafter: the Bundeskartellamt or German NCA) and as the Bundeskartellamt throughout the text.

[6] BKartA, Feb. 6, 2019, B6-22/16, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5 (B6-22/1 herein).

[7] B6-22/1 (n 6), paras 871–913.

[8] Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 2 of the Act of 19 July 2022 (Federal Law Gazette I, p. 1214).

[9] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/1.

[10] Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1. The Bundeskartellamt takes the parameters of the GDPR in B6-22/1 (n 6), paras 525–534.

of discretion to impose behavioural remedies of its choice to restore the existing competitive conditions prior to the conduct, in the sense that no fine was issued against the market player. Alternatively, the Bundeskartellamt imposed a range of behavioural remedies directed at separating the different sources of data obtained as a consequence of the exploitative conduct.[11]

Each of these elements was appealed before the German Courts, which analysed the complexity of the case in light of the German competition statute when determining whether interim measures at the judicial stage were to be imposed against the NCA's final decision. The Higher Regional Court of Düsseldorf (hereinafter: OLG or the Appellate Court) ruled against the Bundeskartellamt and granted Facebook interim measures of suspending the effects of the final decision of the NCA. By contrast, on further appeal of the interim measures, the Federal Court of Justice (hereinafter: BGH or the Federate Court) revoked the findings of the OLG and the subsequent interim measures (suspending the effects of the antitrust decision) that had been adopted by the OLG.[12] Later on, whilst deciding on the legality of the final decision of the Bundeskartellamt (during the main appeal proceedings against that decision), the Appellate Court upheld its original position and again granted the interim suspension of the effects of the final decision of the NCA.[13]

Due to the complexity of the case and the reasonable doubts that the Appellate Court, the OLG, had to answer regarding the interpretation of the German competition rules, it raised seven separate questions to the CJEU for its resolution via a preliminary ruling.[14] Surprisingly, the questions concerned

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[11] B6-22/1 (n 6), paras 915–949. This remedy also influenced the Digital Markets Act prohibition engrained in Article 5(2) and substantiated the German competition authority's newly passed Section 19a via a sanctioning proceeding imposed upon Google's processing of personal data, see BKartA, Oct. 10, 2023, B7-70/21, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2023/B7-70-21.html?nn=3591568.

[12] OLG-Düsseldorf, Aug. 26, 2019. Case VI-Kart 1/19 (V), juris (Ger.) https://openjur.de/u/2179185.html. Translation to English in 'Facebook ./. Bundeskartellamt. The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V)' (*D'Kart*, 28 Sie 2019) <https://www.d-kart.de/wp-content/uploads/2019/08/OLG-D%C3%BCsseldorf-Facebook-2019-English.pdf> accessed 8 March 2023. Bundesgerichtshof [BGH] [Federal Court of Justice] June. 23, 2020, KVR 69/19 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] (Ger.). Translation to English in Bundeskartellamt 'Courtesy translation of Decision KVR 69/19 rendered by the Bundesgerichtshof (Federal Court of Justice) on 23/06/2020 provided by the Bundeskartellamt' (*Bundeskartellamt*, 23 Cze 2020) <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/BGH-KVR-69-19.html> accessed 8 March 2023.

[13] OLG-Düsseldorf, Mar. 24, 2021. Case Kart 2/19 (V), openJur 2021, 16531 (Ger.) <https://openjur.de/u/2337584.html>.

[14] 'Case C-252/21: Request for a preliminary ruling' (*Curia*, 22 April 2021) <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=242143&pageIndex=0&doclang=EN&mode=lst&

the interpretation of the GDPR and not the interpretation of competition law.[15] However, the CJEU covertly addressed the issue of the potential integration of data protection considerations in the antitrust analysis.

This case comment addresses the route that the case has followed throughout the national proceedings against the final decision of the Bundeskartellamt as well as the CJEU's preliminary ruling regarding the interpretation of competition rules when they are considered in relation to data protection. To do that, this article is divided into three sections. The first addresses the back-and-forth between the German courts regarding the main points of contention surrounding the interplay between data protection and competition law, which are the basis to most of the questions addressed to the CJEU. The second section considers the questions addressed in the preliminary ruling, as well as Advocate General Rantos' Opinion[16], insofar as it introduces novel considerations into the debate on the interaction between both fields of law. Finally, the case comment provides an overview of the answers upheld by the Court of Justice in interpreting the GDPR under the antitrust framework in light of the discourse brought forward by the German courts at the national level.[17]

## II. The case at hand: the German NCA's decision against Facebook

The German NCA found that Facebook had infringed its national competition provisions, in particular Section 19(1) GWB, by imposing the use and implementation of its terms of service on its private users in the context of its social network service. The imposition of these data processing activities constituted an abuse of a dominant position on the market for social networks, taking the form of the imposition of abusive business terms, given that those same terms violated the principles set out in the GDPR.[18] Ultimately, the German NCA found an infringement of its competition law regime since Facebook had forced its users to consent to the processing of their data not only on Facebook-related

dir=&occ=first&part=1&cid=679631> accessed 8 March 2023.

[15] 'Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 – Facebook Inc. and Others v. Bundeskartellamt (Case C-252/21)' (*InfoCuria*, 22 April 2021) <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244555&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=679631> accessed 8 March 2023.

[16] Case C-252/21 *Meta Platforms Inc. and Others v. Bundeskartellamt* [2022], Opinion of AG Rantos.

[17] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social* EU:C:2023:537.

[18] B6-22/1 (n 6), para. 523.

websites and apps, but also through those websites where Facebook collected user's personal and non-personal data outside of the provision of its services.

In appearance, this conduct would potentially indicate that Facebook failed to implement its safeguards regarding the protection of the personal data of its users, following the (then applicable) Directive 95/46[19] or the (soon-to-be applicable) GDPR. The German NCA had no competence to find an infringement based on these provisions alone. Instead, the Bundeskartellamt integrated into the antitrust analysis the legal requirements set out in the GDPR, in order to assess whether those potential infringements could infer the existence of anti-competitive harm. However, the methodology to do so was quite unorthodox from the antitrust perspective, insofar as the Bundeskartellamt did not acknowledge that it engaged in an analysis from the perspective of an exploitative abuse following the unfair trading conditions clause under Article 102(a) TFEU.[20] To the contrary, it applied an idiosyncratic balancing of interests which stemmed from the Federate Court's, BGH, case law in the field of constitutional law.

## 1. The constitutional balancing of interests as the legal basis for assessing the conduct

The abuse of a dominant position by Facebook was analysed under the lens of Section 19(1) GWB, which prohibits any abuse of a dominant position by one or several undertakings. Unlike the EC, the German competition law regime covers the protection of the competitive conditions of the market, and, in certain instances, the German NCA may also pursue the protection of consumers.[21] The manifestation of FB's market power through the design and content of the terms and conditions imposed on the social network's users was analysed to establish whether abusive business terms had been prescribed. Nevertheless, the Bundeskartellamt did not adopt the narrower interpretation provided for in Section 19(2) no. 2 of the GWB, which prohibits an abuse by a dominant undertaking that takes the form of demanding business terms that differ from those that would very likely arise if effective competition existed (as-if competition).

[19] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 is no longer in force because it was repealed by the GDPR. However, it was applicable until 24 May 2018, i.e., within the German competition authority's scope of action at the case at hand.

[20] Indeed, the Bundeskartellamt acknowledges that it has regulatory space to apply its national provisions in B6-22/1 (n 6), para. 914. An in-depth analysis in Marco Botta and Klaus Wiedemann, 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) 10(8) Journal of European Competition Law & Practice 465.

[21] B6-22/1 (n 6), para. 525.

The Bundeskartellamt opted to apply the case law of the Federal Court where an infringement of Section 19(1) GWB could be found when the general business terms imposed are found inadmissible under the legal principles in Sections 307 ff. of the German Civil Code.[22] The finding of an infringement of competition law was contingent on the admissibility of the conduct in the realm of civil law. Sections 307 to 310 of the German Civil Code deal with the reasonableness of the terms imposed by the party on its counterparty. For instance, Section 307(1) of the German Civil Code states that standard business terms are ineffective if they unreasonably disadvantage the other party to the contract with the user, or if the provision is not clear or comprehensible enough for the user.

Moreover, the Bundeskartellamt declared that constitutionally protected rights were relevant here and, as such, an extensive balancing of interests was necessary to consider whether the overbearing position held by Facebook prompted an unnecessary interference with its users' fundamental rights. To the contrary, no competition law-based balancing of interests was performed when assessing the undertaking's conduct.[23] Instead, FB's capacity to dictate contractual terms was relevant to establishing whether it fully eliminated the counterparty's contractual autonomy. If this was the case, German case law required the NCA to analyse the fundamental rights involved, and consider whether the restriction caused by the conflicting positions of the parties was admissible from a constitutional perspective.[24]

The test of reasonableness under the German Civil Code was contingent on the appropriateness principle applied to the balancing of constitutional values. On one side, Facebook held the constitutionally protected right of contractual freedom. On the other hand, the rights of Facebook users' was recognised – the right to informational self-determination and the fundamental right to data protection – protected by the EU data protection regimes, which in turn can be traced back to its recognition in Article 8 of the Charter.[25] Therefore, the appropriateness principle in the balancing of these constitutional rights had to consider the GDPR's provisions in the context of the conduct.[26] In turn, the GDPR also contains a range of provisions regarding the existence

[22] B6-22/1 (n 6), para. 527. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 307 <http://www.gesetze-im-internet.de/englisch_bgb/index.html> (Ger.). The cited case-law includes cases from the Federal Court of Justice such as BGH, Nov. 6, 2013, KZR 58/11, openJur 2013, 48037 (Ger.) <https://openjur.de/u/661479.html>, BGH, Jan. 24, 2017, KZR 47/14, openJur 2018, 2166 (Ger.) <https://openjur.de/u/2116703.html> and BGH, Jun. 7, 2016, KZR 6/15, openJur 2016, 7218 (Ger.) <https://openjur.de/u/892001.html>.

[23] Peter George Picht and Cédric Akeret, 'Back to Stage One? – AG Rantos' Opinion in the Meta (Facebook) Case' (2023).

[24] B6-22/1 (n 6), para. 527.

[25] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[26] B6-22/1 (n 6), paras 529 and 531.

of power asymmetries between the data controller and the data subject, and the legal consequences inferred by these types of relationships.[27] For instance, the data subject cannot grant consent in a free and informed way when there is no genuine or free choice, or when the data subject is unable to refuse or withdraw consent without detriment to the provision of a particular service online, according to Recital 43 of the GDPR.[28]

Against this background, the manifestation of FB's market power on the national market for social networks for private users (the anti-competitive strand of the conduct) was prompted through the lens of civil law (the reasonableness test). The latter was, in turn, inferred through the balancing of constitutionally recognised fundamental rights (the appropriateness test), which was sequentially followed by the degree of compliance with the legal requirements set out in EU law – the GDPR. Although many steps were taken to draw a direct legal connection between the finding of anti-competitive behaviour under Section 19(1) GWB, and the finding of an infringement of the GDPR, the Bundeskartellamt did exactly that, given that the larger part of its analysis was directed at assessing whether FB's terms and conditions complied with GDPR rules.

Stemming from its theory of harm, the Bundeskartellamt had to identify what causal link united the finding of a lack of compliance with the GDPR, with conduct that was unacceptable from an antitrust perspective. The Bundeskartellamt acknowledged that strict causality of market power was not required. Therefore, it was not required to show that those data processing conditions could be solely formulated because of market power. Instead, normative causality was enough to demonstrate that a sufficient connection was drawn from the infringement of the GDPR provisions with antitrust.[29] The German NCA found it sufficient to prove that the conduct was anti-competitive as a result of market dominance, regardless of the fact that other circumstances could influence the same outcome.[30]

[27] Ibid., para. 530.

[28] The interpretation of consent has also been explored by the author in, Alba Ribera Martínez, 'The Circularity of Consent in the DMA: A Close Look into the Prejudiced Substance of Articles 5(2) and 6(10)' (2023) 29 Rivista Concorrenza e Mercato: Numero Speciale Concorrenza e Regolazione nei Mercati Digitali 191–212.

[29] Ibid., para. 873. On the differences between both, Rupprecht Podszun, 'The Facebook Decision: First Thoughts by Podszun' (D'Kart, 8 February 2019) <https://www.d-kart.de/en/blog/2019/02/08/die-facebook-entscheidung-erste-gedanken-von-podszun/> accessed 9 March 2023 and Thibault Schrepel, 'Repeal Continental Can' (Network Law Review, 20 December 2019) <https://www.networklawreview.org/repeal-continental-can/> accessed 9 March 2023.

[30] B6-22/1 (n 6), para. 874. An in-depth analysis in Viktoria H.S.E. Robertson, 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' (2020) 57 Common Market Law Review 161 and Anne C. Witt, 'Excessive Data Collection as a Form of Anticompetitive Conduct: The German Facebook Case' (2021) 66(2) The Antitrust Bulletin 276.

## 2. The interim proceedings leading to the preliminary ruling

Following the final decision of the Bundeskartellamt, the OLG, as the Appellate Court that reviewed this decision, decided whether there were serious doubts as to the legality of the resolution of the NCA. The OLG's ruling agreed with Facebook and suspended the effect of the decision of the Bundeskartellamt – the OLG concluded that FB's data processing activities did not give FB any relevant and artificial competitive advantage. Contrary to the finding of the Appellate Court, the Federal Court upheld the execution of the decision of the Bundeskartellamt that imposed behavioural remedies on Facebook. Hence, the BGH revoked the suspensive effects, approved by the OLG, concerning the terms of the remedies originally imposed by the NCA. Facebook appealed the final decision of the Bundeskartellamt, and requested, once again, the suspension of the execution of the decision, which was ultimately granted by the OLG during the main proceedings.

This section analyses the three sets of contentious arguments that were disagreed on throughout the proceedings by the Appellate Court and the Federal Court, which ultimately resulted in the Appellate Court referring seven questions to the CJEU to be settled via a preliminary ruling.

### 2.1. The application of Section 19(1) GWB rather than Section 19(2) no. 2 GWB

The Appellate Court, OLG, criticised the choice of the NCA to apply the prohibition under Section 19(1) GWB, rather than the more specific provision contained in Section 19(2) no. 2 GWB. In this regard, the OLG highlighted that the Bundeskartellamt should have performed an analysis of the 'as-if competition' test (similar to the counterfactual exercise in EU competition law) to demonstrate whether the same data processing terms would have been applicable in a state of competition not hindered by the manifestation of FB's abusive market power.

Following this line of reasoning, the Appellate Court, OLG, analysed whether its users were exploited by Facebook through the imposition of these terms and conditions, i.e., whether the alleged 'loss of control' over their personal data occurred. The Court brought forward an anecdotal fact to support its finding that FB's users were, in fact, in control when granting their consent: as opposed to the 32 million monthly German Facebook users, 50 million on-line users in Germany had not opted to accept FB's data processing conditions and, thus, had not registered for FB's service. Given the fact that users had a sufficient degree of choice to opt out of Facebook altogether, the logical consequence was to think that they decided not to accept FB's terms in a completely autonomous manner without being influenced by others. Therefore, the same principle applies to those users who opted into the service.

Although the Federal Court, BGH, did not directly examine the choice of which instrument, from the German competition law regime, to use to counteract FB's conduct, it did make an effort to respond to the OLG's anecdotal review of the case. Therefore, the Federal Court discarded the fact that genuine choice may be derived from the existence of potential users who are not registered on Facebook. Instead, it set out how FB's conduct must be observed in relation to its existing users, insofar as the terms and conditions of the use of Facebook services were imposed upon them, and they could not choose the degree of protection of their own data, which they wanted to benefit from throughout their online interactions. For instance, it is possible that a segment of FB's existing users would have chosen a more personalised experience if they had been given a choice. Another segment of FB's users might have preferred to enjoy a less personalised experience by providing more limited access to their personal data. Hence, the relevant notion from an antitrust perspective does not necessarily rely on the bigger part of German online users that are not registered on Facebook, but rather on the mandatory expansion of FB's service – from the provision of a social network to other services. The latter would include the collection, processing, and harvesting of user data, which these users could simply not want, data the aggregation of which was not necessary for shaping user experience but was nevertheless collected in order to cater to FB's services.

The approach of the Federal Court, BGH, towards the conduct and potentiality of FB's abuse is characterised by its acknowledgment that data processing policies can be placed at a range of points on a continuum when they interact with antitrust. The fact that the data processing activities of the main digital players are data-intensive, to enable the processing and collection of data from a wide range of services, does not imply that the current situation should remain the same in the future. Consequently, in a competitive environment, one could imagine that a privacy-preserving data processing policy could be attractive to users encouraging their decision to register for a particular service. As opposed to the current situation, one could also think about the possibility conferred upon Facebook users to adjust their privacy settings before they register to the actual service. Even though these policies are not directly available on Facebook, this does not necessarily imply that other alternative privacy-preserving business models, regarding the processing of data, could not be successfully applied in the digital arena. Consumer choice is factored into this line of reasoning as a whole set of possible states of the world that could be developed in the absence of abusive conduct.

**2.2. The constitutional balancing of interests contested in the case at hand**

Regarding the reasoning of the Bundeskartellamt relating to the inferences between different fields of German law, the Appellate Court, OLG, concluded that the NCA's judgment assumed that a simple legal violation (even if it existed) was harmful to competition. Aside from the lack of compliance with the law, the finding of abusive conduct had to require damage to competition. The German competition law regime places different standards on the different manifestations of abusive conduct. In the case of Section 19(2) no. 2 GWB, the standard of "as-if competition" is required to assert whether the premise of abuse is, in fact, true. Although the OLG considered the former should have applied to this case, it also emphasises the role of the standard placed by Section 19(1) GWB, requiring a comprehensive balancing of interests, considering the objective of the GWB is directed towards the protection of the freedom of competition.[31]

The Appellate Court engaged with this argument in a detailed manner, by analysing the precedents pointed out by the German NCA in its decision, in order to signal that not every ineffective provision in the sense of the German Civil Code constitutes an abuse of market power.[32] The OLG remarked that those cases concerned scenarios where the damage to competition by the conduct of the dominant company was obvious and apparent. For example, the terms and conditions imposed in those cases made it inappropriately difficult for the counterparty to terminate the contractual relationship. This led to (i) a considerable impairment of the end users' freedom over their economic disposition, and (ii) an impairment of horizontal competition because alternative providers were unfairly restricted from establishing their contractual relationships with the customers concerned. Therefore, the OLG invalidated the first step of the analysis of the Bundeskartellamt – the connection between an infringement of Section 19(1) GWB and the reasonableness test set out in the German Civil Code.

The OLG also questioned the connection drawn by the NCA between the reasonableness test (civil law) and the appropriateness test (constitutional law approach). The Appellate Court observed that a disregard for fundamental rights-relevant positions by a dominant undertaking is not necessarily harmful to competition. Again, the Appellate Court examined the case that the

[31] The case law that is highlighted here is BGH, Jun. 7, 2016, KZR 6/15, openJur 2016, 7218 (Ger.) https://openjur.de/u/892001.html, BGH, Jan. 23, 2018, KZR 3/17, openJur 2018, 4854 (Ger.) https://openjur.de/u/971140.html and BGH, Oct. 24, 2011, KZR 7/10, openJur 2015, 23849 (Ger.) https://openjur.de/u/772399.html.

[32] The main case analysed is BGH, Jan. 24, 2017, KZR 47/14, openJur 2018, 2166 (Ger.) https://openjur.de/u/2116703.html, para. 35.

Bundeskartellamt rendered instrumental to make its point by drawing out the differences with FB's data processing activities.[33] Under the case law, the plaintiff's exercise of their freedom of economic activity was contingent on the existence of an agreement, whereas that same consequence did not apply to the Facebook case. Surprisingly, the Federal Court, BGH, did not directly engage in this discussion, but did confirm the Bundeskartellamt had enforced the existing case law correctly and with precision.

### 2.3. Causality between an infringement of the GDPR and competition law

As opposed to the German NCA, the Appellate Court's position when interpreting the case law of the Federal Court entailed that upholding normative causality was not enough to demonstrate the existence of anti-competitive harm caused by Facebook, and that strict causality was required instead. In the particular case of the abusive exploitation of consumers, as upheld by the OLG, the reason for exploitation lies on the agreed-upon conditions being disadvantageous to consumers, because of the IR content, rather than on the fact that an unfavourable market outcome is produced by a dominant company. Then, it should follow that the standard of causality in results should apply, given that an impairment of competitive market conditions will not always derive from the conduct of the dominant undertaking.

Nevertheless, the Federal Court, BGH, steered the debate away from strict causality and highlighted that the Bundeskartellamt was right in requiring normative causality between the abuse and the manifestation of market power. In this regard, the BGH justified a less stringent causality requirement applied in this particular case, in light of FB's objective ability to impede competition due to FB's great superiority in power when imposing the terms and conditions upon its users. Following this argument, the mere expectation that different terms would be used under the conditions of effective competition is enough to back up the finding of normative causality, as opposed to the requirement of a higher probability threshold.

All in all, the Appellate Court's and Federal Court's conflicting views set out a narrow and broad interpretation of the German competition law regime regarding exploitative abuse. In light of the large distance dividing the OLG's and BGH's criteria of interpretation, the Appellate Court brought the terms of the discussion to the attention of the CJEU to be addressed in the form of a preliminary ruling. Without directly touching upon the competition law considerations, the OLG requested the CJEU to indicate the contours and limitations of the scope of the GDPR in the EU corpus of law. The matter

[33] The remarked case is BGH, Jun. 7, 2016, KZR 6/15, openJur 2016, 7218 (Ger.) <https://openjur.de/u/892001.html>.

of causality was dropped from the questions submitted to the CJEU, given that three months prior to the request, the GWB had been amended. Therein, the German legislator directly acknowledged that no qualified requirements in the sense of strict causality could be derived from the wording of the provision contained in Section 19(1) GWB.[34] The explanatory memorandum to the 10th amendment of the GWB even brought forward the arguments set out by the Bundeskartellamt and the Federal Court, BGH, in this particular case, in order to demonstrate the validity and effectiveness of the revision of the German competition law regime.

## III. The preliminary ruling in Case *C-252/51* (*Meta Platforms and Others v. Bundeskartellamt*)

The Appellate Court, OLG, submitted its request for a preliminary ruling in April 2021, in relation to the case decided by the Bundeskartellamt against Facebook in the area of antitrust, although the CJEU would have to resolve the interpretation of the terms of the GDPR.

### 1. The questions addressed to the Court of Justice

When the CJEU decided on the content of its preliminary ruling, it considered two groups of questions: (i) those strictly related to the interpretation of the GDPR in the context of FB's data processing (questions II to VI), and (ii) those questions covertly addressing the interaction between data protection and competition law (questions I and VII).

On one side, Questions II–VI of the OLG's request to the CJEU related to the nuanced and comprehensive interpretation of the requirements of the GDPR, as applied by the Bundeskartellamt in its antitrust analysis, namely, whether the data collected and processed by Facebook was to be considered in light of the provisions relating to the special categories of personal data under Article 9 GDPR (Question II), and the lawfulness of the legal bases chosen by Facebook to process its data under the requirements set out in Article 6 GDPR (Questions III–VI). On the other hand, questions I and VII of the

[34] On the 10th amendment to the German Competition Act, see Bundeskartellamt, 'Amendment of the German Act against Restraints of Competition' (*Bundeskartellamt*, 19 January 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html;jsessionid=D7DE4ECE438ABD3122EA85541B569E80.2_cid390?nn=3591568> accessed 20 April 2023; Picht and Akeret (n 23).

request directly addressed the ability of the NCA to rule on the existence of exploitative abuse from the perspective of data protection. The Appellate Court formulated the above questions concerning Article 51 GDPR, which sets out the existing competences and the coordination mechanisms between data protection supervisory authorities across the Member States to contribute to the consistent application of the GDPR throughout the Union.

In light of the debate surrounding the question of causality, and the legal basis of the Bundeskartellamt's decision against FB's data processing activities, these two questions were overtly directed at defining the existing borderlines regarding competition authorities' and data protection supervisory authorities' powers to decide on cases related to the collection, processing, and harvesting of personal data performed by the main digital players.

## 2. The Opinion rendered by Advocate General Rantos

As opposed to the discussion surrounding normative and strict causality under the German competition law regime, in his Opinion, Advocate General Rantos (hereinafter: AG or AG Rantos) stretched out Questions I and VII to resolve whether the German NCA could intervene, in the particular case at hand, as far as competition law is concerned.

Regarding Question I, AG Rantos discarded the argument that the German NCA penalised a breach of the GDPR directly in its final decision. Instead, he asserted that the Bundeskartellamt reviewed FB's alleged abuse of its dominant position while considering the undertaking's non-compliance with the GDPR. In his view, the German NCA did not decide, as the main issue of the case on the finding of an infringement of the GDPR.[35] The Bundeskartellamt cannot be faulted for its analysis in this aspect. Nonetheless, AG Rantos highlighted that a NCA does not have the competence to make a ruling, primarily based on the GDPR, insofar as that regulatory space is reserved for data protection supervisory authorities, according to Articles 51 to 67 of the GDPR, which provide for the mechanism of the one-stop-shop principle.[36] Hence, AG Rantos legitimised the Bundeskartellamt's enforcement actions as far as the finding of an infringement of an abuse was concerned – the NCA did not interfere with the competences solely attributed to data protection supervisory authorities and, thus, cannot be condemned for doing so.

This first statement brought forward by AG Rantos is quite detached from reality. Aside from the constitutional and nationally idiosyncratic theory of harm

[35] Case C-252/21 *Meta Platforms Inc. and Others v. Bundeskartellamt* Opinion of AG Rantos (n 16), paras 17 and 18.

[36] Ibid., footnote 11.

presented by the Bundeskartellamt, one can establish that the NCA's analysis was anything but a direct application of the GDPR. Throughout the Bundeskartellamt's decision, the GPDR's provisions – which are carefully analysed by AG Rantos in his Opinion – constitute the main corpus and reasoning leading to the finding of an abuse. If one operates the counterfactual of the case's rationale, if that data protection considerations were to be completely precluded from the NCA's antitrust analysis, the German NCA's line of reasoning would completely collapse. In the absence of an extensive analysis by the Bundeskartellamt of the requirements set out by the GDPR to find an infringement, the only relevant and substantive provisions left would be Sections 307 and following of the German Civil Code and Section 19(1) GWB, which provide ample space for bringing consumer protection and antitrust considerations under the same analysis.

Moreover, the VII question addressed to the CJEU considers whether a NCA is entitled to assess the undertaking's degree of compliance with the GDPR, in data processing terms, as an incidental question and not as a main finding in its final decision. Since the GDPR only provides for the coordination mechanisms for the different data protection supervisory authorities in the Member States, AG Rantos highlighted that the GDPR's application is not automatically precluded from every intervention pursued by a competition authority.[37] Indeed, the GDPR may be considered a key element in the fact-sensitive analysis of the individual competition law case.

AG Rantos proposed that this incidental knowledge may be incorporated into the consideration of the legal and economic context in which the conduct takes place. That is, the undertaking's degree of compliance may be adopted as the ratio decidendi to determine whether its conduct deviates from merit based competition. To this statement, AG Rantos re-directed the points of contention (present in the interim proceedings following the final decision of the Bundeskartellamt) away from causality and the applicable legal test, and towards the procedural aspect of the competences granted upon the NCA's and the data protection supervisory authority's assessments of the data processing activities of dominant undertakings. AG Rantos covertly advocated for the integration of both fields of law in an abstract manner, insofar as the limitations between the capacity to intervene of the former and the latter are not spelled out from a substantive perspective.

Instead, the AG's Opinion took a procedural stance on the dichotomy based on the principles of sound administration and the NCA's duty to cooperate in good faith pursuant to Article 4(3) TEU. Given the fact that an NCA can undermine the coherent application of the GDPR, as opposed to its direct interpretation from the side of data protection supervisory authorities, NCAs

[37] Case C-252/21 *Meta Platforms Inc. and Others v. Bundeskartellamt* Opinion of AG Rantos (n 16) para. 22.

must act in accordance with an extensive duty of diligence and care when analysing data processing activities covered by the GDPR. In the absence of these clear rules on cooperation mechanisms between NCAs and data protection supervisory authorities, a NCA's duty of diligence comprises, at least, a duty to inform and cooperate with data protection supervisory authorities, even in those cases where these authorities have not begun any investigation concerning similar practices. At its highest, this duty of care entails considering (both formally and informally) previous decisions or ongoing proceedings in the realm of the data protection supervisory authorities so that an NCA's decision, incidentally applying the GDPR, does not deviate from the findings of the competent data protection authorities. Caution could translate into waiting for the moment when the data protection supervisory authority issued its own decision, in order to avoid the duplication of proceedings in two parallel assessments, in line with the theory and substance of prejudicial effect.[38] Nonetheless, the legal basis and modality of cooperation introduced by AG Rantos, concerning the relationships and duties imposed on NCAs in relation to data protection supervisory authorities, is quite extraordinary. Given that secondary EU law has not provided an adequate response to the forced interaction between both fields of law, AG Rantos proposed instead a theoretical construction based on primary law to tackle the scenario.

In line with the European Commission's opposition to requiring causation between any type of conduct and its anti-competitive effects, to demonstrate the existence of an abuse of a dominant position, causality is still a pending matter for the antitrust field as a whole.[39] One can only turn to the *Hoffmann-La Roche* and *Tetra Pak* rulings, which require that a mere link between the dominant position and the alleged abusive conduct exists, to establish an abuse.[40]

For the particular case of the analysis of the GDPR, AG Rantos cautioned against drawing direct inferences from one field of law onto the other one. First, an infringement of Article 102 TFEU is not directly apparent from conduct deriving from the lack of compliance with the GDPR. The finding of an infringement of competition law coming from the interpretation of the GDPR cannot be directly linked and considered as an automatic theoretical stance as anti-competitive conduct. Second, the concepts of market power and

[38] Case C-252/21 *Meta Platforms Inc. and Others v. Bundeskartellamt* Opinion of AG Rantos (n 16) paras 28–32.

[39] European Commission, Competition policy brief (Issue 1, March 2023) accessed 20 April 2023.

[40] Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* [1979] ECR I-461, para. 91; Case C-333/94 *Tetra Pak International SA v. Commission of the European Communities* [1996] ECR I-5951, para. 27.

dominance must not be combined in any case, and especially in relation with the dichotomy between competition law and the application of the GDPR. The exertion of market power below the threshold of dominance can lead to the existence of a clear imbalance between the data 'subject' and the data 'controller' in the sense of the GDPR. The Advocate General saw market power as relevant from the GDPR's perspective, and dominance as a factor to assess whether the requirements of the consent granted by the data subject have been complied with. However, they are not pre-requisites to the finding of an infringement of the GDPR, either. The opposite does not seem to be true: market power and dominance are undeniable elements to establish abuse, even if they are associated with additional elements, which do not directly ascribe to the competition-related elements normally considered in antitrust analysis.

At face value, AG Rantos's Opinion is quite adamant in advocating in favour of integrating both legal fields, even if that requires differentiating the application of the GDPR into two artificial categories (incidental and direct), as well as introducing a procedural backdoor to enable NCAs and data protection supervisory authorities to cooperate.

## 3. The Court of Justice's ruling

The Court of Justice resolved all of the discussion revolving around the interplay between data and competition law in a nuanced and tempered manner. Although it built onto most of AG Rantos' narrative surrounding the case, the Court presented its view on how both fields of law should interact. It did not respond in an all-or-nothing fashion to Questions I and VII. Instead, it chose to interpret the mechanisms established in the GDPR as co-existent with the prohibition of an abuse of a dominant position established under Article 102 TFEU.

The CJEU set in the foreground that Article 55(1) GDPR provides that each data protection supervisory authority is competent for the performance of the tasks assigned to it and the exercise of the powers conferred on it.[41] Those tasks include the monitoring and enforcing of the GDPR, which is materialised, in some of the cases brought to the data protection supervisory authorities' attention, via the cooperation mechanisms enshrined under EU data protection regulation. The one-stop-shop mechanism compels the data protection supervisory authorities to exchange information and to provide each other with mutual assistance in ensuring consistency in the GDPR's application.

[41] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 17) paras 37 and 38 with reference to Case C-645/19 *Facebook Ireland Ltd and Others v. Gegevensbeschermingsautoriteit* EU:C:2021:483, para. 47.

The mechanism only binds data protection supervisory authorities and not national competition authorities, even if they decide to apply the GDPR as a benchmark to the finding of an infringement of competition law. In a similar vein, there is no provision under EU data protection regulation or competition law prohibiting a national competition authority from applying such a theory of harm as the one presented by the Bundeskartellamt.[42] In the absence of such rules, the Court of Justice glances over to Article 5 of Regulation No 1/2003.[43]

To produce a finding of an abuse of a dominant position in the sense of Article 102 TFEU the competition authority must have regard to the consequences of such an abuse for consumers in that market to establish whether the dominant undertaking's conduct departs from competition on the merits. In this context, the Court of Justice asserts, that the compliance or non-compliance of the potentially abusive conduct with the provisions of the GDPR may be a vital clue among these relevant circumstances of the case to establish whether the dominant undertaking resorted to methods governing normal competition.[44] The Court plays out with this argument and upholds that ignoring the processing of personal data performed by FB on its business model would be tantamount to keeping oneself blind from the real functioning of digital markets and ultimately undermining the effectiveness of competition law altogether. Framing the argument in the reverse implies, in the Court's own words that the access and processing of personal data has become a significant parameter of competition between undertakings in the digital economy.[45]

These bold statements are subsequently tempered by the rest of paragraphs in the ruling, insofar as the interplay (posed in the narrow terms already established by the Court) will only be admissible when the rules on the protection of personal data are necessary for the competition authority to examine whether the conduct departed from competition on the merits.[46] Hence, the Court adds to the case an additional layer of complexity by establishing a new threshold of necessity in the appraisal of the interplay between data protection and competition law.[47] Not every single antitrust

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[42] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 17) paras 42 and 43.

[43] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[44] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 17) para. 47.

[45] Ibid., para. 51.

[46] Ibid., para. 48.

[47] On the introduction of this additional threshold, see Alba Ribera Martínez, 'A Threshold Can Take You Further Than a Statement – The Court of Justice's Ruling in *Meta Platforms and Others (Case C-252/21)*' (*Diritti Comparati*, 13 September 2023) <https://www.dirritticomparati.

case that considers EU data protection regulation in its analysis is accepted, which is a welcome limitation on the side of the Court of Justice.[48]

Furthermore, a competition authority must not only check that it has surpassed the threshold of necessity, but it shall also examine whether it has respected the duty of sincere cooperation enshrined in Article 4(3) TEU when applying EU data protection regulation – without taking recourse to the assessment of a data protection supervisory authority. The Court paves the way for competition authorities that wish to apply – albeit narrowly – the GDPR in their antitrust analyses and establishes a group of steps that must be followed to ensure that the competition authority does not endanger the consistency of the GDPR's application throughout the Union.[49] First, the national competition authority must ascertain whether the same conduct has already been subject to a decision by the competent national supervisory authority, the lead supervisory authority or the Court. If that were to be the case, then the national competition authority is bound by their conclusions as far as their interpretation of EU data protection goes, whereas they remain free to draw their own conclusions in applying competition law.

Second, where the national competition authority has doubts on the interpretation of the conduct in light of data protection regulation it shall consult and seek the cooperation of the corresponding data protection supervisory authorities. If there was an ongoing procedure under the terms of the GDPR, depending on the circumstances of the case, the national competition authority may have to wait for the supervisory authority's findings before it takes its own decision. In the absence of an ongoing procedure, the national competition authority is only expected to wait for a reasonable period of time to dispel its doubts about the interpretation of EU data protection regulation. In the extreme case that the national supervisory authority does not respond, the national competition authority may continue its own investigation.

Therefore, NCAs are compelled to abide by their duty of sincere cooperation by asking first whether the data protection supervisory authorities have any valuable insight for them. If they do not, nothing else binds a competition

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it/a-threshold-can-take-you-further-than-a-statement-the-court-of-justices-ruling-in-meta-platforms-and-others-case-c-252-21/> accessed 14 October 2023.

[48] The case has also been analysed in depth by the author previously in Alba Ribera Martínez, 'Getting Clued Into the Interplay Between Data Protection Regulation and Competition Law in Case C-252/21 Meta Platforms and Others (Conditions Générales d'Utilisation d'un Réseau Social)' (*Kluwer Competition Law Blog*, 5 July 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/07/05/getting-clued-into-the-interplay-between-data-protection-regulation-and-competition-law-in-case-c-252-21-meta-platforms-and-others-conditions-generales-dutilisation-dun-reseau-social/> accessed 14 October 2023.

[49] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 17) paras 52–63.

authority when interpreting the GDPR under the antitrust framework. On the other side, when the data protection supervisory authority provides its views to the competition authority, the latter is not bound in any substantive way by its conclusions, given that the Court only establishes this binding effect in the presence of an ongoing investigation.

Regarding the tenet of causality in the finding of an abuse of a dominant position in relation to the interpretation of the GDPR, the Court of Justice remains silent, just as AG Rantos did in his opinion. However, an implicit recognition against it may be inferred via the Court's ruling on the case. Against the background of the Court's appraisal that the dominant undertaking's degree of compliance with the GDPR may be factored into the all-relevant circumstances analysis, it discards that a direct correlation may be directly drawn from one field of law to the other. Both elements are disconnected factually and legally, and they remain in that particular form after the Court's preliminary ruling resolving the Bundeskartellamt's case against FB.

## IV. Conclusions

The Bundeskartellamt's Facebook case is paradigmatic in the sense that it has forced national courts to contest and put forward their arguments on the admissibility of the integration between data protection and competition law considerations. Taking it a step further, it has also forced the CJEU to express its own opinions regarding the potential integration of both fields of law into a unified analysis. However, a bottom-up approach towards the 'to and fro' of the judicial review of the case – before the Appellate Court and Federal Court through its interim proceedings – shows that the ramifications of this preliminary ruling will be more profound than expected.

Even with the CJEU's finding that the GDPR can, to some extent, be appraised into the same analysis, these conclusions – when they travel back to the national courts – may be drawn out and expanded upon into a re-statement of the applicable threshold of causality between abuse, and the manifestation of market power towards the legal standard place by causality of results.

The CJEU has deviated in substance but not so much in form from AG Rantos' Opinion, by constructing a nuanced theory of its own regarding the separation between both fields of law. Nonetheless, the CJEU shies away from providing any definitive answers in light of the singularity of the case on which the preliminary ruling is based, and the inferences that may be directly drawn from the perspective of Article 102 TFEU to the relevant analysis under the national provisions. The Facebook case is not the rule for

considering data processing activities at large within the antitrust analysis, given its idiosyncratic nature and narrow scope in relation to the application of the German competition law regime. As such, the Facebook case should not be attributed with the characteristics of an enforcement blueprint, but as a stop sign to assess whether the current interpretation of the competition law analysis may easily adapt to the data-intensive business models which shape the digital arena.

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