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DIGITAL MARKETS GUIDE

SECOND EDITION

Editors
Claire Jeffs, Danny Sokol and Susan Ning

Digital Markets Guide

Second Edition

Editors

Claire Jeffs, Danny Sokol and Susan Ning

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Publisher's Note

The digital economy is transforming day-to-day lives, with an exponential rise in connectivity not only between people but also between vehicles, sensors, meters and other aspects of the internet of things. Yet, as noted by Claire Jeffs and Nele Dhondt in their introduction, even as the Fourth Industrial Revolution accelerates, the traditional concerns of competition authorities are still very much present. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is thus critical.

The second edition of the *Digital Markets Guide* – published by Global Competition Review and edited by Claire Jeffs, Danny Sokol and Susan Ning – provides just such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The guide draws on the wisdom and expertise of distinguished practitioners globally and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as how pricing algorithms intersect with competition law and antitrust enforcement in certain tech mergers – for all competition professionals.

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Introduction: Why Digital Markets?

Claire Jeffs and Nele Dhondt[1]

Competition agencies' increased focus on digital markets

The emergence of the digital economy has been a powerful force, bringing about increased competition across a wide range of products and services. As noted in the European Commission's report 'Competition policy for the digital era', digitisation and developments in artificial intelligence have led to the emergence of new possibilities and business models. The Report recognises that 'many of these changes have greatly benefited European citizens', for instance, 'the accessibility of information has greatly increased . . . [transacting] across national borders has been facilitated . . . [and] [consumer] choice has increased.'[2] The report of the UK's Digital Competition Expert Panel similarly found that the 'digital economy has benefited consumers by creating entirely new categories of products and services', often high-quality with low prices, and has in some areas facilitated greater competition, for example in the case of digital comparison tools.[3]

As with any cycle of disruption and innovation, this digital revolution also presents some challenges for competition law enforcement. The contributions to this guide show that competition agencies continue to intensify their scrutiny of the digital economy, and that they are trying to get to grips with both the opportunities and challenges.

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1 Claire Jeffs is a partner and Nele Dhondt is a PSL counsel at Slaughter and May. The authors would like to thank Gunnar Schulte, former associate at Slaughter and May, for his contributions to this introduction.

2 The report is available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

3 The report is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

It is clear from the contributions to this guide that many agencies are also aware that regulatory overreach could have negative effects on the development of digital markets and that they should take an evidence-based approach to competition enforcement in this area.[4] As a first step, a number of agencies (or their governments) commissioned market studies or appointed experts in the digital field to prepare industry reports. Jurisdictions such as the European Union, the United Kingdom, Germany, France and Canada led the way in this respect and others have since followed (including the United States and India).

It is notable that a first wave of studies and reports on selected topics, such as e-commerce and data,[5] has been followed by a second wave of studies and reports tackling broader topics, such as 'digital competition' and 'digital platforms'. Examples of such reports include:

- the 'UK Expert Panel Report – Unlocking Digital Competition' (the Furman Review) (March 2019), followed by the CMA's 'Online platforms and digital advertising market study' (July 2020);[6]
- the 'EU Commission Special Advisers Report on Competition Policy for the Digital Era' (April 2019);[7]
- the report by the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law,[8] which followed a series of hearings on digital competition (October 2020);[9] and

4 For example, the authors of Chapter 17 (India) refer to the Competition Commission of India (CCI) noting that 'the competition regulator needs to balance regulation and/or intervention while ensuring that it does not chill innovation'.

5 These include the e-commerce sector inquiry reports of the European Commission (in 2017) and the French competition agency (in 2012).

6 The Expert Panel report is available here: www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel and the CMA market study is available here: https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

7 The report is available here: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

8 The report is available here: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519. The report found that Amazon, Apple, Facebook and Google held significant and durable market power and urged stronger antitrust enforcement and legislative reform.

9 These hearings covered a variety of e-commerce-related topics, including: (1) the identification and analysis of collusive, exclusionary and predatory conduct by digital and technology-based platform businesses; (2) the antitrust framework for evaluating acquisitions of potential or nascent competitors in digital marketplaces; (3) privacy, big data and competition; and (4) algorithms, artificial intelligence and predictive analytics.

- the Australian Competition and Consumer Commission (ACCC)'s Digital Platforms Inquiry final report (July 2019), Digital Platform Services Inquiry's interim reports (the latest edition published September 2022) and Digital Advertising Services Inquiry final report (September 2021).[10]

Many competition agencies have also established or appointed specialist digital markets units or officers with the aim of developing expertise and regulation to deal with fast-paced digital markets. For example:

- In the United Kingdom, a Digital Markets Unit (DMU) has been established within the CMA. While the DMU is currently working on a non-statutory basis, the UK government is consulting on legislative proposals for a new pro-competition regime for digital markets. Under the proposals, the new regime will focus on companies that the DMU designates as having 'strategic market status'.[11]
- In the United States, the FTC has operated a permanent Technology Enforcement Division since October 2019.[12]
- In Canada, the Competition Bureau set up its Digital Enforcement and Intelligence Branch (CANARI) at the end of 2021. CANARI stands for Competition through Analytics, Research and Intelligence.[13]
- In Australia, the ACCC has set up a specialist Digital Platforms Branch to conduct further work related to digital platform markets.[14]
- In the EU, Competition Commissioner Vestager announced in September 2022 that the EC was in the process of establishing a chief technology office.[15]

While many reports and studies have found that existing competition rules generally continue to provide a solid basis for protecting competition in the digital age, the calls for greater changes to regulation are growing. The reports have generally noted that the traditional tools for competition analysis may require some

10 See Louise Klamka, Andrew Low, Amelia Douglass and Michelle Xu (Chapter 15). The 'Digital advertising services inquiry – final report' is available at https://www.accc.gov.au/publications/digital-advertising-services-inquiry-final-report.

11 See https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.

12 See https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division.

13 See Chapter 13 (Canada).

14 See Louise Klamka, Andrew Low, Amelia Douglass and Michelle Xu (Chapter 15).

15 Speech at Fordham Annual Conference on International Antitrust Law & Policy, New York, 16 September 2022.

adaptation or refinement to address better the specificities of online markets, such as the multisided nature of platforms, network effects, zero-price markets, 'big data' and the increased use of algorithms.[16] In some jurisdictions, changes to the existing competition law framework have been suggested – for example, in India, changes to the jurisdictional thresholds in merger control have been proposed to capture more digital mergers (see below),[17] and similar changes have already been implemented in Germany and Austria. Germany has also amended its competition legislation to tighten the control of abusive conduct in digital markets. Under the amended act, the Federal Cartel Office can intervene at an early stage in cases where 'competition is threatened by certain large digital companies' and prohibit certain types of conduct.[18]

In other jurisdictions – in particular the EU, the US, China and the UK – there are proposals for new ex ante regulation to govern gatekeeper digital platforms, with a general move to more prescriptive regulation of such platforms.[19]

The European Commission has in particular profiled itself as a frontrunner in regulating digital industries and this has led to various legislative initiatives, including the Digital Markets Act (DMA).[20] The DMA, which could have far-reaching implications, particularly for companies designated as 'gatekeepers', entered into force on 1 November 2022. Following their designation, gatekeepers

16 For example, the EU Commission Special Advisers Report notes that, 'Over the last 60 years, EU competition rules have provided a solid basis for protecting competition in a broad variety of market settings. Competition law doctrine has evolved and reacted to various challenges and changing circumstances case by case, based on solid empirical evidence. At the same time, the stable core principles of EU competition rules have ensured consistent enforcement. We are convinced that the basic framework of competition law . . . continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era. However, the specific characteristics of platforms, digital ecosystems, and the data economy require established concepts, doctrines and methodologies . . . to be adapted and refined.'

17 See Chapter 17 (India).

18 See Press release of Bundeskartellamt, Amendment of the German Act against Restraint of Competition, 19 January 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html?nn=3591568.

19 For the EU and UK, see the Chapter on Digital Regulation in Europe and the chapter on EU: Restrictions of Online Sales. For the US, see Chapter 7 on Key Developments in the United States, and for China, see Susan Ning, Ruohan Zhang, Weimin Wu (Chapter 16).

20 The Chapter on Digital Regulation in Europe (Chapter 2) provides an extensive overview of the new regulatory regime established by the DMA – including the obligations for gatekeepers – and a bird's-eye perspective of the Digital Services Act and Data Act. See also 'Key Developments in Europe' (Chapter 1).

should have until early March 2024 to comply with its requirements.[21] It will be interesting to see how the DMA regime will interact with traditional competition law enforcement by the EC and the national competition authorities.

Some trends in competition enforcement

Trends in antitrust

In an increasing number of jurisdictions, competition agencies have moved on from market studies and expert panel reports, and instigated investigations into specific conduct. In some instances, these investigations have resulted in enforcement action. Overall, this action confirms that competition agencies across the globe have found that the current competition rules are sufficiently flexible to deal with a range of potentially anticompetitive restrictions in a digital environment, including third-party platform bans, online sales restrictions (including 'geo-blocking'), dual pricing, most-favoured-nation (MFN) clauses and algorithmic collusion.

For example, based on its E-commerce Sector Inquiry findings (May 2017), the European Commission opened a number of antitrust investigations in relation to online vertical restrictions. These investigations resulted in (1) four decisions relating to online resale price maintenance (RPM) (against four manufacturers of consumer electronics products) in July 2018; and (2) a decision in relation to an online cross-border sales restriction (against Guess) in December 2018.[22] Vertical restraints in digital markets, such as dual pricing and RPM, have also been the subject of national investigations in Europe.[23]

There have also been a number of newly launched or continued abuse of dominance investigations against tech companies. In Europe, a key focus has been the dual role of platforms and the impact of 'closed ecosystems' on competition. For example, the European Commission is investigating Apple in relation

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21 EC press release, Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force, 31 October 2022, IP/22/6423.

22 The EC investigation found that Guess's distribution agreements restricted authorised retailers from, among other things: (1) using the Guess brand names and trademarks for the purposes of online search advertising (an infringement of the EU competition rules not yet known to the Commission); and (2) selling online without a prior specific authorisation from Guess (which was not based on any specified quality criteria). The related press release is available here: https://europa.eu/rapid/press-release_IP-18-6844_en.htm. See also Chapter 3, Stephen Mavroghenis and Christina Kolotourou, 'European Union: Restrictions of Online Sales'.

23 For an overview of the relevant decisional practice of European national competition agencies, see Chapter 3.

to its App Store and iOS, and Amazon in relation to its use of marketplace seller data and its e-commerce business practices.[24] Regulators in many other jurisdictions have also opened investigations with a particularly noticeable uptick in the United States.[25]

From a procedural perspective, regulators have also shown that they can use the existing frameworks to resolve digital cases via commitments or settlements. For example:

- In the European Commission's RPM and online cross-border sales restrictions cases described above, the companies cooperated with the Commission 'beyond their legal obligation to do so' and the Commission therefore granted fine reductions ranging from 40 per cent to 50 per cent.[26] Using the settlement procedure for non-cartel cases in this way helped the Commission speed up its investigations.
- In February 2019, the CMA accepted commitments from a group of hotel booking websites[27] following concerns that these sites had been misleading consumers online. The CMA accepted further commitments from 25 more hotel booking sites, including online travel agencies, meta-search engines, hotel chains and short-term rental sites shortly after its original decision in a push to standardise practices across this sector.[28]
- In July 2021, the AGCM closed its investigation into the broadcasting agreement made by DAZN and Telecom Italia after the parties agreed to a series of commitments designed to broaden consumer access to the parties streaming content online.[29]

24 For commentary on abuse of dominance investigations and decisions by the EC and NCAs in Europe, see 'Key Developments in Europe' (Chapter 1) and 'Self-preferencing in Digital Markets' (Chapter 5).

25 See, for example, Hideki Utsunomiya, Yusuke Takamiya and Yuka Hemmi (Chapter 18), Chapter 17 (India) and Chapter 13 (Canada). For the US, see George L Paul, D Daniel Sokol and Gabriela Baca, 'Key Developments in the United States' (Chapter 7).

26 The companies provided evidence with 'significant added value' and expressly acknowledged the facts and the infringements of EU antitrust rules.

27 This included Booking.com, Expedia. Ebookers, Hotels.com, Trivago and Agoda Company Pte.

28 See https://www.gov.uk/cma-cases/online-hotel-booking.

29 See https://globalcompetitionreview.com/exclusivity-clauses/italy-accepts-telecom-italia-and-dazn-broadcasting-commitments.

- In February 2022, the CMA decided to accept commitments from Google in relation to its proposals to remove third-party cookies (TPCs) on Chrome and develop its Privacy Sandbox tools bringing the CMA's investigation to an end without an infringement decision.[30]

There has also been an increase in the use of interim measures in relation to digital and technology markets (e.g., in France and the EU).[31] In particular, in October 2019, the European Commission imposed interim measures on Broadcom (a designer, developer and provider of integrated circuits for wired communication devices) in the TV and modem chipsets markets. At the time, Competition Commissioner (now Executive Vice-President) Margrethe Vestager said that in the absence of intervention 'Broadcom's behaviour is likely . . . to create serious and irreversible harm to competition . . . We therefore ordered Broadcom to immediately stop its conduct.'[32] This was the first time in 18 years that the Commission imposed interim measures.

Trends in merger control

Some enforcers have raised questions about the prevalence and potential impact of low-turnover, high-value transactions in digital markets. So far, legislative changes have mostly remained limited to refinements to the jurisdictional tests in certain countries to address the perceived concern that such transactions may otherwise escape review.[33] However, more far-reaching proposals have been put forward in some jurisdictions. For example, the UK government is considering

30 More info is available on the CMA's case page here: https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes. In its October 2022 update report on the implementation of the commitments, the CMA concluded that Google is complying well with the commitments.

31 For France, see Isabelle de Silva, President of the Autorité de la concurrence, keynote speech at Fordham Conference, 12 September 2019, p. 6.

32 European Commission press release, 16 October 2019, available here: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109. Broadcom offered commitments in April 2020 – see further https://ec.europa.eu/commission/presscorner/detail/en/ip_20_755.

33 In particular, Germany amended its merger control thresholds in 2017 to include a size-of-transaction test to address concerns that the existing thresholds, which were based on turnover, did not always catch deals of competitive significance. However, these (alleged) concerns are not specific to the digital economy but are or could also be relevant in relation to other research-intensive sectors (e.g., the pharmaceuticals and technology sectors). For further details on the debate around merger control thresholds, see, for example, Hideki Utsunomiya, Yusuke Takamiya and Yuka Hemmi (Chapter 18), Chapter 17 (India) and Susan Ning, Ruohan Zhang and Weimin Wu (Chapter 16).

introducing a new regime in which companies designated as having 'strategic market status' would have to report their most significant mergers to the CMA prior to completion and the CMA would have a broader jurisdiction to review such mergers through the introduction of a transaction value threshold and an accompanying UK nexus test.[34] Germany and Austria have already introduced transaction value thresholds.[35] While there are no plans to amend the jurisdictional thresholds in the EU Merger Regulation, the European Commission announced an overhaul to its approach to the use of the referral mechanism in the EU Merger Regulation so as to allow it to review transactions falling below EU and national merger review thresholds.[36]

A number of jurisdictions have intensified their merger control enforcement in relation to tech companies. One example is China. The Chinese State Administration for Market Regulation (SAMR), for example, prohibited the proposed merger between Huya and DouYu, two companies backed by the Chinese Internet giant Tencent, who are operating live game streaming platforms in China. SAMR has also imposed fines for gun-jumping, for example in relation to Tencent's acquisitions of China Music Corporation without seeking merger control approval.[37]

In the EU, another important recent development has been the way in which merger control deals with data and privacy. The Commission's decisions have set new precedents on market definition for data markets, the theories of harm that

34 The CMA has already taken an increasingly expansive approach to the jurisdictional scope of UK merger control under the existing rules.

35 See, for example, the guidance published by the Bundeskartellamt and the Bundeswettbewerbsbehörde, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

36 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021)1959, 26 March 2021. The guidance states: 'Article 22 of the Merger Regulation allows for one or more Member States to request the Commission to examine, for those Member States, any concentration that does not have an EU dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. It is clear from the wording, the legislative history and the purpose of Article 22 of the Merger Regulation, as well as from the Commission's enforcement practice, that Article 22 is applicable to all concentrations, not only those that meet the respective jurisdictional criteria of the referring Member States.'

37 See https://my.slaughterandmay.com/insights/briefings/first-merger-prohibition-in-the-digital-space-china-blocks-the-huyadouyu-merger-and-more-gun-jumping-decisions. See also Susan Ning, Ruohan Zhang and Weimin Wu (Chapter 16).

may be relevant and the remedies that can solve such concerns.[38] Meanwhile, in the US, recent statements by AAG Kanter suggest that remedies in technology mergers or acquisitions may face more scrutiny than in previous administrations.[39]

Updated guidance from agencies and courts

Another trend that is noticeable in the jurisdictions covered by this guide is that a number of competition agencies have reviewed and updated, or intend to review and update, their published guidance as they gain more experience in relation to digital markets. For example:

- In 2020, the JFTC amended its guidelines on merger review (Merger Review Guidelines) to clarify the JFTC's approach to various issues mainly relating to digital economy, for example the issue of market definition in digital markets.[40]
- In China, the Anti-monopoly Guidelines on Platform Economy, implemented in February 2021, list factors that indicate when an e-commerce platform is dominant.[41]
- In March 2021, the CMA adopted revised Merger Assessment Guidelines. Changes from the previous Guidelines include a greater emphasis on a dynamic approach to assessing mergers and non-price factors of competition;[42]
- In May 2022, the European Commission published its new Vertical Block Exemption Regulation (VBER) and the related Vertical Guidelines, with some amendments aimed at ensuring that the VBER and Guidelines better reflect practices in digital markets.[43]
- In January 2022, the DOJ and FTC announced a review of the agencies' Horizontal and Vertical Merger Guidelines that they had issued in June 2020, suggesting that these were too lenient.[44]

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38 See Gerwin Van Gerven, Annamaria Mangiaracina, Will Leslie and Lodewick Prompers (Chapter 6).

39 See George L Paul, D Daniel Sokol and Gabriela Baca, 'United States: Tech Mergers' (Chapter 8) and Daniel S Bitton, Leslie C Overton, Melanie Kiser and Neelesh Moorthy, 'United States: E-Commerce and Big Data Merger Control' (Chapter 9).

40 See Hideki Utsunomiya, Yusuke Takamiya, and Yuka Hemmi (Chapter 18).

41 See further Susan Ning, Ruohan Zhang, Weimin Wu (Chapter 16).

42 See the accompanying blog post published by the CMA, available at https://competitionandmarkets.blog.gov.uk/2021/04/08/bringing-the-cmas-merger-assessment-guidelines-up-to-date.

43 The review and content of the new VBER and Guidelines are considered by Philippe Chappatte and Kerry O'Connell (Chapter 4) and Stephen Mavroghenis and Christina Kolotourou (Chapter 3).

44 See George L Paul, D Daniel Sokol and Gabriela Baca, 'Key Developments in the United States' (Chapter 7); Daniel S Bitton, Leslie C Overton, Melanie Kiser and Neelesh Moorthy,

The courts are also increasingly providing guidance on how the competition rules should be applied to digital markets. For example, in May 2021, the German Federal Court overturned an earlier decision by the Higher Regional Court of Düsseldorf and held that the latter had failed to consider whether Booking.com's narrow MFNs were 'objectively necessary' for the performance of the main contract, the provision of online intermediary services.[45] Another landmark decision in the area of vertical restrictions in online markets is the European Court of Justice's ruling in *Coty*. This ruling shed more light on the extent to which selective distribution systems can be used by manufacturers to restrict distributors in their use of online marketplaces. It confirmed the European Commission's view that platform bans in selective distribution agreements benefit from the Commission's Vertical Block Exemption Regulation.[46]

Enforcer guidelines and court rulings that provide further guidance on how the competition rules will or should apply to online markets (including how and when the traditional tools require adaptation or refinement) should be welcomed. It is clear from the contributions to this Guide, however, that issues of market definition and potential competition in digital markets continue to be debated.[47] This can also be seen in the FTC's litigation against Facebook, alleging

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'United States: E-Commerce and Big Data Merger Control' (Chapter 9) and Garibotti and Gorin, United States: Platforms and Mergers (Chapter 10).

45 See Philippe Chappatte and Kerry O'Connell (Chapter 4). The new VBER only comes out strongly against retail wide parity clauses but recognises that parity clauses at other levels of the distribution chain or indeed narrow retail parity clauses could deliver efficiencies which would justify a block exemption. Meanwhile in post-Brexit UK, the Competition Appeal Tribunal (CAT) recently overturned a CMA decision that found insurance price comparison website CompareTheMarket's use of wide MFNs violated both Section 2(1) of the UK's Competition Act 1998 and Article 101 TFEU, and imposed a fine of £17.9 million. The CAT criticised the CMA's findings, concluding that wide MFNs are not by object infringements and that the UK NCA had failed to establish that the clauses had the anticompetitive effects articulated in its decision.

46 Judgment of 6 December 2017, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, C-230/16. For an analysis see Chapter 3 (Restrictions of Online Sales). In this chapter, Stephen Mavroghenis and Christina Kolotourou note that the new Vertical Guidelines of the EC further clarify the position vis-à-vis market place bans in a number of ways, for example, they define 'market places'.

47 See, for example, Daniel S Bitton, Leslie C Overton, Melanie Kiser and Neelesh Moorthy (Chapter 9).

that Facebook holds monopoly power in an alleged market for 'personal social networking services'.[48] Facebook is not the only tech company facing litigation by US regulators.[49]

As can be seen from the contributions, there has also been an uptick in private enforcement claims against tech platforms, including *Epic Games v. Apple*, in which the United States District Court for the Northern District of California considered allegations of antitrust violations in relation to the control of an app store and in-app purchasing systems, as well as a number of other private enforcement actions. These claims will also continue to provide important precedents on competition issues in digital markets.

Continue to keep calm and carry on . . . in a global way

Technological innovation is largely pro-competitive and the existing competition rules are, and will continue to be, flexible and robust enough to deal with the challenges of the online world. Careful, evidence- and precedent-based enforcement in individual cases continues to be the best approach to address competition concerns in digital markets, although this will in future likely operate alongside ex ante regulation of gatekeeper platforms in some jurisdictions.

A globally coordinated approach to the challenges raised in competition law by the digital age remains important wherever possible. Not only are the substantive issues similar across jurisdictions, but remedies should be coordinated where possible to avoid undermining the very cross-border competition that the online world has facilitated. We hope this Guide encourages competition enforcers and practitioners to think and act globally when it comes to the enforcement and practice of competition law in the online world.

48 See George L Paul, D Daniel Sokol and Gabriela Baca, 'Key Developments in the United States' (Chapter 7). As set out in this chapter, the suit was dismissed by a district court but an amended claim has been filed.

49 In 2020, the DOJ brought an action against Google, alleging anticompetitive behaviour in search and search advertising. As of September 2021, the lawsuit is still ongoing. See George L Paul, D Daniel Sokol and Gabriela Baca, 'Key Developments in the United States' (Chapter 7).

Part 1

Europe

CHAPTER 1

Key Developments in Europe

Paul Johnson, Ben Allgrove, Rebecca Bland and Ola McLees[1]

Reforming the regulatory framework

The past decade has shown that regulation has been unable to keep up with the rapid pace of development in the digital and technology sectors, impacting the enforcement capabilities of the European Commission (EC) and national governments. The pace of new technology has fast surpassed existing regulatory frameworks leaving governments to play catch up.

In order to avoid being caught in this situation again, they are keen to ensure a broad ability to regulate and enforce to try and keep pace with rapidly evolving technology. The EC in particular has recognised the need for a systemic overhaul and have embarked on an ambitious plan to enact both the Digital Markets Act (DMA) and Digital Services Act (DSA) in the coming year.

Before analysing these and other impactful new pieces of regulation, there are a number of important key themes to recognise relating to the regulation and enforcement, particularly of competition legislation in the technology sector.

Increasing responsibility put on digital service providers

Regulators have made significant strides aimed at making digital and technology players take greater responsibility for user safety and the content they make available online. Under the e-Commerce Directive from 2000,[2] platforms were

1 Paul Johnson and Ben Allgrove are partners, and Rebecca Bland and Ola McLees are associates at Baker McKenzie. The authors would also like to thank Bram Hoorelbeke, Beau Maes, Katia Dehon, Alexandra Gracia de Torres and Rebecca Longe for their contributions to this chapter.

2 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1.

disincentivised from taking proactive measures to combat illegal content at the risk of losing their safe harbour protection. The huge success of platforms built on this foundation led to significant user safety risks and rightsholder remuneration demands. As a result, governments have begun trying to rebalance the status quo by placing more onerous duties on platforms in 'exchange' for their safe harbour protection.

Broader scope of regulation

The race towards innovative, impactful and cutting-edge technology has put the digital sector in the crosshairs of governments and politicians, with particular focus on:

- the significance of 'the cloud' for the public and private sectors, and related questions around the security of networks;
- increasing reliance by digital actors on algorithms, AI and robotics;
- roll-out of impactful technologies like facial recognition or predictive and data-driven law enforcement and justice initiatives, and relating privacy issues; or
- the impact of technology on children, including increased focus on digital and technology players developing services geared towards children (notably in light of covid-19 and the significant regulating digitalisation of education) along with concerns about child online safety.

Legislative blueprint

The EC finds itself in a perfect storm of competing pressures while attempting to legislate on the digital and technology sectors. The issues at play can be largely grouped into three themes: human rights impact, national security interests and preserving corporate value as illustrated by the diagram below.

Coupled with this is the task of navigating the geopolitical sensitivities of each Member State as well as the varying levels of scrutiny different countries have to new technology and its place in their society. As a result, some member states, notably Germany, are taking matters into their own hands and enacting national legislation, which has the potential to disrupt the harmonisation efforts of the EC.

A blueprint has begun to emerge across the new digital and tech-focused regulation, which consists of:

- accountability: making digital services providers responsible for harm or third-party infringement;
- transparency: increased reporting requirements placed on digital services providers; and

- proactive obligations: filtering, blocking and gating requirements placed on digital services providers.

Notably, these regulatory proposals also feature the potential for higher penalties, calculated as a percentage of worldwide turnover.

Digital Markets Act (DMA) and Digital Services Act (DSA)

The DMA and DSA are two of the potentially most impactful pieces of EU regulation, aiming to create a 'safer digital space in which the fundamental rights of all users of digital services are protected'[3] and 'to establish a level playing field to foster innovation, growth and competitiveness, both in the European Single Market and globally'. The DSA and DMA represent the most significant pieces of technology regulation to date and will require extensive technology builds and process updates to ensure compliance.

Digital Markets Act

The DMA provides for a set of specific obligations which apply to certain categories of services (core platform services (CPSs) which include search engines, social media networks, web browsers, operating systems, online intermediation services, etc.) provided by very large digital companies identified through thresholds and other metrics as 'gatekeepers'. The stated goal of the DMA is to contribute to the proper functioning of the internal market by ensuring contestable and fair markets in the digital sector.

The DMA will enter into force on 1 November 2022,[4] and will start applying as of 2 May 2023. Gatekeepers will then need to comply with the behavioural rules for their CPSs, starting in the first quarter of 2024.

The obligations contained in the DMA relate to a mix of practices that are traditionally subject to competition rules or have recently been on the competition authorities' radar (e.g., exclusivity, tying and self-preferencing) and others that clearly fall outside of that prerogative (e.g., data collection, usage and portability, transparency and alternative dispute resolution). These obligations will likely require gatekeepers to undertake significant changes to the design and operation of some of their key services to ensure compliance.

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3 https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package, accessed 16 September 2022.

4 In April 2022, the EU institutions reached a compromise on the final text of the DMA, which was then approved by the European Parliament and Council of the European Union in July 2022.

The DMA provides for an extensive toolkit for the EC to monitor and enforce compliance with the new obligations. Gatekeepers are obliged to annually report on the measures they have taken to comply with the obligations. The EC can impose fines up to 10 per cent of worldwide consolidated turnover, which can increase to 20 per cent in case of repeat infringement, as well as behavioural and structural remedies if they find shortcomings in these efforts leading to violation of these obligations.

The EC will also have the power to launch market investigations into systemic non-compliance by particular gatekeepers or to assess whether further digital services should be added to the list of CPSs. Additionally, gatekeepers are required to inform the EC of all intended concentrations (within the meaning of the EU Merger Regulation) in the digital sector prior to their implementation.

Digital Services Act

The DSA largely maintains the safe harbours set out in the e-Commerce Directive but adds on significant new duties on each of the four newly defined online service categories.

New online service categories

The DSA proposes four categories of online services: 'intermediary', 'hosting service', 'online platform' and 'very large online platform' (VLOP). Each category is now subject to expanded obligations, with the highest stakes and fines likely to impact VLOPs.

Safe harbours

The e-Commerce Directive safe harbours will be largely replicated in the DSA, with the addition of a 'Good Samaritan' provision for intermediaries who carry out investigations to detect illegal content or undertake measures to comply with the DSA. This is a welcome change that has long been advocated for by the technology industry. However, the defences under the DSA will be narrowed to exclude consumer law violations where it is reasonable for consumers to believe the intermediary is providing the information, goods or services they received. In other words, clarity as to with whom a consumer is engaging will become paramount, and going forward this will impact product and customer contracting strategies and related business structures.

Notice and takedown

The DSA aims to harmonise notice and takedown mechanisms for the first time in the EU. However, the mechanisms proposed are fairly general and in practice are unlikely to materialise in significant changes for the majority of platforms and marketplaces, most of which already have sophisticated processes for notice and takedown in place. The most significant change proposed is to require a statement of reasons to be provided to explain why a host has removed or disabled content. These statements will then have to be made publicly available, which mirrors a parallel obligation in the P2B, but with much wider potential impact.

Another proposed change is the recognition of 'trusted flaggers', who will be appointed by the newly established Digital Service Coordinators in Member States, on the basis of their expertise in flagging illegal content. However, given some of the current political tensions within the EU relating to divergent views on the rule of law, there will likely be material variance between Member State approaches to trusted flagging, with no EC-level harmonisation mechanism.

Know-your-trader requirements

In an effort to clamp down on illegal and harmful goods and services available online, the EC has proposed 'know your trader' requirements, requiring online platforms to obtain proof-of-trader identities and to actively verify their accuracy. While some of this information is already collected by platforms in their ordinary course of business, the legal duty to verify this information has not been seen before outside of where anti-money laundering requirements are applicable. These requirements echo proposals in other jurisdictions, including the US, and are a bid by the EC to force marketplaces to take greater responsibility for their platform without – automatically – bearing liability for the actual listings.

VLOPs and 'systematic risks'

The DSA proposes a requirement for VLOPs to carry out an annual review to identify what 'systemic risks' stem from the use and provision of their services and then to take measures to address these risks. This approach invokes the spirit of self-regulation, but with sharper legal teeth, including the possibility of an independent audit.

Transparency reporting

One of the strongest themes emanating from the DSA is the push for greater transparency. While many intermediaries already provide some, or even much, of the information the DSA is asking for, the DSA requires more. All intermediaries must publish transparency reports at least once a year that include the number of

orders by Member States to remove content, notice and takedown requests, the time it takes to remove them, and what content moderation measures have been implemented.

VLOPs will also be required to publish details of any automated means used for content moderation, the number of disputes submitted to out-of-court dispute bodies and suspensions imposed for misuse of the notice and takedown procedure. This extensive transparency reporting will be required every six months through a specifically appointed compliance officer appointed by the VLOP responsible for compliance with the DSA. For context, this is a significantly expanded requirement to what is expected of a Data Protection Officer under the GDPR.

Online Safety Bill[5] (OSB)

In light of the UK's exit from the European Union, the DSA will not apply in the UK. The UK government has therefore drafted its own piece of legislation with the aim of making 'the UK the safest place in the world to be online while defending free expression'.[6] The OSB has been most recently amended in July [7] with the expectation that it will pass into law later this year or early 2023. The Bill has been criticised for failing to protect freedom of expression and it looked as if this could derail the whole Bill but former prime minister Liz Truss confirmed the intention to water down some of the obligations to moderate such concerns and push the Bill into force.[8]

The OSB will bring in a new statutory duty of care on online platforms that host or publish user-generated content. Services in scope of the OSB will therefore include social media networks, search engines and video-sharing platforms. Companies will be under a duty to put systems and processes in place, which protect users by limiting or removing any harmful or illegal content. The greatest obligations will fall on Category 1 companies with less burdensome obligations on Category 2 companies, which will generally be smaller companies whose user base does not exceed a certain number.

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5 Online Safety HC Bill (2022-23) [121].

6 https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet, accessed 16 September 2022.

7 https://publications.parliament.uk/pa/bills/cbill/58-03/0121/amend/onlinesafety_rm_rep_0706.pdf, accessed 16 September 2022.

8 Daniel Thomas, Jim Pickard and Cristina Criddle, 'Liz Truss set to dilute online safety bill over free-speech concerns' *Financial Times* (London, 7 September 2022), https://www.ft.com/content/4c6ac9fa-bd52-4da2-bdf9-8a30d368d260, accessed 16 September 2022.

The OSB aims to prevent the spread of illegal content by requiring platforms to remove this content as soon as they see it. This priority illegal content includes terrorism and child sexual exploitation. A key aim of the government is also to protect children by ensuring they are not exposed to inappropriate online content. The Bill therefore requires stricter age-verification processes and the obligation to monitor private chats for child sexual abuse. Unlike the DSA, the OSB draws a distinction between 'harmful' and 'illegal' content, which has caused concerns around how this should be identified. In light of this, the Secretary of State has been empowered to regulate this type of content through secondary legislation.

Ofcom will enforce the Bill and will be able to impose fines of up to £18 million or 10 per cent of a company's annual global revenue. Ofcom are also expected to be empowered to impose criminal sanctions on senior managers and directors for serious breaches of duty.

AI Act[9]

AI technologies present a multitude of benefits to society but also raise certain risks such as the possibility of categorising individuals based on appearance or behaviour. According to the EC, its proposed AI Act will be the first legal framework to address and regulate AI. The extent of regulatory intervention within the Act is based on the level of threat posed by the respective use of an AI system to the fundamental rights and security of citizens.

The Act uses a risk-based approach, defining the following risk categories:

- The unacceptable risk category includes systems that pose a threat to individual's rights and safety and are therefore banned.
- The high-risk category sets out obligations for the providers and users of such systems to abide by, including (but not limited to) appropriate human oversight and adequate risk assessment. Within the limited risk category, AI systems are required to be transparent, notifying users that they are interacting with a machine (e.g., chatbots).
- Finally, where there is minimal or no risk, the Act allows liberal use.

9 Proposal for a Regulation of the European Parliament and of the Council Laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final.

The Act proposes GDPR level penalties and is to be enforced by Member States and the proposed European Committee on Artificial Intelligence. The draft of the Act also proposes AI regulatory sandboxes at a national level, allowing businesses to experiment with AI products under the supervision of a regulator.

Data Act

In February 2022, the EC published a proposal for the Data Act,[10] with the stated aim of maximising the value of data (both personal and non-personal) in the digital economy. The Data Act will impose several new obligations on digital players:

- Providers of connected devices and any related services (including virtual assistants) must make data generated by their use available to users (both businesses and consumers). Users can also ask these providers to make data available to third parties (so that they can, for example, access a wider range of after-sales services, such as repair and maintenance).
- Where data holders are required to make data available to third parties acting in a professional capacity (either under the Data Act or other EU legislation), they must do so on fair, reasonable and non-discriminatory terms. Any terms concerning data that are unilaterally imposed on micro-, small- and medium-sized enterprises will be subject to a fairness test, similar in some respects to the fairness test for terms in consumer contracts under the Unfair Contract Terms Directive.[11]
- Data holders must make data available to public sector and EU bodies where those bodies can demonstrate an exceptional need to use the data requested (e.g., in the case of public health emergencies or major cybersecurity incidents).
- Cloud services providers must take measures to ensure customers can switch to another data processing service of the same type offered by a third party provider, ensuring continuity of service during transition. They must also take reasonable steps to prevent unlawful access to non-personal data by third country governments (similar in some respects to the international transfer provisions of the GDPR).[12]

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10 Proposal for a Regulation of European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act) COM (2022) 68 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A68%3AFIN.

11 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013.

12 Chapter V, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal

Regulatory framework in competition law

As a response to the changing nature and increasing importance of digital services and products, the EC has initiated an evaluation and review exercise of many of its existing regulatory frameworks to adapt to the new economic reality of the digital economy.[13] For instance, DG COMP has been since 2021 in the process of revising the Market Definition Notice issued in 1997,[14] which was found not to reflect factors such as globalisation, multi-sided markets, digital ecosystems, treatment of data and zero monetary price services.[15]

Another, more recent initiative is the evaluation of Regulation 1/2003 and its implementing regulation, Regulation 773/2004 (together to be considered as the EC's antitrust procedural regulations). This is considered necessary because of the changing economic landscape, such as the digitalisation of the global economy.[16] As the consultation is still at an early stage,[17] there are limited details on as to what it will entail, but focus is already set on (1) changing investigative powers

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data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), https://eur-lex.europa.eu/eli/reg/2016/679/oj.

13 A new competition tool was also proposed by the EC to intervene in an effective and timely manner against structural problems. The EC considered four options: (1) a dominance-based competition tool with a horizontal scope, (2) a dominance-based competition tool with a limited scope, (3) a market structure-based competition tool with a horizontal scope and (4) a market structure-based competition tool with a limited scope. The latter did not result in a concrete initiative. See EC, Inception Impact Assessment, 2 June 2020, https://ec.europa.eu/competition/consultations/2020_new_comp_tool/new_comp_tool_inception_impact_assessment.pdf.

14 Margrethe Vestager, Commissioner of Competition, proclaimed with the publication of the Staff Working Document: 'The Notice does not fully cover recent evolutions in market definition practice, including those related to the digitalisation of the economy. We will now analyse if and how the Notice should be revised to address the issues we have identified.' see EC press release, 'Commission publishes findings of evaluation of Market Definition Notice', 12 July 2021. The publication of the Notice is planned for the first quarter of 2023, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3585.

15 The EC staff working document, 'Evaluation of the Commission notice on the definition of relevant market for the purposes of the Community competition law of 9 December 1997', 12 July 2021. The staff working document noted in this context (1) the increase of digital activities, (2) the high level of concentration in digital markets, and (3) the increase of digital integration of traditional products such as watches, televisions, telephones, etc.

16 EC, 'EU Antitrust procedural rules evaluation', June 2022. The publication of the Regulation is planned for the second quarter of 2024.

17 The EC is still inviting feedback from market participants. Interesting parties can respond until 6 October 2022. The intention is to publish a staff working document in the second quarter of 2024.

considering increased digitisation of business,[18] and (2) strengthening enforcement powers to intervene more quickly in digital enforcement. An interesting development will be how the EC will amend the rules on interim measures, which have often proven to be too restrictive and cumbersome.[19] In only one case under Regulation 1/2003 has the EC successfully relied on it, namely the 2019 *Broadcom* case.[20]

Key areas of focus in technology cases

In antitrust enforcement, competition authorities are often interested in the characteristics of the digital ecosystem model and resulting competition law concerns.

A first, common concern is the dual or hybrid role played by online platforms, both as the provider of the marketplace, advertising space or app store, but also as a competitor of the third-party seller, advertiser or app developer.[21] These third parties are often disadvantaged while largely depending on dual platforms to reach end-users. As a result of vertical integration, dual platforms can also have access to enormous datasets, including non-public seller data, or data about consumer behaviour.

Other concerns include quasi-monopolistic positions on aftermarkets of the ecosystem, where the platform does not allow for or restrict competing products. For example, not allowing alternative app stores, payment methods or gaming platforms, or refusing to supply access to their operating system to third-party technologies.

Finally, ecosystems can cause user lock-in because of high (technological and financial) switching barriers, and lack of interoperability with other products and services. In addition, large technology companies can leverage the power they have in different layers of their ecosystem to adjacent markets.

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18 For example, one possible proposal could be to have the power to restrict online server access and modifications during an investigation.

19 See Massimiliano Kadar, Use of Interim Measures and Commitments in the European Commission's *Broadcom* case, June 2021, https://academic.oup.com/jeclap/article-abstract/12/6/443/6106193.

20 EC press release, Commission imposes interim measures on Broadcom in TV and modem chipset markets, 16 October 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109. The EC imposed interim measures on Broadcom as it found Broadcom's exclusivity deals were harming competition by preventing customers from buying chips from Broadcom rivals.

21 Illustrated by Competition authorities investigations into marketplaces, app stores and advertising.

To illustrate recent antitrust enforcement of digital ecosystems, Apple provides a strong example and possible precedent for future cases. The EC is currently investigating Apple on multiple fronts, with both its App Store and mobile wallet practices (Apple Pay) being under scrutiny.

After the EC issued a Statement of Objections to Apple in April 2021 with the preliminary view it has infringed competition law rules in the music streaming industry, a second investigation was launched into Apple Pay in May 2022.[22] The EC expressed concerns that Apple had been abusing its dominant position in the market for mobile wallets on its iOS system. In particular, the EC objected to Apple restricting competing mobile wallet developers' access to near-field communication technology (NFC), which is the standard technology used for contactless payments with mobile devices.[23]

However, the EC is not alone in its investigations into Apple's practices. In June 2022, the Bundeskartellamt initiated a proceeding into Apple's third-party app tracking rules,[24] the CMA is still ongoing in its investigation into the App Store.[25] More specifically, the ACM stated that the obligation for app developers to use the Apple's IAP, as well as the imposed anti-steering provisions deprived app developers of their freedom of choice and were unfairly disadvantaging them by imposing conditions that are unlikely to be accepted if app developers were not dependant on the App Store to reach an user base.

The ACM therefore ordered Apple to change its conditions to allow alternative payment methods for dating apps on iOS. After taking approximately five months to comply, Apple addressed the ACM's concerns and changed its payment policy for dating apps in the Dutch market. The ACM ordering Apple to change its payment conditions for online dating apps in the Netherlands is a far-reaching remedy, because it touches upon the core of Apple's App Store

22 The main concerns relate, first, to the obligation Apple imposes on app developers to use Apple's In-App-Purchase system (IAP) to distribute their apps on the App Store. Second, the EC takes issue with Apple restricting app developers from informing consumers of alternative payment options (anti-steering provisions); Commission press release, 'Commission sends Statement of Objections to Apple on App Store rules for music streaming providers', 30 April 2021.

23 Commission press release, 'Commission sends Statement of Objections to Apple over practices regarding Apple Pay', 2 May 2022.

24 Bundeskartellamt release, 'Bundeskartellamt reviews Apple's tracking rules for third-party apps', 14 June 2022.

25 CMA, 'Investigation into Apple AppStore', last updated 30 March. Further investigation is estimated until October 2022.

monetisation strategy and thus its business model. It forms a precedent for other competition authorities raising concerns with the conditions Apple imposed on app developers that depend on its platform to use iOS.

The same concerns on closed ecosystems, as well as concerns regarding the dual role of platforms, can be found in recent data cases. The increasing scrutiny of data intensive markets is illustrated by various EC investigations:

- On 14 July 2022, Amazon proposed commitments in hopes of addressing the EC's concerns about its Buy Box and Prime, regarding the use of non-public data from independent retailers selling in its marketplace. The EC found that relying on non-public independent seller data to calibrate business decisions could distort fair competition, and favour Amazon's Buy Box and Prime services.
- On 11 March 2022, the EC opened an investigation into a possible anti-competitive agreement between Google and Meta, as the agreement might reflect 'efforts to exclude ad tech services competing with Google's Open Bidding programme, and therefore restrict or distort competition in markets for online display advertising'.[26]
- On 22 June 2021, the EC opened an investigation into Google's display advertising. Throughout its ecosystem Google has access to a large dataset of its users. The EC investigates whether Google distorts competition by imposing obligations to exclusively use Google's advertising technologies and restricting access to user data by third parties for advertising purposes, while favouring its own online display advertising.[27]

Developments in antitrust cases

Competition authorities worldwide are taking a more unified stance in competition enforcement against digital players. International exchanges of information and cooperation between authorities have noticeably increased as digital products and services, and the anticompetitive practices associated with them, are often global in reach; therefore, their regulation benefits from such interaction between authorities. This evolution towards international cooperation was particularly notable when heads of DG COMP met with the US Federal Trade Commission

26 Commission press release, 'Commission opens investigation into possible anticompetitive conduct by Google and Meta, in online display advertising', available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1703.

27 EC press release, 'Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector', 22 June 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143.

(FTC), and the US Department of Justice (DOJ) to issue a Joint Statement in December 2021 on increased cooperation with respect to the technology sector in particular.[28]

The expansion of digital enforcement has also brought renewed scrutiny on Microsoft, whose anticompetitive behaviour has brought it back under the microscope after seemingly escaping competition scrutiny for over a decade. During this period of rapid growth of digital services and products, Microsoft has avoided public scrutiny by regulators, unlike other digital giants such as Google, Apple, Meta (formerly Facebook) and Amazon, but it is now facing investigation by the EC for bundling and anticompetitive licensing practices in the cloud sector following several complaints from market participants in the cloud sector for bundling and anticompetitive licensing practices.[29]

While competition enforcement in the digital space has increased in the EU, the EU courts continue to enforce the relevant legal tests with divergent results. A political victory first came at the end of 2021 for the EC, when the General Court upheld the EC's 2017 decision on *Google Shopping*, which relied on a new theory of 'self preferencing' as abusive conduct.[30] The decision was seen as a much-needed endorsement of DG COMP's more expansive policy on digital enforcement, and instilled more confidence in how the European courts would rule in other ongoing appeals, such as the *Google Android* and *Google AdSense* cases.

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28 The Joint Statement under Margrethe Vestager, Lina Khan and Jonathan Khanter emphasized the mutual interest of cooperation. It expressed interest in sharing insights and experience with the aim of coordinating in terms of policy and enforcement. The three agencies intend to explore new ways to facilitate coordination, knowledge and information exchange. See EC, EU-US launch Joint Technology Competition Policy Dialogue to foster cooperation in competition policy and enforcement in technology sector, 7 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6671.

29 In particular, the complaints concerned Microsoft using its dominant position in Productivity Suites (Office/M365) to leverage customers onto their Cloud (Azure), by increasing licensing restrictions on the use of Microsoft Productivity Suites on competing Cloud providers. This investigation stems from complaints by OVHCloud, Aruba and two Dutch cloud providers alleging that Microsoft conduct results in higher price to consumers. Before, Slack also filed a complaint with the EC over the bundling of Teams with Office 365.

30 Case T-612/17, Google LLC, formerly *Google Inc. and Alphabet, Inc. v European Commission*, 10 November 2021, https://curia.europa.eu/juris/document/document.jsf;jsessionid=BBD21BB195FFF5E20E44FE3B6D54F1D3?text=&docid=250881&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7264798; General Court of the European Union, 'Press release – the General Court largely dismisses Google's action against the decision of the EC finding that Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services', 10 November 2021, https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf.

However, this confidence boost was short-lived, when in January 2022, the General Court partially annulled the DG COMP decision imposing a €1.06 billion fine on Intel for abusing its dominant position in the global x86 processor market by granting certain exclusivity rebates. The General Court held that the EC's analysis was incomplete and that DG COMP did not establish that the rebates Intel was giving were anticompetitive.[31]

In June 2022, the General Court again annulled a decision of DG COMP that found that Qualcomm abused its dominant position on the global market for chipsets compatible with the Long Term Evolution (LTE) standard. The General Court found that there were procedural irregularities in the investigation and invalid analysis of the anticompetitive effects of the incentive payments.[32] In August 2022, it was announced that the EC will not appeal the decision.[33]

In September 2022, the General Court largely endorsed the EC's finding of Google abusing its dominant position by imposing anticompetitive contractual restrictions on original equipment manufacturers (OEMs) and on mobile network operators. The fine, reduced only slightly, still remains the largest ever imposed in Europe, with Google having to pay €4.125 billion.[34] The decision, which can be deemed as the new 'Microsoft' case in digital enforcement, is likely to have a significant impact on future global enforcement involving mobile ecosystems.

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31 Case T-286/09 RENV, *Intel Corporation Inc. v European Commission*, 26 January 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009TJ0286(01)&from=EN; General Court of the European Union, 'Press release – the General Court annuls in part the EC decision imposing a fine of €1.06 billion on *Intel*', 26 January 2022, https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf.

32 Case T-235/18, *Qualcomm, Inc. v European Commission*, 15 June 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018TJ0235&from=EN; General Court of the European Union, Press release – abuse of dominance on the LTE chipsets market: the General Court annuls the Commission decision imposing on Qualcomm a fine of approximately €1 billion, 15 June 2022, https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/cp220099en.pdf.

33 Reuters, 'Reuters reveals win for Qualcomm as EU antitrust regulators will not appeal court ruling against $991 mln fine', 29 August 2022, https://www.reutersagency.com/en/reutersbest/article/reuters-reveals-win-for-qualcomm-as-eu-antitrust-regulators-will-not-appeal-court-ruling-against-991-mln-fine/.

34 General Court press release, 'The General Court largely confirms the Commission's decision that Google imposed unlawful restrictions on manufacturers of Android mobile devices and mobile network operators in order to consolidate the dominant position of its search engine', 14 September 2014, https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf.

National Competition Authorities (NCAs) have continued to play an active role in antitrust enforcement in digital markets, launching an increased number of investigations and becoming through experience more comfortable with designing and monitoring more complex technical remedies. This trend is exemplified in the decisional practice of various NCAs. For example:

- In November 2021, the Italian competition authority (ICA) fined both Google and Apple €10 million for not providing clear enough information on the commercial use of data and using aggressive practices to push users to accept the commercial processing.[35] In December 2021, the ICA fined Amazon €1.3 billion for abusing its dominant position in the Italian market for intermediation services on marketplaces. In particular, the ICA concluded that Amazon was giving sellers who used its logistics service, called 'Fulfillment by Amazon', advantages in terms of visibility and sales.[36] In June 2022, the ICA launched an investigation into Google for allegedly hindering interoperability in sharing data on its platform with other platforms and, in particular, with the Weople APP, an operator that has developed an innovative data investment bank.[37]
- On 5 January 2022, the German Federal Cartel Office (FCO) found Google to be of 'paramount significance for competition across markets' under the new Section 19(a) of the German Competition Act. This triggers a right of accelerated intervention against Google's business practices.[38] As a direct result, in June 2022, the FCO launched proceedings against Google for restricting the combination of its Google Maps service with third-party mapping services,

35 ICA press release, 'Fines of 20 million to Google and Apple for using user data for commercial purposes', 26 November 2021, https://www.agcm.it/media/comunicati-stampa/2021/11/PS11147-PS11150.

36 ICA press release, 'Sanction of more than 1 billion and 128 million euros to Amazon for abuse of a dominant position', 9 December 2021, https://www.reuters.com/technology/italys-antitrust-fines-amazon-113-bln-euros-alleged-abuse-market-dominance-2021-12-09

37 ICA press release, Italian Competition Authority, investigation opened against Google for abuse of dominant position in data portability, 14 July 2022.

38 FCO press release, 'Alphabet/Google subject to new abuse control applicable to large digital companies', 5 January 2022. Further, Meta and Amazon are now designated as companies with paramount significance for competition. See FCO press release, 'New rules apply to Meta (formerly Facebook) – Bundeskartellamt determines its "paramount significance for competition across markets"', 5 April 2022; FCO press release, 'FCO press release, Amazon now subject to stricter regulations – Bundeskartellamt determines its paramount significance for competition across markets' (Section 19(a) GWB), 6 July 2022.

including not embedding location data.[39] Also under Section 19(a), in June 2022, the FCO launched proceedings against Apple to investigate whether its third-party app tracking rules also apply to Apple itself, raising suspicions of preferential treatment.[40]

- On 24 January 2022, the Dutch Authority for the Consumer and Market (ACM) began imposing periodic fines on Apple for failing to amend the App Store rules that forced Dating-app users to only use Apple's own payment method.[41] Apple changed its rules, after the sum of all periodic fines had reached the maximum amount of €50 million.[42]
- On 11 February 2022, the UK's Competition and Markets Authority (CMA) accepted commitments offered by Google to ensure that its Privacy Sandbox browser proposals[43] do not unduly restrict competition nor harm consumers while protecting privacy. A monitoring trustee working directly with the CMA will now closely monitor Google to ensure the Privacy Sandbox is developed in a way that benefits consumers and does not favour Google.[44]
- In June 2022, the CMA launched an investigation into Google's Play Store rules in the UK, whereby app developers are obliged to use Google's own payment system (Google play Billing) for in-app purchases on Android devices.[45]
- In June 2022, the French Competition Authority (FCA) accepted Google's commitments to compensate French publishers for the use of journalistic content by negotiating in good faith and sharing advertising revenue information. It is noteworthy that the FCA required Google to withdraw the appeal

39 FCO press release, 'Proceeding against Google for possible anticompetitive restrictions of map services', 21 June 2022.

40 FCO press release, 'Bundeskartellamt reviews Apple's tracking rules for third-party apps', 14 June 2022, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html.

41 ACM press release, 'Apple fails to satisfy requirements set by ACM', 24 January 2022.

42 ACM press release, 'Apple changes unfair conditions, allowing alternative payment methods in dating apps'.

43 These are a set of proposed changes on Chrome where Google mainly aims to remove cross-site tracking of Chrome users through third-party cookies and other methods of tracking. Google will then implement other alternative tools to provide functionalities that are currently dependent on cross-site tracking.

44 CMA press release, 'CMA to keep "close eye" on Google as it secures final Privacy Sandbox commitments' 11 February 2022, available at https://www.gov.uk/government/news/cma-to-keep-close-eye-on-google-as-it-secures-final-privacy-sandbox-commitments.

45 CMA press release, 'Investigation into suspected anti-competitive conduct by Google', 10 June 2022.

against the initial decision.[46] Also in June 2022, the FCA accepted Meta's commitments to address concerns of a French online advertiser regarding: (1) the manner in which access criteria for a marketing programme were established, (2) disparagement practices and (3) the removal of access to a certain Meta API.[47]

- Following the ongoing EC investigation, in July 2022, the CMA also started investigating suspected anticompetitive practices of Amazon, evaluating whether Amazon was distorting competition by advantaging its own retail business or sellers using its services, over third-party sellers on the Amazon UK marketplace.[48]

New competition concerns on the horizon

Competition authorities are increasingly launching market investigations to familiarize themselves with the working and competitive landscape of a wide range of new digital services and products, such as mobile ecosystems, the internet of things (IoT), streaming platforms and cloud. These often prove to be of great interest to smaller competitors when facing anticompetitive behaviour in a closed ecosystem and an emerging 'tipping' digital market.

Mobile ecosystems

On 10 June 2022, the UK CMA published a final report of its market investigation into mobile ecosystems. In this report, the CMA found that Apple and Google had a considerable grip over their mobile ecosystem which resulted in

46 FCA press release, 'The Autorité accepts Google's commitments', 21 June 2022, https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-accepts-googles-commitments. These extensive remedies do not prevent courts from occasionally overturning them. For example, in May 2022, the Paris Court of Appeal overturned the FCA's injunction to Google to implement a tool helping advertisers submit complaints to Google Ads and to publish detailed annual reports on the number of content providers it suspended, including the reason why these advertisers had been removed from the platform. The FCA had found that Google had abused its dominant position in the search advertising market by applying non-objective, non-transparent and discriminatory conditions in contracts with advertisers. While upholding the €150 million fine, the Court revoked the above mentioned injunction as it considered this requirement unjustified and disproportionate.

47 FCA press release, 'Meta makes commitments to the Autorité de la concurrence', 16 June 2022, https://www.autoritedelaconcurrence.fr/en/press-release/meta-makes-commitments-autorite-de-la-concurrence.

48 CMA press release, 'CMA investigates Amazon over suspected anti-competitive practices', 6 July 2022.

reduced competition, and therefore identified a range of potential interventions.[49] Given the number of concerns of market participants, the CMA also launched a consultation on a proposed market investigation reference into the supply of mobile browsers and browser engines, and the distribution of mobile cloud gaming services.[50]

Internet of things

The EC recently took interest in another technology niche, launching a market investigation into the consumer internet of things (IoT). In January 2022, in its final report, the EC highlighted potential concerns regarding:

- exclusivity and tying practices in relation to voice assistants, as well as practices limiting the use of different voice assistants;
- the extensive access to and accumulation of data, which allow voice assistant providers to leverage more easily into adjacent markets;
- the lack of interoperability, leading to the ability of providers of voice assistants and operating systems to limit functionalities of third-party smart devices;
- the difficulty for emergent or small providers of smart device operating systems and voice assistants to compete effectively with leading vertically integrated companies (such as Amazon, Apple and Google) that have built their own ecosystems within and beyond the consumer IoT sector.[51]

The findings of this sector inquiry have fed into the legislative debate on the scope of the Digital Markets Act (DMA), as it led to the inclusion of virtual assistants in the list of Core Platform Services (CPSs).[52]

Music streaming

In July 2022, the CMA published its interim report of its market study into music and music streaming, which was launched in January 2022. The CMA concluded that while there was market concentration within recorded music and

49 CMA, 'Mobile ecosystems market study', last updated 10 June 2022, see https://www.gov.uk/cma-cases/mobile-ecosystems-market-study.

50 CMA, 'Mobile browsers and cloud gaming', published 10 June 2022, see https://www.gov.uk/cma-cases/mobile-browsers-and-cloud-gaming. The CMA has been inviting responses until 22 July 2022.

51 EC, 'Final report - sector inquiry into consumer Internet of Things', 20 January 2022, available at https://competition-policy.ec.europa.eu/system/files/2022-01/internet-of-things_final_report_2022_en.pdf.

52 DMA, Article 2(2)(h).

music streaming, there was no concrete evidence that this was causing harm to consumers. The CMA will continue its market study for the next six months, with a deadline to publish its final report by 26 January 2023.[53]

Cloud

Concerns related to closed ecosystems and possible leverage of market power from other markets seem to also become a particular concern in the cloud sector following the increasing trend of competition authorities launching market investigations in the cloud sector.

In January 2022, the FCA decided to start proceedings *ex officio* to assess the competitive situation of the cloud sector.[54] As part of its investigation, the FCA is holding a public consultation to gather comments from stakeholders. Following this consultation, the FCA will issue final conclusions in early 2023.[55]

In September 2022, the ACM published its market study into Cloud Services, whereby it concluded there is a high degree of concentration in the cloud sector. In particular, the ACM raised two major concerns: (1) user lock-in as result of switching barriers and lack of interoperability, and (2) the leverage of a strong position within the different layers of cloud. While highlighting the importance of European regulatory solutions (such as the DMA and Data Act), the ACM announced a follow-up investigation on switching barriers such as egress fees.[56]

Developments in merger control

The EC and national competition authorities are continuing to refine their policies on 'killer acquisitions' in the technology sector. An interesting recent new development is the EU General Court giving the green light to below-threshold

53 CMA, 'Music and streaming market study', last updated 26 July 2022, see https://www.gov.uk/cma-cases/music-and-streaming-market-study.

54 In addition, a market investigation on cloud is currently ongoing in Korea. See Kim & Chang, KFTC's Survey of the Cloud Industry, 25 February 2022. Further, in June 2022, the Japanese Fair Trade Commission (JFTC) published its Report on its survey on cloud services. See JFTC, Report Regarding Cloud Services, 28 June 2022.

55 FCA press release, 'The Autorité de la concurrence starts proceedings ex officio to analyse competition conditions in the cloud computing sector', 27 January 2022.

56 ACM press release, 'ACM: amendments to Data Act necessary for promoting competition among cloud providers', 5 September 2022, see https://www.acm.nl/en/publications/acm-amendments-data-act-necessary-promoting-competition-among-cloud-providers.

merger referrals from the Member States to the EC under Article 22 of the Merger Regulation and the new EC Guidance on the application of the referral mechanism.[57]

Outside the EU, the Turkish Competition Authority introduced special thresholds for technology companies in March 2022.[58] In April 2022, the UK government proposed, among other things, to introduce a new threshold allowing to the CMA to capture more technology deals.[59] Further, a most recent development is the entry into force of Italy's Annual Law for Competition in August 2022, which introduces the possibility for the ICA to request notification of below-thresholds mergers.[60]

Not only do competition authorities have a greater hold on tech deals due to implementing new lower thresholds, but also as a result of society evolving where everyday products and services are becoming even more and more intertwined with technology.

The first example is the now established new norm of not watching a show or movie on television, but on a streaming service. An interesting example that revolved around a streaming platform was the investigation into Amazon's acquisition of MGM, which also touched upon the provision of marketplace service products such as Amazon Prime Video.[61]

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57 General Court press release, 'The General court upholds the decisions of the EC accepting a referral request from France, as joined by other Member States, asking it to assess the proposed acquisition of Grail by Illumnia', 13 July 2022. Another interesting development was the Bundeskartelamt's parallel investigation of *Meta/Kustomer*, which was also investigated by the EC under Article 22.

58 Baker McKenzie, 'Turkey: the Turkish Competition Authority revised the turnover thresholds for mandatory control filings', 9 April 2022, see https://www.globalcompliancenews.com/2022/04/09/turkey-the-turkish-competition-authority-revised-the-turnover-thresholds-for-mandatory-merger-control-filings220322/.

59 Proposed thresholds are: an existing 33 per cent share of supply of goods or services of any description in the UK and £350 million of UK turnover.

60 Baker Mckenzie, 'Italy: The new Italian annual law for competition entered into force, new merger control rules and further powers to the Italian Competition Authority', 1 September 2022.

61 EC press release, Mergers: Commission approves acquisition of MGM by Amazon, 15 March 2022, see https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1762.

The second example is the current ongoing evolution of not only buying or downloading a game, but streaming it. Recent examples in this sector is the ongoing in-depth investigation into the acquisition of Activision Blizzard King by Microsoft, which also touched upon evolutions such as cloud gaming.[62]

A final example is that many industries, such as healthcare, are seeking to digitise their operations by placing them in the cloud. This has also led to follow-up merger investigations such as: Microsoft's acquisition of Nuance,[63] a transcription software company with strong focus on healthcare; and Oracle's acquisition of Cerner,[64] a provider of digital information systems used within hospitals and health systems.

We are currently seeing an increase in international cooperation and a new, more rigid policy toward digital enforcement, and in general a tougher stance is noticeable.

In February 2022, NVIDIA and SoftBank Group announced the termination of its proposed acquisition of Arm Limited because of significant regulatory challenges worldwide.[65] Similarly, in May 2022, Ritchie Bros, the largest online auction provider for heavy machinery, abandoned its planned purchase of Euro Auctions after the CMA decided to refer the deal for an in-depth Phase 2 investigation and refused the undertakings offered by the parties to address the CMA's competition concerns.[66] The EC approved Meta's acquisition of Kustomer but only after a Phase II investigation and the requirement of remedies to approve the transaction.[67] While the CMA did not pursue a Phase II investigation of *Meta/Kustomer*,[68] it did block the acquisition of Giphy after finding that the deal could

62 CMA, 'Microsoft/Activision Blizzard merger inquiry', last updated 1 September, see https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry.

63 EC press release, 'Mergers: Commission approves acquisition of Nuance by Microsoft', 21 December 2021, see https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7067.

64 Oracle press release, 'Oracle Purchase of Cerner Approved', 1 June 2022, see https://www.oracle.com/be/news/announcement/oracle-purchase-of-cerner-approved-2022-06-01/.

65 NVIDIA press release, NVIDIA and SoftBank Group Announce Termination of NVIDIA's Acquisition of Arm Limited, 7 February 2022, see https://nvidianews.nvidia.com/news/nvidia-and-softbank-group-announce-termination-of-nvidias-acquisition-of-arm-limited.

66 Euro Actions press release, Termination of the Merger Between Euro Actions and Ritchie Brothers, 29 April 2022.

67 EC press release, Merger: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions, 27 January 2022, see https://ec.europa.eu/commission/presscorner/detail/en/ip_22_652.

68 *CMA, Facebook, Inc./Kustomer, Inc.*, last updated 9 November 2021, see https://www.gov.uk/cma-cases/facebook-inc-dot-slash-kustomer-inc.

harm social media users and UK advertisers.[69] In 2022, the CMA is continuing to establish itself as a strict enforcer of technology deals, as evidenced by its recent announcement to launch a Phase II investigation into Microsoft's acquisition of Activision Blizzard King.[70]

However, as recent decisions have shown,[71] competition authorities are often still receptive to clear technology acquisitions even as they often seek to advance their digital enforcement policies and evolve their approach to effective remedies in a digital context. Since these frequently involve new sorts of products and services, such as cloud and increasingly complex digital ecosystems such as mobile and online advertising, a more educative approach toward authorities, such as the use of several teach-in and contact moments with the business, is often deemed critical in technology investigations.

Digital companies are not passively submitting when faced with for instance a prohibition decision. In particular, when a competition authority is deemed to not fully respect the procedural rights of the parties involved. A clear example is Meta appealing the CMA's decision to block its acquisition of Giphy. In June 2022, the Competition Appeal Tribunal (CAT) agreed with Meta's procedural challenge with respect to the extensive redactions applied by the CMA in its preliminary findings report which harmed Meta's rights of defence.[72]

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69 CMA press release, 'CMA directs facebook to sell Giphy', 30 November 2021, see https://www.gov.uk/government/news/cma-directs-facebook-to-sell-giphy.

70 CMA, 'Microsoft/Activision Blizzard merger inquiry', last updated 1 September, see https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry.

71 e.g., the CMA clearing *Meta/Kustomer* unconditionally in Phase I proceedings, authorities unconditionally *Microsoft/Nuance* and *Oracle/Cerner*, the CMA unconditionally clearing the merger between NortonLifeLock and Avast. See CMA press release, 'CMA clears NortonLifeLock/Avast merger', 2 September 2022, see https://www.gov.uk/government/news/cma-clears-nortonlifelock-avast-merger.

72 CATl, *Meta Platform, Inc. v Competition and Markets Authority*, 14 June 2022, see https://www.catribunal.org.uk/judgments/142941221-meta-platforms-inc-v-competition-and-markets-authority-judgment-14-jun-2022.

CHAPTER 2

Digital Regulation in Europe

Michael Dietrich, Nelson Jung and Ashwin van Rooijen[1]

The European Commission has increasingly profiled itself as a frontrunner in regulating digital industries. As part of its 'Digital Agenda for Europe', it has set out to create safe and secure digital services and markets, prioritising, among others, areas such as digital sovereignty, artificial intelligence, semiconductors, access to data, the responsibility of online platforms and fair competition in digital markets. This strategy has led to various legislative initiatives, including the Digital Markets Act (DMA), Data Governance Act (DGA), Data Act, Chips Act, Digital Services Act (DSA) and Artificial Intelligence Act. This chapter focuses on the new regulatory regime established by the DMA and its far-reaching implications, particularly companies designated as 'gatekeepers'. It also provides a bird's-eye perspective of the DSA and Data Act and their interplay with the DMA.

Digital Markets Act

Purpose of the DMA

The DMA is born out of a perception that European Union competition law has struggled to remedy in sufficiently effective manner anticompetitive conduct by large digital companies in a timely manner. The DMA seeks to close that perceived gap by automatically subjecting companies that qualify as gatekeepers to specific ex ante obligations, without any need to define relevant markets, demonstrate the dominance of those companies, establish anticompetitive effects, or consider countervailing efficiencies and objective justifications.

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This is reflected in Recital 11, which describes the purpose of the DMA as 'complementary, but different' from the protection of 'undistorted competition on any given market' under competition law terms. The DMA is intended to ensure that markets where gatekeepers are active remain 'contestable and fair' while seeking to achieve an enforcement method that is independent from a case-by-case assessment of the gatekeeper conduct in question. Hence, enforcement of the DMA is without prejudice to the application of any competition law provisions requiring a case-by-case assessment, such as Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), competition law provisions in EU Member States and 'other competition rules regarding unilateral conduct' requiring an individual assessment of market power and conduct (Recital 10 DMA). These 'other competition rules' refer to rules at the Member State level, including Section 19(a) of the Act against Restraints of Competition in Germany, which provides the German competition authority with new quasi-regulatory powers over large digital companies designated as having paramount significance for competition across markets.

While the policy goals of the DMA and competition law are broadly the same, the tools under the DMA on the one hand and EU and national competition laws on the other hand differ significantly: the DMA creates sector specific ex ante competition regulation whereas EU and national competition laws undertake an individual ex post case-by-case assessment. In this regard, the DMA creates a new type of competition regulation in the EU that is much more far-reaching than the traditional competition law concept. The legal basis for the DMA, a topic that itself has given rise to debate, is Article 114 TFEU. It was chosen to allow the European Commission (EC) to achieve its objectives and to harmonise the rules applying to gatekeepers within the internal market.

Timing

The EC, European Parliament and Council of the EU reached political agreement on the DMA in March 2022, which was endorsed by EU Member States' representatives on 11 May 2022. The European Parliament and the Council of the EU provided their final approval on the new rules in July 2022. The final text has been published in the Official Journal of the EU. Upon entry into force on 1 November 2022, the DMA will start to apply six months later (i.e., on 2 May 2023). Companies that meet the quantitative gatekeeper thresholds have two months to provide certain relevant data to the EC, which would then issue a designation decision within 45 working days following receipt of the complete

information. After that, designated gatekeepers have six months to comply with their respective obligations under the DMA. Provided that there are no delays in the process, these obligations are expected to begin applying in February 2024.

The DMA targets gatekeepers

Gatekeepers provide core platform services, and the obligations in the DMA apply to those gatekeepers. Only undertakings that provide core platform services can be designated as gatekeepers. Article 2(2) identifies the various types of core platform services. They include online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising services (if offered by an undertaking that provides at least one other core platform service). Article 19 gives the Commission the power to conduct a market investigation to identify digital services that should be added to the list of core platform services.

Criteria and presumptions for gatekeeper designation

According to Article 3(1), an undertaking shall be designated as a gatekeeper if it meets three cumulative criteria, each of which are presumed to be satisfied if certain quantitative thresholds (included in Article 3(2)) are met.

- First criterion: significant impact on the internal market. In order to be designated, a gatekeeper must have a significant impact on the internal market. This criterion is presumed to be met where an undertaking (1) provides the same core platform service in at least three Member States, and (2) where it achieves an annual EU turnover of more than €7.5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least €75 billion in the last financial year. It is not entirely clear why the market capitalisation or fair market value requirement only refers to the last financial year, while the EU revenue requirement needs to be fulfilled in each of the three financial years prior to designation. Recital 19 indicates that the presumption of significant impact may be particularly susceptible to rebuttal where the undertaking's market capitalisation is above the threshold in the most recent year only, but significantly below it in previous years, and certain other factors are present. In contrast, if the threshold is exceeded for more than three years, Recital 18 states that this should be considered as 'further strengthening that presumption'.

- Second criterion: important gateway. A gatekeeper must provide a core platform service that is an important gateway for business users to reach end users. This criterion is presumed to be met where an undertaking provides a core platform service that in the past financial year has at least 45 million monthly active end users established or located in the EU and at least 10,000 yearly active business users established in the EU. The DMA and the related annex remain silent on the meaning of the distinction between monthly active end users established or located in the EU. One possibility is that it refers to the quality of the link between a user and the EU territory. In that sense, a traveller using a core platform service in transit in the EU may be viewed as 'located' in the EU in contrast with a permanent resident (e.g., an EU citizen) who likely would be viewed as an 'established' end user.
- Third criterion: entrenched and durable position.

A gatekeeper must enjoy an entrenched and durable position in its operations, or it must be foreseeable that it will enjoy such a position in the near future. This criterion is presumed to be met where an undertaking has met the threshold of the second criterion in each of the last three financial years. Again, there seems to be an inconsistency between the three years required for a presumption of an entrenched and durable position and what is required in the second criterion for the presumption of an important gateway to apply. Although there is a difference between a durable position of an undertaking and the importance of a core platform service, the presumption requires that all criteria are met cumulatively. Hence, the presumption only applies if the most far-reaching criterion is satisfied. In this regard, the one-year requirement in the second criterion is effectively made redundant by the three-year requirement in the third criterion. From a practical perspective, given the lack of clarity and far-reaching implications, it would be helpful if the EC were to provide guidance on the underlying substantive concept and interpretation of an 'entrenched and durable' position and the basis to conclude that it is 'foreseeable' that an undertaking 'will enjoy such a position in the near future'. Recital 4 provides that a gatekeeper position is characterised by a serious imbalance of bargaining power (i.e., economic dependency) resulting in unfair practices and conditions for a group of platform users collectively below the level of market dominance (Recital 5). Beyond that, the EC has wide discretion to intervene and designate potential gatekeepers provided that there is sufficient evidence that a group of platform users is dependent (or could become dependent) on the (potential) gatekeeper due to the absence of realistic

alternative options. According to Recital 26, the EC may also intervene where it appears appropriate to prevent a market from tipping irreversibly, although within the limits of the principle of proportionality described in Recital 27.

Where an undertaking provides core platform services and meets each of the requirements of Article 3(1) but does not satisfy each of the three cumulative criteria of the presumption in Article 3(2), the EC shall take into account the (non-exhaustive) elements set out in Article 3(8) (a) to (g) in its designation decision. In carrying out its assessment, the EC also shall consider foreseeable developments in relation to the elements listed in letters (a) to (g) including planned concentrations involving another undertaking providing core platform services of other services in the digital sector. Again, the basis to establish the applicable time span to determine the foreseeability of developments is unclear.

Obligation to notify and rebuttal of the presumption

Undertakings that meet all of the above thresholds must notify the EC thereof within two months of the thresholds being met, after which the EC shall designate the undertaking as a gatekeeper at the latest within 45 working days. An undertaking that meets these thresholds can seek to rebut the gatekeeper presumption. It can do so by presenting 'sufficiently substantiated arguments' in its notification to demonstrate that it 'exceptionally' does not satisfy the requirements in Article 3(1), despite meeting the quantitative thresholds. If the EC concludes that the arguments put forward by the presumed gatekeeper 'do not manifestly call into question the presumptions', it may reject these arguments and proceed with the gatekeeper designation. This formulation indicates that the bar to convince the EC not to designate an undertaking as a gatekeeper if it meets the quantitative thresholds is high, and it remains to be seen to what extent the presumption can be overcome in practice. Alternatively, where each of the requirements of Article 3(1) are met, but not the thresholds in Article 3(2), the EC shall take a designation decision following a market investigation in accordance with the procedure laid down in Article 17.

Gatekeeper designation based on qualitative criteria

Where a presumed gatekeeper fails to notify the EC, the EC can still designate an undertaking as a gatekeeper based on information it requests, or, if the undertaking fails to provide such information, based on available information. The EC also has the power to designate an undertaking as a gatekeeper even if it does not meet the quantitative thresholds, based on qualitative criteria including the size of the undertaking, its number of users, the existence of network effects, its access to data, user lock-in, or its vertically integrated nature.

The DMA imposes far-reaching obligations on gatekeepers

Gatekeepers must comply with obligations set out in the DMA. The DMA provides that gatekeepers must comply with the specific obligations laid down in Articles 5, 6 and 7 within six months after a core platform service has been listed in the designation decision pursuant to Article 3(9). There are many different obligations, and not all obligations will be equally relevant to all core platform services. Generally, the EC has drawn inspiration for these obligations from recently concluded and ongoing competition investigations. However, the order in the list lacks a clear structure, possibly given their apparent link to several investigations involving a range of issues. The overview below seeks to cluster the obligations based on a few recurring themes:

- Freedom on app stores: the DMA includes several obligations related to app stores. These will require gatekeepers with app stores to change their practices in relation to the distribution of apps on the respective operating systems (OS) (e.g., iOS or Android) substantially. Gatekeepers will be required to:
  - allow sideloading of apps or third-party app stores on their OS and allow such apps or app stores to be accessed by means other than the relevant core platform services (Article 6(4));
  - allow such apps to be easily set as default (Article 5(4));
  - allow users easily to uninstall apps (Article 6(3));
  - refrain from restricting end users from switching between, and subscribing to, different apps in services by using the core platform services of the gatekeepers (Article 6(6));
  - provide fair, reasonable and non-discriminatory (FRAND) general conditions of access to their app stores, online search engines and online social networking services (Article 6(12));
  - refrain from forcing app developers to use exclusively the in-app purchase systems of the gatekeeper to offer in-app purchases, for example on their Android or iOS apps (Article 5(7)).
- Prohibition of anti-steering practices: the DMA will put an end to practices preventing business users from directing their consumers to alternative offers. The new anti-steering provisions effectively create two obligations for gatekeepers: (1) allow businesses to inform users about and offer promotions, including under different conditions, outside the core platform services; and (2) allow business users to conclude contracts with end users without using the gatekeepers' core platform service. Hence, gatekeepers are required to allow businesses using their intermediation services (e.g., app developers distributing apps on app stores) to promote offers to end users free of charge and subsequently transact with these users without using the gatekeepers'

services (e.g., without using the app store owner's in-app purchase solution) (Article 5(4)). In addition, under Article 5(5) app store owners may not eliminate 'reader apps', which allow end users to access content purchased from a business outside the app store (e.g., accessing a Netflix subscription purchased on Netflix.com or the Netflix iOS app). The prohibition of anti-steering is at the heart of the EC's ongoing investigation into Apple's app store practices as they relate to music streaming services.

- Prohibition on MFNs: Article 5(3) prevents gatekeepers from imposing most-favoured-nation (MFN) clauses on business users preventing them from offering their products to third-party online intermediation services or through their own direct sales channels on different (potentially more favourable) terms. This prohibition draws on the treatment of MFNs under competition law at the EU and Member State levels, including cases relating to hotel online booking websites, as well as the EC's recently revised vertical block exemption regulation and corresponding guidelines.
- Users' freedom to set default: the DMA also expressly requires that users are able to easily change the default services to which a gatekeeper's OS, virtual assistant, or web browser steers them for various functions (e.g., which music service comes up when the user asks Siri to play a song). It also introduces the obligation to provide a choice screen on the OS enabling users to choose their preferred default online search engine, web browser or virtual assistant when first using a device (Article 6(3), sub-paragraph 2). However, this obligation only applies to an online search engine, virtual assistant or web browser listed in the designation decision pursuant to Article 3(9).
- Restrictions on gatekeepers' use of data: the DMA restricts how gatekeepers can use the data gathered through their various activities. For instance, without specific user consent, gatekeepers must not combine or cross-use personal data from a core platform service with personal data from any other service of a gatekeeper or third party services. Gatekeepers should also obtain consent to use, for advertising purposes, the data collected from end users through their usage of, for example, third-party websites and apps. Repeated cookie banners requiring consent will also be banned, as gatekeepers cannot request consent more than once per year if consent has already been refused (Article 5(2)). Moreover, gatekeepers shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services (Article 6(2)).

- Access to gatekeepers' data: the DMA regards data as a critical input in the digital economy. In an attempt to lower barriers to entry in these markets, the DMA obliges gatekeepers to give end users, business users and competitors access to different types of data, if so requested. Search engine gatekeepers will need to provide rivals with FRAND access to user-generated search data (Article 6(11)). Gatekeepers will also have to provide business users with access to data that is generated by those business users (and their customers) on the core platform service, or another service offered with, or supporting, the core platform service (Article 6(10)). To facilitate switching between different services and multi-homing, the DMA requires gatekeepers to ensure portability and provide free-of-charge tools to enable end users to port the data they generate on the gatekeeper's core platform service (Article 6(9)).
- Prohibition of self-preferencing: likely inspired by the *Google Shopping* case (T-612/17 dated 10 November 2021), the DMA includes a prohibition on gatekeepers treating their own services and products more favourably in ranking, indexing and web-crawling. It also requires rankings to be conducted under FRAND terms (Article 6(5)). In *Google Shopping*, the EC found, and the General Court confirmed, that Google had abused its dominant position by promoting its own comparison-shopping services on its search engine result page and demoting similar services offered by rivals.
- Prohibition of tying: gatekeepers must not impose on businesses or end users, *inter alia*, their identification services, web browser engines, payment services and in-app purchase mechanisms (Article 5(8)). They should also refrain from requiring end users to subscribe to further core platform services as a condition for subscribing to any of their other core platform services (Article 5(7)) (see above freedom on app stores).
- Advertising transparency: the DMA aims to increase information available to advertisers and publishers about the terms of the advertising services they purchase. Gatekeepers will have to provide advertisers and publishers with information about prices paid and remuneration received as well as the methodology under which the prices and remuneration were calculated (Articles 5(9) and 5(10)). Moreover, the DMA requires gatekeepers to provide advertisers and publishers with access to the performance measuring tools and data, allowing them to run their own verifications to assess the performance of gatekeepers' advertising services (Article 6(8)).
- Interoperability: the DMA also includes new and far-reaching obligations related to interoperability. Gatekeepers will need to provide third-party services interoperability with the same software and hardware features as are available to their own services (Article 6(7)). The entirely new Article 7

(that did not exist in the EC's original legislative proposal) requires, subject to conditions, that gatekeeper messaging services must interoperate with competing messaging services for basic functions such as text messaging, voice and video calls and sharing files. In practical terms, this would mean that iMessage users must be allowed to correspond with, for instance, Signal users on iMessage.

- Prohibition of non-aggression obligations: another new prohibition that was not included in the original proposal prevents gatekeepers from restricting business users or end users from raising any issue of non-compliance with other applicable provisions under EU or national law by the gatekeeper with the competent authority, including national courts (Article 5(6)).
- Prohibition of disproportionate general terms and conditions: Article 6(13) provides another mosaic stone in the DMA to facilitate switching between different core platform services and multi-homing. The gatekeepers must not apply general terms and conditions for terminating the core platform services that are disproportionate for the end user. In practical terms, gatekeepers shall ensure that users can terminate the core platform service without undue difficulty (e.g., no hidden obstacles or particularly burdensome communication requirements).

Articles 5, 6 and 7 are considered self-executing, namely directly binding on the gatekeeper. Article 8 requires gatekeepers to ensure and demonstrate effective compliance with those Articles. In this regard, the DMA clarifies that gatekeepers' compliance must not result in cutting corners at the expense of consumers. They need to observe in particular all applicable consumer protection law provisions, namely data privacy, cybersecurity and product safety aspects.

Obligation to inform about concentrations

Gatekeepers will also be required to inform the EC of any intended concentration – prior to its implementation – where the merging entities or the target of the concentration provide core platform services or any other services in the digital sector or enable the collection of data. The EC will publish annually the list of acquisitions of which it has been informed by gatekeepers and will inform competent Member State authorities of the information received as part of the gatekeeper's notification. These authorities may rely on this information to request the EC to examine the concentration pursuant to the referral mechanism under Article 22 of Regulation 139/2004, even if the transaction does not meet the merger control thresholds of the EU or of any EEA Member States. This additional notification requirement for gatekeepers is expected to lead to an

increase in Article 22 referral requests to the EC and as such increases uncertainty for gatekeepers' transactions in the digital sector where the turnover thresholds under the EUMR are not met.

Enforcement by the EC

The EC will be the sole enforcer of the DMA. In this regard, lobbying efforts from national competition authorities (NCAs) and regulators aimed at obtaining concurrent enforcement powers under the DMA have failed. However, Articles 37 and 38, which were not reflected in the EC's original proposal, provide a legal framework for cooperation and coordination between the EC and NCAs through the European Competition Network (ECN). This is important for the parallel enforcement of the DMA and competition law rules set out in Article 1(6).

Organisation

Based on the latest communication from the hierarchy of the EC, it is likely that the Directorate-General for Communications Networks, Content and Technology (DG Connect) will oversee enforcement of the DMA together with DG COMP and other Commission services. However, enforcement will also encompass the DSA and will need to be divided into three different units with responsibility for technical, social and economic aspects of the DMA and the DSA. The unit in charge of economic enforcement shall be drawn from enforcers from the Directorate-General for Competition (DG COMP) and see through the application of the DMA. Under the EC's original DMA proposal, it was envisaged that the size of the EC team enforcing the DMA would increase to 80 EC officials over the next few years. Given the magnitude of the task, this may be insufficient to ensure effective enforcement. The EC has since acknowledged this as a potential issue and committed to increase the number of EC officials to 150.

The EC's broad enforcement powers and the role of NCAs

The EC will have broad investigative powers to enforce the DMA which resemble those under EU competition law. The EC will be able to request all relevant information to carry out its duties, regardless of ownership, location, format or storage medium. Furthermore, the EC has the power to conduct inspections (dawn raids) and interviews. At the same time, NCAs also have a role to play.

The EC and NCAs are under an obligation to cooperate and coordinate their enforcement activities under the DMA on the one hand and EU and national competition law on the other through the ECN (Articles 37 and 38).

NCAs may, on their own initiative, investigate possible gatekeeper non-compliance with Articles 5 and 6. The relevant NCA will then report its findings to the EC and the EC can at any point relieve the NCA by opening its own investigation. The NCAs have no power to sanction gatekeepers for violations of the DMA.

NCAs and other regulators, such as the Body of the European Regulators for Electronic Communications, will also be represented in the high-level group for the DMA. This high-level group may provide the EC with advice and expertise regarding the implementation and enforcement of the DMA.

Member States will be represented in the Digital Markets Advisory Committee. This Advisory Committee is to provide its opinion to the EC on a specific issue presented to it.

Finally, three or more Member States may request the EC to open an investigation on suspicion that an undertaking should be designated as a gatekeeper. They may also request the EC to open a market investigation to add a service or practice to the DMA (Article 17). A sole Member State may request the EC to open an investigation into suspected systematic non-compliance by a gatekeeper.

Private enforcement

As an EU regulation, the DMA has direct horizontal effect, meaning third parties can bring private actions before the national courts against gatekeepers. In doing so, private actors could enforce compliance with the obligations and prohibitions set out in Articles 5 and 6 DMA subject to two conditions: (1) they are directly applicable and provide third party rights; and (2) the EC has designated a gatekeeper (which is an exclusive competence of the EC).

The possibility of private enforcement is recognised in Article 39, which sets out a mechanism for cooperation between the EC and national courts; however, the extent to which private enforcement can establish itself as a successful dispute resolution mechanism will also depend on further clarification by the EC of which DMA obligations provide individual rights to private actors. Another indication that the DMA recognises private enforcement is Article 42, which applies the rules on representative actions to infringements by gatekeepers of their obligations under the DMA that harm or may harm the collective interests of consumers.

In addition, third parties can inform competent national authorities and the EC regarding any behaviour by gatekeepers that falls within the scope of the DMA (Article 27), though this is not a formal complaint procedure. National

authorities or the EC will have full discretion to follow up on any information received by third parties. Third parties benefit from the protection of the EU Whistle-blower Directive 2019/1937 (Article 43).

Penalties for non-compliance

The EC may adopt a non-compliance decision if it considers that a gatekeeper does not comply with the DMA. The EC will aim to adopt a non-compliance decision within 12 months from opening a proceeding. In addition to a cease-and-desist order, the EC is empowered to impose fines on gatekeepers of up to 10 per cent of their total worldwide turnover in the preceding financial year. In the case of a second non-compliance decision within eight years concerning the same or a similar infringement of a DMA obligation in relation to the same core platform service, the maximum amount of the fine the EC could impose increases to 20 per cent of the gatekeeper's total worldwide turnover in the preceding financial year. The DMA also gives the EC the power to impose periodic penalty payments. To prevent serious and irreparable harm, the EC has the ability to order interim measures against a gatekeeper on the basis of a *prima facie* finding of an infringement.

When a gatekeeper has engaged in systematic non-compliance, the EC may impose appropriate behavioural or structural remedies to ensure effective compliance with the DMA. In this regard, the DMA explicitly sets out the ability for the EC to prohibit, for a limited time period, the gatekeeper from entering into any concentration regarding those core platform services or other digital services that are affected. A gatekeeper shall be deemed to have engaged in systematic non-compliance with the obligations set out in Articles 5 and 6 where the EC has issued three non-compliance decisions against a gatekeeper within eight years in relation to any of its core platform services. To ensure that the remedies the EC adopts are effective, interested third parties will have the ability to provide comments during the market investigation into possible systematic non-compliance.

EC's subordinate acts

Once the DMA enters into force, it is likely that it will be complemented by various non-legislative acts that can be adopted by the EC. In particular, the DMA envisages that the EC may adopt implementing acts, delegated acts and guidelines.

The implementing acts could cover various issues, such as: specifying the details of gatekeepers' notifications (e.g., notification on meeting the thresholds, notification of concentrations), submissions (e.g., compliance reporting) and requests (e.g., request for a suspension of obligations); the EC's proceedings

(e.g., market investigations, interim measures, commitments proceedings); and cooperation between the EC and national authorities, or could even specify the technical measures that the gatekeepers should put in place to ensure compliance with DMA obligations.

The delegated acts may be used to supplement the list of DMA obligations following a market investigation. This could, for example, include the extension of existing obligations to other core platform services or ancillary services or specifying the manner in which the obligations are to be performed to ensure compliance. In addition, the delegated act may specify the methodology of calculation of quantitative thresholds.

Finally, the EC could also adopt guidelines 'on any of the aspects' of the DMA to 'facilitate its effective implementation and enforcement'. It remains to be seen how and when the EC will make use of these powers. It is possible that, in the first instance, the EC will prioritise those acts that are strictly necessary for the designation process and other proceedings foreseen in the DMA.

Practical issues

How enforcement of the DMA will unfold in practice is unclear, of course. Several key factors are yet unknown.

The EC is facing considerable enforcement challenges

The EC as central enforcement authority still must decide on its final organisation and strategy (how much willingness to compromise and how much appetite to litigate), which will inevitably depend on the gap between the staff required and those available on the ground. Furthermore, the DMA provisions largely are uncharted territory and some of the gatekeeper obligations appear to be quite complex and raise multiple questions regarding their scope in practice. The EC has been criticised for adopting a 'one size fits all' approach to regulation lacking appropriate flexibility to take account of specific aspects of vastly differing underlying business models that may be subject to the DMA. The EC now must deliver by striking the right balance between reigning in the power of gatekeepers where there are harmful practices and avoiding damage to their ability and incentives to innovate. In the first quarter of 2023, the EC intends to publish an 'implementing regulation', which shall provide 'detailed arrangements' on the designation process and how gatekeepers are expected to comply with their obligations in Articles 5 and 6 and the interoperability obligations in Article 7. The EC also wants to give more guidance on how it will use its powers to investigate, including on important issues such as rights of defence, disclosure of information and coordination with NCAs.

DMA might not be an enforcement priority for all NCAs

However, the extent to which the EC can rely on the NCAs' willingness to do more than pay lip-service in assisting with the enforcement of the DMA is far from clear. Some NCAs still will have some misgivings about the EC's powerplay and barely concealed unwillingness to agree with the NCAs on a co-enforcement mechanism under the DMA. A role that is reduced to being the eyes and ears of the EC may not be much of an incentive to contribute for NCAs. As such, NCAs may choose to focus on enforcing antitrust law and unilateral conduct based on other competition law rules outside of the scope of the DMA or in addition to gatekeeper obligations. This could result in a greater role for national courts and private litigants seeking to enforce those obligations that are relevant to them.

Interaction with competition law enforcement unclear

It remains to be seen how the DMA regime will interact with traditional competition law enforcement by the EC and NCAs. In principle, the DMA was created as a complementary tool to traditional enforcement, thus leaving sufficient space for competition law rules (at both the EU level and the national level) to continue to apply to digital sector activities in parallel with the DMA regime. Such parallel enforcement of antitrust rules appears particularly important in relation to practices in digital markets with strong economies of scale and network effects and that have not yet 'tipped'.

Potential gatekeepers are gauging their options

Complying with the DMA will require far-reaching changes to certain of the gatekeepers' operations. Therefore, companies likely to meet the DMA's gatekeeper thresholds will be carefully weighing their options, including challenges to decisions adopted under the DMA. There will inevitably be issues where gatekeepers' views and that of the EC will differ significantly. In those cases, it is extremely important that gatekeepers' rights of defence are respected. The EC cannot simply jump to conclusions as to whether these companies' conduct is caught by the provisions of the DMA, not least given the potentially draconian sanctions for non-compliance.

Opportunities for non-gatekeepers

It goes without saying that the DMA is not just relevant to gatekeepers and users of their core platform services. Smaller operators, including online platforms, will likely also be impacted in a variety of ways under the DMA. For example, they can benefit from DMA obligations on gatekeepers such as those on interoperability and data portability. They may also seek to engage in practices that the DMA

prohibits for gatekeepers competing with them. Furthermore, they will play a role in enforcing the DMA, and indeed the EC may to some extent rely on support from third parties in alleviating the burden of DMA enforcement. To that end, the DMA contains provisions enabling third parties to submit complaints as well as to provide comments at key stages in enforcement investigations, including in relation to the specification of compliance measures, findings of circumvention, the adoption of a non-compliance decision, and the imposition of behavioural or structural remedies in cases of systematic non-compliance.

The DMA's interplay with other key regulatory initiatives: DSA, DGA and Data Act

Alongside the DMA, other key pillars of the EU's digital strategy include the DSA, DGA and the proposed Data Act.

The DSA was adopted by the European Parliament in July at the same time as the DMA. The DSA's formal adoption by the Council, planned for September 2022, is expected to be a formality. The DSA, which creates harmonised EU rules for the regulation of illegal online content and the protection of online service users, will apply to a broader range of undertakings than the DMA. It incorporates the conditional liability exemptions of the 2000 e-Commerce Directive for mere conduit, caching and hosting services (together termed 'intermediary services' under the DSA). Some of the DSA's provisions apply to all providers offering intermediary services to EU-located recipients, such as the duty to provide information in user terms and conditions on certain usage restrictions and content moderation policies and tools. Other rules apply specifically to providers of 'hosting services' (including online platforms), for instance a notice and action regime for illegal content. Providers of 'online platforms' are subject to further requirements, including a prohibition on using interfaces to distort or impair recipients' ability to make informed decisions, restrictions on targeted advertising, transparency and user modification requirements for adverts and recommender systems and, for online marketplaces, a duty to collect – and verify – trader traceability information. Larger technology companies are subject to additional rules: the DSA reserves further obligations for 'very large online platforms' and 'very large online search engines', with over 45 million average monthly active EU service recipients, including additional requirements concerning recommender systems and public reporting on advertising activity. While this threshold number of service recipients mirrors one of the cumulative criteria for gatekeeper designation under the DMA, it remains to be seen how these numbers will be calculated under each piece of legislation.

Some of the DSA's provisions echo themes under the DMA – for example, advertising transparency, and prohibitions on making repeated consent requests or making termination cumbersome – and the DSA may contribute to a 'levelling of the playing field' for providers of intermediary services through harmonisation of EU rules.

The DGA, adopted on 16 May 2022 and officially published on 3 June 2022, creates a legal framework for the reuse of protected public sector data (e.g., confidential data, personal data or data protected by intellectual property rights) for public or commercial purposes and the voluntary sharing of data between businesses. The DGA seeks to promote access to protected public sector data by creating harmonised conditions for its reuse and establishing a system of recognised independent data intermediation service providers who facilitate the exchange and use of data between data subjects, data holders and data users and are not permitted to monetise the relevant data. The EU Commission describes this framework as 'an alternative model to the data-handling practices of the Big Tech platforms, which have a high degree of market power because they control large amounts of data'.[2]

The proposed Data Act,[3] issued in February 2022, complements the DGA in terms of seeking to ensure the flow of data. The proposed regulation has the declared objective of ensuring fairness in how the value of data is allocated and unlocking the potential of the data economy. The Data Act would require that data generated by use of 'internet of things' products and related services is easily accessible to users (including business users) and, at the user's request, to third parties. Approaching data as a non-rivalrous good, the proposal prohibits data access on an exclusive basis, except by user request, and when data sharing is mandated by national or EU rules data holders must provide access on FRAND terms. There are further restrictions on imposing unfair terms on small- and medium-sized enterprises. The proposal excludes designated gatekeepers under the DMA from being beneficiaries of the data access rights, given 'the unrivalled ability of these companies to acquire data'. Other aspects of the proposal that seek to promote competition include measures aimed at facilitating customer switching

2 https://digital-strategy.ec.europa.eu/en/policies/data-governance-act-explained.

3 Proposal for a Regulation of the Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act) COM(2022) 68 final. Read more detail in the Clifford Chance briefing on the Data Act proposal here. Discussions are ongoing on the proposal.

and enhancing of interoperability between cloud, edge and other related data processing services. At the time of writing, the proposal is being debated at the European Parliament and the Council and is unlikely to be adopted before 2023.

Together, these regulatory initiatives demonstrate the need to adopt a holistic approach to review and compliance with the EU's broad and evolving framework for digital regulation.

CHAPTER 3

European Union: Restrictions of Online Sales

Stephen Mavroghenis and Christina Kolotourou[1]

Introduction

The Digital Single Market constitutes one of the key political priorities of the European Commission (EC) through which it seeks to improve access to cross-border e-commerce for consumers and businesses throughout the European Union.[2] To achieve its ambitions, the EC:

- has intensified the enforcement of competition law with regard to restrictive practices related to online sales; and
- has been updating and modernising the applicable legislative framework as well as creating new legislative instruments[3] with a view to lessen and ultimately remove barriers impeding the increased use of online trade.

These initiatives assume additional importance given the exponential growth of online trade as a result of the covid-19 pandemic.

It is against this background that this chapter:

- analyses the current state of the law and summarises the latest decisional practice concerning: (1) online sales restrictions and third-party platform bans; (2) dual pricing in online sales; and (3) resale price maintenance (RPM) in online sales;

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2 See https://eufordigital.eu/discover-eu/eu-digital-single-market.

3 By way of example, see below on the recently approved final text of the Digital Markets Act (DMA) and the enactment of the Geo-blocking Regulation.

- provides an overview of the latest changes brought forward by the revised Vertical Block Exemption Regulation (the new VBER),[4] the accompanying revised Guidelines on vertical restraints (the new Vertical Guidelines)[5] and the Digital Markets Act (DMA);[6] and
- unbundles the key provisions of the Geo-blocking Regulation while reconciling the relevant case law.

New regulatory regime on vertical restraints

On 10 May 2022, the EC published its new VBER and new Vertical Guidelines, which entered into force on 1 June 2022. The new legislation will be valid for 12 years with an evaluation report after eight years. The new VBER provides for a transitional period for existing agreements until 31 May 2023, by which time those agreements must be aligned with the new regime.

The EC's revisions to the previous regime reflect changes in market dynamics and the platform economy since the VBER was adopted in 2010 and come after an extensive public consultation process that began in 2019. The final version of the new VBER and Guidelines follows an earlier draft published by the EC in July 2021.[7]

One of the main objectives of the revisions was to provide up-to-date guidance on online restrictions and ensure a harmonised approach across the EU, as the previous set of rules did not offer sufficient clarity. As a result, national authorities and courts had interpreted the prior legal framework with wide discretion, which led to contradictory and often inconsistent enforcement practices.

Although the new VBER and Guidelines clarify the applicable legal framework concerning exclusive and selective distribution and online sales restrictions, uncertainty still arises, especially with regard to the new online sales hardcore restriction.[8] As the Guidelines constitute soft law, national authorities and courts are still susceptible to interpret the views expressed by the EC differently.

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4 Commission Regulation (EU) 2022/720.

5 Communication From the Commission, Commission Notice: Guidelines on Vertical Restraints (2022/C 248/01).

6 See https://data.consilium.europa.eu/doc/document/PE-17-2022-INIT/en/pdf.

7 The biggest 'last-minute' change concerns the safe harbour for information exchanges in dual distribution relationships, with the new VBER clarifying that certain types of information exchanges will be block-exempted for all companies with market shares not exceeding 30 per cent.

8 See below for more detail and new Vertical Block Exemption Regulation, Article 4(e).

Analysis of restrictive practices

Online sales restrictions

Outright bans on internet sales constitute by-object restrictions of competition within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and correspond to hardcore constraints under the new VBER. Such practices survive antitrust scrutiny only where the four criteria under Article 101(3) TFEU are cumulatively met.

The Court of Justice of the EU (CJEU) first addressed restrictions on online sales through its judgment in *Pierre Fabre*. Members of Pierre Fabre's selective distribution system were required to sell cosmetics and personal care products only at brick-and-mortar stores and in the presence of a trained pharmacist:[9]

- The CJEU held that a general and absolute ban on internet sales in the context of a selective distribution network constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU. It reasoned that such a ban 'considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.'
- The CJEU further held that the restriction in question could not be justified on the basis of any safety and public health grounds and that maintaining a prestigious image does not qualify as a legitimate aim for limiting competition.
- The CJEU also found that the measures under review could not benefit from the VBER. A general internet ban operates as a limitation on active and passive sales within the meaning of Article 4(c) VBER.
- The CJEU nonetheless left it open whether such measures could benefit from the individual exemption under Article 101(3) TFEU.

Online sales restrictions also constitute a high priority for national enforcers.

By way of example, in 2018 (prior to Brexit), the UK Competition Appeal Tribunal (CAT) found against an online sales ban imposed by the golf club manufacturer Ping[10] and upheld the CMA's infringement decision of 2017.[11] Ping relied on its long-standing practice of offering face-to-face custom fitting and prevented retailers in its selective distribution system from selling golf clubs online.

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9 Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS*, EU:C:2011:649 (*Pierre Fabre*).

10 *Ping Europe Limited v. Competition and Markets Authority* [2018] CAT 13. Further upheld by the Court of Appeal in *Ping Europe Limited v. Competition and Markets Authority* [2020] EWCA Civ 13.

11 Decision of the Competition and Markets Authority (CMA) in *Ping*, Case No. 50230, imposing a fine of £1.45 million.

The CAT's findings are as follows:

- First, the CAT, siding with the CMA, found that the online sales ban under review amounted to a restriction of competition by object, as it: (1) restricted consumers' access to retailers outside their local area; and (2) reduced or even removed the ability and incentives of retailers to compete over business through the internet.
- Second, the CAT considered that the imposed restriction was not justified since Ping could still compete with other manufacturers on non-price parameters even absent the ban.
- Third, the CAT dismissed Ping's argument that the CMA had erred in finding the ban as disproportionate and considered that the alternative measures proposed by the CMA would not damage Ping's brand image.
- Last, but not least, the CAT held that the ban in question could not be exempted pursuant to Article 101(3) TFEU.

Online sales restrictions under the new VBER

Contrary to the old VBER, which did not explicitly mention online sales, the new VBER introduces a new category of defined hardcore restrictions with regard to online sales. In particular, Article 4(e) identifies as a hardcore restriction any vertical agreement that, directly or indirectly, has as its object 'the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold'.

Permissible exemptions to this hardcore restriction are: (1) other restrictions of online sales, such as restrictions intended to ensure the quality or appearance of the buyer's online store, requirements regarding the display of the goods or services; and (2) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel. Essentially, resellers must not be banned from using the internet as a sales or advertising channel.[12]

The new Guidelines make sure to provide guidance and examples of hardcore online sales restrictions other than the obvious outright bans;[13] nevertheless, some uncertainty remains. For instance, because restricting the effective use of the

12 New VBER, Article 4(e).

13 See new Vertical Guidelines, Paragraph 206 et seq. Relevant examples include: forcing distributors to prevent customers located in another territory from viewing their websites or to re-route their customers to the manufacturers' or other distributors' websites; requiring distributors to terminate consumers' online transactions once their credit card data reveal addresses outside the distributors' territory; obliging distributors to

internet is now a hardcore restriction, there is a necessity to conduct an individual assessment to ascertain whether a restriction has as its object the effective use of the internet. This requirement not only leaves meaningful interpretative room on what restrictions – other than the obvious – would prevent the effective use of the internet, but it also seems to defeat the purpose of a block exemption, which is to provide an automatic safe harbour without the need for an individual assessment.

Third-party platform bans

Marketplace bans do not constitute hardcore restrictions of competition within the meaning of both the old and the new VBER. According to the EC, such practices 'do not generally amount to a de facto prohibition on selling online or restrict the effective use of the internet as a sales channel irrespective of the markets concerned'.[14]

The CJEU assessed the legality of third-party platform bans in its judgment in *Coty*.[15] The case arose out of a request for a preliminary ruling posed by the Frankfurt Court of Appeal. Coty, a producer of luxury cosmetics in Germany, disseminated its products through a selective distribution system. Parfümerie Akzente, an authorised distributor, sold Coty's products through different channels, including its own online shop and Amazon Germany.

Coty revised the terms of its selective distribution system and allowed its authorised distributors to make online sales only through 'electronic shop windows'. Conversely, sales through third-party undertakings not previously authorised by Coty, such as online marketplaces, were banned. Coty argued that this updated policy was necessary to protect the luxurious nature of its cosmetics products and by extension its brand value.

Faced with these facts, the CJEU reasoned first that selective distribution systems for luxury goods are compatible with Article 101(1) TFEU so long as these meet the criteria under the *Metro* case law.[16] It applied these conditions to the facts of the case and confirmed that these were indeed met.

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seek suppliers' prior authorisation for selling online; not allowing distributors to use the supplier's trademarks or brand names on their websites; preventing distributors from establishing or operating one or more online stores, irrespective of whether the online store is hosted on the distributor's own server or on a third-party server; and prohibiting distributors from using an entire online advertising channel, such as price comparison tools or advertising on search engines.

14 See https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

15 Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941.

16 The organiser of a selective distribution system must demonstrate that: (1) the nature of the products concerned necessitates selective distribution to preserve their quality and ensure

First, the CJEU considered that the nature of the products in question justified the organisation of their sales through a selective distribution system. In so doing, it:

- affirmed, in line with its previous case law under *Copad*, that the quality of luxury goods is not just the result of their material characteristics but also encompasses their 'aura of luxury'.[17] Consequently, any impairment of the product's luxury aura can negatively affect consumers' perception on their corresponding quality; and
- clarified that Paragraph 46 of its previous judgment under *Pierre Fabre*[18] must be read in the light of the context of that judgment and related solely to the goods at issue and the contractual clause in question in that case (i.e., a prohibition of online sales) rather than the selective distribution system in its entirety or selective distribution in general.

Second, the CJEU held that the measure under review was appropriate since:

- the restriction sought to ensure that the goods in question would be exclusively associated with the authorised distributors;
- the marketplace was not bound by contractual obligations of any sort obliging them to respect the manufacturer's quality sales conditions; and
- sales through third-party platforms are generally liable to harm products' luxury image.

Third, the CJEU also found that the measures under review were proportionate to the extent that:

- these did not amount to an absolute ban on internet sales; and
- any predefined quality sales conditions could not be effective alternatives to achieve the aims pursued.

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their proper use; (2) the restrictions are laid down uniformly for all resellers and are not applied in a discriminatory way; and (3) the restrictions are proportionate.

17 Case C-59/08, *Copad*, EU:C:2009:260.

18 *Pierre Fabre*, Paragraph 46: 'The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.'

Last but not least, the CJEU provided guidance on how to approach online marketplace bans where the *Metro* criteria are not met and Article 101(1) TFEU is therefore applicable. The CJEU found that marketplace bans do not amount to hardcore restrictions of competition and can therefore benefit from the VBER. This is so for two reasons:

- First, such bans do not exclude online sales entirely. They restrict certain specific types of internet sales while sales through their individual web shops or non-discernible third-party platforms remain possible.
- Second, third-party platform customers are not a definable customer group within the meaning of Article 4(b) of the old VBER; hence, marketplace bans do not exclude sales to a certain category of customers as a whole.

The CJEU's reasoning in *Coty* is convincing on the surface; however, the court left a number of issues unresolved, especially concerning the scope of the judgment's application. It therefore comes as little surprise that different national enforcers have taken strikingly diverging views on how to substantiate the notion of luxury goods as well as whether the CJEU's findings under *Coty* apply beyond luxury products.[19] Fortunately, the new Vertical Guidelines have addressed some of the issues identified in the judgment, including clarifying the position regarding marketplace bans in a number of ways:[20]

- First, they define marketplaces as online platforms, which connect merchants and potential customers with a view to enabling direct purchases.[21]
- Second, the EC explains that a restriction or ban of sales in online marketplaces concerns the manner in which the buyer may sell online and does not restrict sales to a particular territory or customer group. While such a ban restricts the use of a specific online sales channel, other online sales channels remain available to the buyer; therefore, marketplace bans do not amount to hardcore restrictions so long as they do not ban online sales altogether but just limit certain modalities of online sales.[22]
- Third, seizing the opportunity to end the debate on the correct application of the *Coty* judgment, the new Vertical Guidelines expressly stipulate that online marketplace restrictions may be block exempted provided that the relevant market share thresholds are met, irrespective of the nature of the products

19 See, for example, Decision of the French Competition Authority (FCA) in *Dammann Frères*, 20-D-20 cf Decision of the German Federal Court of Justice in *Asics*, KVZ 41/17.

20 New Vertical Guidelines, Section 8.2.3.

21 ibid, Paragraph 332.

22 ibid, Paragraph 334.

concerned or the distribution regime.[23] The EC also provides guidance for the case-by-case assessment of online marketplace restrictions where the market share thresholds provided for in the VBER are exceeded.[24]

Dual pricing

Dual pricing under EU competition law in general

Dual pricing, outside the online sales context, mainly concerns practices through which manufacturers price products differently depending on the geographic market where the products are sold. Such practices seek to discourage cross-border sales – no rational consumer would enter into a cross-border transaction for a product priced cheaper in their domestic market – and essentially amount to export bans inhibiting parallel trade, contrary to the common market objective. Dual-pricing measures constitute by-object restrictions of competition, which are nonetheless capable of meeting the Article 101(3) criteria.

Dual pricing and online sales under the old regime

The old Vertical Guidelines defined dual pricing as a practice through which 'the distributor [shall] pay[s] a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line' and classified such relevant practices as hardcore restrictions.[25] The relevant decisional practice regarding dual pricing in the field of e-commerce mainly comes from national competition authority decisions.

The first type of dual-pricing cases concerns setting a different wholesale price for the same product to the same retailer depending on whether the resale channel is online or offline. In 2013, the Bundeskartellamt investigated the rebates schemes of Gardena[26] and Bosch Siemens Hausgerate,[27] which favoured offline sales, and reached the preliminary conclusion that these practices constituted hardcore restraints of competition. The enforcer was not prepared to accept that

23 ibid, Paragraphs 208 and 335.

24 ibid, Paragraph 337 et seq.

25 Old Vertical Guidelines, Paragraph 52.

26 Gardena awarded discounts to its retailers calculated based on the distribution channel used for the sale of products. The Bundeskartellamt (BKA) found that this staggered system of discounts amounted to illegal dual pricing because the reductions were structured in such a way that only brick-and-mortar retailers could benefit from the full discount.

27 Similarly Bosch's rebate system put hybrid dealers, namely dealers who sold household appliances in both brick-and-mortar shops and online shops, at a disadvantage compared to pure offline dealers. Bosch awarded a smaller discount for sales achieved through online channels.

the measures were justified pursuant to Article 101(3) TFEU, and the investigations closed with the investigated companies committing to remove the offending provisions.[28]

The second type of dual-pricing case concerns setting a different wholesale price for the same product to different retailers, some of which may be present only online. The EC recently clarified that such practices do not qualify as hardcore restrictions and that this classification is only applicable to dual pricing concerning the same retailer.[29]

The most recent enforcement activity in this field comes from the French Competition Authority (FCA).[30] Lego implemented a discount policy that de facto put its online retailers at a disadvantage. The applicable rebate scheme system offered additional discounts to reward certain qualitative physical store features, such as extra shelf space. Naturally, pure online resellers could not have access to these discounts. This practice amounted to dual pricing since Lego essentially charged pure offline or hybrid dealers a better sales price post-discount compared to pure online resellers.

The FCA considered first that the scheme was capable of constituting an anticompetitive agreement. It then reached the preliminary conclusion that although the agreement did not amount to a by-object restriction of competition or a hardcore restraint, it was nonetheless 'likely to have anticompetitive effects, by disadvantaging the pure players and reducing the competitive pressure they could exert'.

Importantly, the FCA did not see any objective justification for the price differentiation and held that Lego had failed to demonstrate that its pricing scheme was indispensable and proportionate to the objectives of building awareness of the brand among children, ensuring the availability of products and the quality of the overall shopping experience. Following the above, Lego agreed to change its rebate system, and the investigation was closed based on the company's commitments.

28 Decision of the BKA in *Gardena*, B5-144/13; Decision of the BKA in *Bosch Siemens Hausgerate*, B7-11/13.

29 ibid.

30 Decision of the FCA in *Lego*, 21-D-02.

Dual pricing under the new regime

The EC's review of the old VBER and the old Vertical Guidelines concluded that online sales have now grown into a well-operating sales channel that no longer requires special protection compared to offline sales channels.[31] As a result, the new Vertical Guidelines stopped treating dual pricing as a hardcore restriction.

In particular, Paragraph 209 recognises that the 'requirement that the buyer pays a different wholesale price for products sold online than for products sold offline' can benefit from the block exemption as 'it may incentivise or reward an appropriate level of investments in online or offline sales channels, provided that it does not have the object of restricting sales to particular territories or customers'.

Dual pricing is considered a hardcore restriction only where the difference in the wholesale price for products sold online has the object of preventing the effective use of the internet by the distributor to sell the contract goods or services to particular territories or customers. The EC further explains that this would be the case where the difference in wholesale price makes selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to the buyer for sale online.[32]

Equivalence principle

The new Vertical Guidelines also abandoned the principle of equivalence between offline and online sales. Paragraph 235 recognises that within the context of a selective distribution system, a supplier 'may impose on its authorised distributors criteria for online sales that are not equivalent to those imposed for sales in brick and mortar shops' so long as the lack of equivalence in the criteria imposed does not 'indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers'. The purpose of the revised text is to take account of the specific characteristics of the two sales channels, as often criteria important for one cannot be implemented in the other respective channel.

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31 See, in this regard, the 'Explanatory note on the new VBER and Vertical Guidelines' of the European Commission (EC), available at: https://competition-policy.ec.europa.eu/system/files/2022-05/explanatory_note_VBER_and_Guidelines_2022.pdf.

32 New Vertical Guidelines, Paragraph 209.

RPM

RPM under EU competition law in general

Article 101(1)(a) TFEU specifically prohibits agreements that 'directly or indirectly fix purchase or selling prices or any other trading conditions'. Moreover, Article 4(a) of the new VBER specifically excludes from the block exemption agreements that include:

> *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.*[33]

This covers all behaviour on the part of the seller intended to constrain the buyer to resell the contract products at or above a certain price. Paragraph 187 of the new Vertical Guidelines gives a non-exhaustive list of practices that are tantamount to price maintenance.[34] The EC further refers to practices, the combination of which tends to indicate price maintenance, such as coupling a resale price recommendation with incentives to apply a certain price level.[35] The new Vertical Guidelines also provide specific guidance on setting minimum advertised prices that is considered a form of RPM.[36]

Paragraph 196 of the new Vertical Guidelines explains how RPM restricts intra-brand or inter-brand competition by setting out the anticompetitive effects following from RPM practices.[37] The new Vertical Guidelines also recognise that

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33 See also new Vertical Guidelines, Paragraph 185 et seq.

34 Such practices include, for example, fixing a distributor's or buyer's resale margin, fixing the maximum level of discount that a distributor can grant from a prescribed price level, making the granting of rebates or the reimbursement of promotional costs subject to the observance of a given price level, imposing minimum advertised prices (MAPs) that prohibit distributors from advertising prices below a level set by the suppliers and linking sales prices to those of competitors.

35 New Vertical Guidelines, Paragraphs 188 and 190.

36 ibid, Paragraphs 187 and 189.

37 The Vertical Guidelines identify that RPM practices may, among other things: facilitate collusion between suppliers by enhancing price transparency in the market, thereby making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price; eliminate intra-brand price competition and facilitate collusion between the buyers (i.e., at the distribution level); soften competition between manufacturers or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them; pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem; be implemented by a

there are situations where RPM restrictions may lead to efficiencies and be justified pursuant to Article 101(3) TFEU.[38] By way of example, it can be legitimate to impose RPM for a short period in the context of the promotion of a new product.

RPM and online sales

Algorithms and other electronic surveillance technologies further facilitate RPM practices in online sales and exacerbate the anticompetitive impact resulting therefrom. The relevant technologies: (1) allow prices to be automatically adopted and adjusted, ensuring that the imposed RPM is followed at all times; and (2) render monitoring compliance with any imposed RPM practices easier and, therefore, increase any corresponding sanctioning. This explains why RPM practices in the e-commerce field have recently come under the enforcers' spotlight.

On 24 July 2018, the EC closed its investigation on consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer by imposing a total fine of €111 million.[39] The EC found that the infringing parties had limited price competition among retailers 'by restricting the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks, and hi-fi products', leading to an increase in consumer prices. The use of algorithms to implement and enforce the RPM practices under review was a central piece of the EC's analysis. As the EC explained at the time the investigation was opened:

> *The effect of these suspected price restrictions may be aggravated due to the use by many online retailers of pricing software that automatically adapts retail prices to those of leading competitors. As a result, the alleged behaviour may have had a broader impact on overall online prices for the respective consumer electronics products.*[40]

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manufacturer with market power to foreclose smaller rivals; and prevent price competition between distributors, therefore reducing innovation at the distribution level.

38 New Vertical Guidelines, Paragraph 197. For example, fixed resale prices may be necessary to organise a coordinated short-term, low price campaign; or a minimum resale price can be used to prevent a distributor from using the product of a supplier as a loss leader since regularly reselling a product below the wholesale price could damage the brand image of that product and overtime reduce overall demand for it and undermine supplier's incentives to invest in quality and brand image.

39 Decision of the EC in *Asus*, AT. 40465; *Denon & Marantz*, AT. 40469; *Philips*, AT. 40181; and *Pioneer*, AT. 40182.

40 European Commission, Antitrust: Commission opens three investigations into suspected anticompetitive practices in e-commerce (2 February 2017), available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_201.

Similarly, national competition authorities have been increasingly active in investigating and sanctioning RPM practices in online sales.

By way of example, in May 2016, the CMA fined a supplier of commercial refrigeration equipment over £2 million[41] and a bathroom fittings manufacturer over £780,000[42] for preventing retailers from advertising or selling products online below a certain price. The CMA held that these practices, in essence, restricted retailers' freedom to set the price for online sales individually and, therefore, amounted to illegal RPM.

Following these cases, the CMA published further guidance on restrictions of online resale prices in the form of an open letter, noting the growing importance of online sales channels and reiterating that the CMA 'takes RPM seriously and is focused on tackling anti-competitive practices that diminish the many benefits of e-commerce'.[43]

In June 2017, the CMA fined a supplier of domestic light fittings £2.7 million for having dictated the minimum prices at which its resellers could sell products online.[44] National Lighting Company's agreements with its resellers prevented the sale of its Endon and Saxby brands below a certain minimum at the retail level. The infringing agreements were not memorialised in writing. Resellers nonetheless understood these restrictions as being a necessary condition and part of the agreement they entered into with the National Lighting Company allowing them to use the manufacturer's brand and image.

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41 Decision of the CMA in *ITW Limited infringed*, Case CE/9856-14. In the commercial catering equipment case, the supplier imposed a MAP policy that restricted the price at which retailers could advertise the supplier's product online. It enforced this MAP policy by threatening dealers who advertised below this minimum price with higher cost prices for products or seize of supply altogether.

42 Decision of the CMA in *Ultra*, Case CE/9857-14. In this case, the manufacturer threatened retailers with penalties for not pricing at or above a 'recommended' online price as set out in previously circulated 'online trading guidelines'. Enforcement threats included charging retailers with higher prices, withdrawing rights to use the supplier's images online or withholding supply of products altogether. In addition to the guidelines, Ultra introduced a new copyright licensing procedure according to which use of Ultra's imagery by resellers was subject to separate licensing. Ultra argued that the rationale for introducing the aforementioned measures was to protect its brand value and to address poor quality service by online retailers. The CMA concluded that these objectives were at most subsidiary to the overall goal of protecting reseller's margins and reiterated that 'maintaining a prestigious image is not a legitimate aim for restricting competition'.

43 See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620454/resale-price-maintenance-open-letter.pdf.

44 Decision of the CMA in *National Lighting Company Limited*, Case 50343.

The CMA continued to focus on RPM-related practices in 2019 and 2020:

- In August 2019, the CMA fined the digital piano and keyboard supplier Casio £3.7 million for online RPM infringements over a five-year period between February 2013 and April 2018.[45]
- In January 2020, the CMA fined guitar maker Fender Musical Instruments Europe Limited and its US parent company, Fender Musical Instruments Corporation, £4.5 million.[46]
- In June 2020, the CMA fined Roland, a supplier of electronic drum kits, and Korg, a supplier of synthesisers and high-tech music equipment, £4 million and £1.5 million respectively.[47]
- Later in June 2020, the CMA also fined retailer of musical instruments GAK £278,945.[48]

UK approach to vertical restraints

Concurrently to the EC's consultation on the old VBER and Vertical Guidelines, the CMA and the Department for Business, Energy and Industrial Strategy (BEIS) also reviewed the Vertical Agreements Block Exemption Regulation, which was retained under UK law following the UK's exit from the EU (the retained VABER). In May 2022, the BEIS published the final version of the Vertical Agreements Block Exemption Order (VABEO),[49] which came into force on 1 June 2022 and will be in effect for six years, until 31 May 2028.

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45 Decision of the CMA in *Casio*, Case 50565-2. The CMA concluded that Casio required its online resellers to advertise and sell Casio products at or above a minimum price and prohibited them from offering online discounts. Casio monitored the policy using software and threatened to withdraw marketing contributions and other incentives where resellers failed to comply.

46 Decision of the CMA in *Fender*, Case 50565-3. The CMA found that Fender required its online resellers to sell guitars above a minimum price and took retaliation measures against non-compliant counterparties.

47 Decision of the CMA in *Roland*, Case 50565-5, and *Korg*, Case 50565-4. The infringing entities restricted online retailers from selling their musical instruments below a set minimum price and used price monitoring software to monitor real-time pricing and ensure their online retailers' compliance. Interestingly, both companies had taken steps to conceal evidence of their infringing conduct.

48 Decision of the CMA in *GAK*, Case 50565-6. GAK had admitted to the CMA its agreement with Yamaha not to discount the online price of certain Yamaha musical instruments below a minimum price. Yamaha was granted total immunity from fines for being the first to bring the conduct to the attention of the CMA, whereas GAK settled the case. This was the first time the CMA took enforcement action against a retailer, rather than a supplier, in an RPM case.

49 See www.legislation.gov.uk/uksi/2022/516/introduction/made.

In July 2022, the CMA also published its guidance[50] on the application of the VABEO to help businesses assess their vertical agreements and determine whether they benefit from the block exemption provided by the VABEO. Although the VABEO closely mirrors the EC's new rules, there are a number of points of divergence. Consequently, businesses operating in both the UK and the EU will have to consider both regimes.

DMA

Another important development in the field of e-commerce is the EC's proposal for a regulation on contestable and fair markets in the digital sector, the DMA.[51] On 24 March 2022, the European Council and the European Parliament reached a provisional agreement on the DMA proposal. On 5 July 2022, the European Parliament approved the final text of the DMA, followed by the European Council's approval on 18 July 2022.[52] The regulation is set to enter into force 20 days following its publication in the Official Journal of the European Union and will start to apply six months after that (i.e., approximately mid-2023).[53]

The DMA lays down harmonised rules aimed at regulating the behaviour of digital platforms that act as 'gatekeepers'. It represents a significant shift of regulatory powers from ex post antitrust intervention to ex ante regulation in the form of a set of self-executing obligations imposed on those gatekeepers, namely providers of core platform services with a significant impact on the internal market, a core platform service that is an important gateway for business users to reach end users, and an entrenched and durable position in the market.[54]

The DMA also sets forth an exhaustive list of 'core platform services', which includes online intermediation services, online search engines, online social networking services, video-sharing platforms, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing and advertising.[55]

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50 See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091830/VABEO_Guidance.pdf.

51 See https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN.

52 See European Council press release of 18 July 2022, available at: www.consilium.europa.eu/en/press/press-releases/2022/07/18/dma-council-gives-final-approval-to-new-rules-for-fair-competition-online.

53 DMA, Article 54.

54 DMA, Article 3(1).

55 ibid., Article 2(2).

Article 5 of the DMA sets out a number of ex ante 'blacklist' self-executing prohibitions for gatekeepers,[56] and Article 6 of the DMA provides a list of ex post potentially prohibited behaviour that needs to be further specified depending on the different core platform services on offer.[57]

Interestingly, the DMA requires gatekeepers to inform the EC of any contemplated M&A activity involving another provider of core platform services or digital services, irrespective of whether the proposed transaction is reportable under the applicable EU or Member State merger control regime.[58]

The DMA allows the EC to take enforcement actions similar to those concerning the application of its antitrust rules. The EC may, therefore, initiate formal investigations, conduct on-site inspections, send out requests for

56 Practices under Article 5 that gatekeepers should refrain from include the following: processing, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper; combining personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services; cross-using personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and signing in end users to other services of the gatekeeper to combine personal data.

57 Obligations susceptible to being further specified according to Article 6 include the duties: not to use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users; to allow and technically enable end users to easily uninstall any software applications on the operating system of the gatekeeper, without prejudice to the possibility for that gatekeeper to restrict such uninstallation in relation to software applications that are essential for the functioning of the operating system or of the device and that cannot technically be offered on a standalone basis by third parties; to allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper; to refrain from self-preferencing practices; to allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant of the gatekeeper; and to provide end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service.

58 DMA, Article 14.

information, adopt infringement decisions and impose fines, order the application of interim measures and accept commitments in relation to infringements of the DMA.[59]

The CMA has been moving along similar lines. In 2019, it published its Digital Markets Strategy setting out its priorities in the field,[60] following which it undertook an in-depth market study into online platforms and digital advertising in July 2020[61] and announced its intention to introduce stricter regulation of digital players in November 2020.[62]

In this context, the CMA set up in April 2021 a specialised Digital Markets Unit (DMU) charged with overseeing a new pro-competition regulatory regime for digital platforms with strategic market status, as well as monitoring the competitive conditions prevailing in digital markets more widely.[63] In May 2022, the UK government published its response to its public consultation on the new pro-competition regime for digital markets[64] and announced its plan to adopt new competition rules for digital markets as part of the Digital Markets, Competition and Consumer Bill, which will reinforce the DMU with statutory status.[65]

The developments set out above reflect the enforcers' intention to supplement the current enforcement regime and ensure a level-playing field in digital markets with an ex ante system of regulating the market conduct of key players. This observation naturally reinforces the strategic importance of digital markets for both the EC and the CMA and, as a matter of fact, for the current economy. It will be interesting to see the interplay of these two parallel enforcement systems in practice.

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59 ibid, Chapter V.

60 See www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy-february-2021-refresh.

61 See https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

62 See www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated.

63 ibid.

64 See www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation.

65 See https://competitionandmarkets.blog.gov.uk/2022/05/10/digital-markets-and-the-new-pro-competition-regime.

Geo-blocking and geo-filtering

What is geo-blocking and geo-filtering?

Geo-blocking encompasses various practices through which online sellers restrict cross-border sales based on consumers' nationality, residence or place of establishment. Frequently, online sellers allow consumers to access and purchase goods or services cross-border, but nonetheless extend different terms and conditions if the customer is in a different Member State (geo-filtering).

Geo-blocking may take many forms, including but not limited to:

- blocking users access to websites if they are located in another Member State;
- automatically rerouting users to another website of the same or a different service provider (possibly with a different price);
- refusing the delivery of goods or services based on the user's location or place of residence; and
- refusing certain payment methods based on geographic criteria related to the location of the user, their bank or credit account, or their banking institution.

It clearly follows from the above that such practices essentially constitute a form of discrimination based on unjustified geographic criteria: online sellers treat EU consumers differently for reasons related to the users' nationality, place of residence or establishment.

By blocking or, at the very least, restricting EU consumers' access to cross-border trade, those practices de facto amount to geographical market segmentation and, therefore, contravene the EU's core free movement principles as well as the digital single market objective.

The EC's Final e-Commerce Sector Inquiry Report published in May 2017 documented the extensive use of geo-blocking: 38 per cent of the responding retailers selling consumer goods online and 68 per cent of the responding digital content providers affirmed that have made recourse to geo-blocking measures.[66]

Geo-blocking Regulation

On 28 February 2018, the EU adopted Regulation (EU) 2018/302 (the Geo-blocking Regulation), which entered into force on 22 March 2018 and became applicable as of 3 December 2018.

66 See https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

The Geo-blocking Regulation seeks to remove unwarranted, discriminatory restrictions to users' access to cross-border trade and services and obliges online sellers to treat similarly situated EU consumers in the same manner, irrespective of their nationality, place of residence or establishment.

Scope

The Geo-blocking Regulation, as it currently stands, excludes from its scope the following industries:

- audiovisual services, including services providing access to film and television content;
- financial services; and
- transport-related services.[67]

Non-audiovisual, electronically supplied services protected by copyright – such as music, e-books and games – generally fall within the Regulation's ambit,[68] subject to certain exceptions discussed below.[69]

That said, the EC recently reviewed the application of the Geo-blocking Regulation pursuant to Article 9. In so doing, it considered the possibility of extending its scope to encompass audiovisual services and fully cover copyright-protected content.[70] The EC identified the clear benefits following from the availability of a wider choice of audiovisual content across the EU and found that the details and conditions for extending the Regulation's content in this direction must be further assessed in the context of a stakeholder dialogue with the audiovisual sector.

Conversely, the EC concluded that extending Article 4 of the Geo-blocking Regulation to capture online copyrighted content would not bring additional benefits to consumers in terms of access to new content. The catalogues of online content available throughout the EU are generally homogenous.

The Geo-blocking Regulation applies to:

- business-to consumer transactions; and
- business-to-business transactions so long as these:
    - are conducted on the basis of general conditions (i.e., are not individually negotiated); and

67 Regulation (EU) 2018/302, Paragraphs 8–9.

68 ibid, Paragraph 8.

69 ibid, Article 4.

70 See https://digital-strategy.ec.europa.eu/en/news/commission-publishes-its-short-term-review-geo-blocking-regulation.

- are intended for end use (i.e., made without the intention to resell, transform, process, rent or subcontract).

The key features under the Geo-blocking Regulation

Access to online interfaces (Article 3)

Article 3 of the Geo-blocking Regulation prohibits traders from:

- blocking access to their interfaces (websites or apps) for reasons related to the customer's nationality, place of residence or establishment; and
- rerouting users to an interface different than the one the customer initially sought access to, by virtue of its layout, use of language or other characteristics that make it specific to customers with a particular nationality, place of residence or establishment, unless the customer has explicitly consented to such redirection.

Non-discrimination in access to goods or services (Article 4)

Traders are obliged to grant users access to goods and services under the same conditions as those applied to local, national customers ('shop like a local') in respect of:

- the sale of goods with delivery or pickup in an area already served by the trader;
- the sale of electronically supplied services (e.g., cloud services, data warehousing and website hosting); and
- the sale of services provided in a specific physical location, including when booked online (e.g., ticketing services, accommodation and car rental services).

Article 4 does not currently apply to non-audiovisual, electronically supplied services protected by copyright (e.g., e-books, video games, music and software). These services, nonetheless, remain subject to the rest of the Regulation's prohibitions. The EC is still assessing the possibility of extending the scope of the Regulation as part of its short-term review.

Non-discrimination for reasons related to payments (Article 5)

Traders are free to choose the means of payment (i.e., credit cards, debit cards, card-based payment instruments of the same brand and category of cards) that they make acceptable through their online websites or platforms and apps. They are nonetheless prohibited from discriminating against customers who use the acceptable payment methods based on unjustified geographic criteria (i.e., customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument).

Discriminatory practices may take various forms, including refusal of certain transactions (e.g., refusal to accept certain cards) and different payment conditions (e.g., implementing additional transaction costs) for any of the reasons listed above. The non-discrimination prohibition under Article 5 applies provided that the payments are made through electronic transactions, in a currency accepted by the trader, and pursuant to applicable authentication requirements.

Agreements on passive sales (Article 6)

Article 6 renders as outright null and void any vertical arrangements prohibiting traders from responding to unsolicited requests from consumers throughout the EU (passive sales) in the specific situations covered by the Regulation. This is an absolute prohibition that applies irrespective of the trader's market position.

Enforcement activity in the field

Geo-blocking practices in the field of video games

On 2 February 2017, the EC launched an investigation into Valve, owner of the online PC gaming platform Steam, and five video game distributors (Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax) for violations of geo-blocking rules. The EC concluded on 20 January 2021 that the investigated undertakings had restricted the cross-border sales of certain PC video games on the basis of the geographical location of users and imposed a total fine of €7.8 million.[71] More specifically, the EC found that:

> *Valve and the publishers had entered into bilateral agreements and/or concerted practices through which they restricted the cross-border purchases of certain video games for the period from September 2010 to October 2015. The parties implemented geo-blocking keys to bar the activation of specific video games outside certain Member States. They therefore prevented passive sales in the regions where activation was blocked.*

Certain publishers introduced clauses in their licensing and distribution agreements with some of their respective PC video games distributors in the European Economic Area (other than Valve) restricting passive sales within the EU from March 2007 until November 2017.

71 Decision of the EC in *Focus Home*, AT.40413; *Koch Media*, AT.40414; *ZeniMax*, AT.40420; *Bandai Namco*, AT.40422; and *Capcom*, AT.40424.

Geo-blocking practices in the field of TV broadcasting

On 13 January 2014, the EC opened an investigation into possible restrictions affecting the provision of pay-TV services within the EU. More specifically, the EC took the preliminary view that certain clauses in film licensing contracts for pay TV between Paramount (among other studios) and Sky UK were in breach EU antitrust rules since they:

- required Sky UK to block access to Paramount's films through its online pay-TV services or through its satellite pay-TV services to consumers outside its licensed territory (UK and Ireland); and
- required Paramount to ensure that broadcasters outside the UK and Ireland were prevented from making their pay-TV services available in the UK and Ireland.

The EC considered that these provisions essentially restricted the ability of broadcasters to accept unsolicited requests for their pay-TV services from consumers located outside their licensed territory. Concomitantly, the EC took the preliminary view that each of Disney, NBCUniversal, Sony, 20th Century Fox and Warner Bros had put in place similar contractual restrictions in their agreements with Sky UK.

On its part, Paramount offered commitments to ban and no longer enforce the territorial protection provisions in question. The EC adopted its commitments decision on 26 July 2016.[72] Disney, NBCUniversal, Sony, 20th Century Fox and Warner Bros refrained from offering any commitments until 2018. The EC eventually adopted a commitments decision in respect of these undertakings in March 2019.[73]

By way of reminder, EC commitments decisions do not establish a positive infringement finding and do not hold addresses liable for any breach of EU competition rules. It is important to highlight in this connection that audiovisual content is outside the scope of the Geo-blocking Regulation as it currently stands.

On 8 December 2016, French TV broadcaster Canal+ challenged the EC commitments decision on Paramount, arguing before the General Court that the EC had violated its intervention rights as an interested third party. On appeal, the CJEU sided with Canal+ and annulled the EC's decision on procedural grounds related to the way in which Paramount's proposed commitments were accepted.[74]

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72 Decision of the EC in Case AT.40023, *Cross-border access to pay-TV* dated 26 July 2016.

73 Decision of the EC in Case AT.40023, *Cross-border access to pay-TV* dated 7 March 2019.

74 C-132/19 P, *Groupe Canal+ v. Commission*, EU:C:2020:1007.

The CJEU held, among other things, that when analysing commitments in the context of Article 9, the principle of proportionality requires that the EC verify that the remedies correspond to its preliminary competition concerns and takes into account the interests of third parties.

The CJEU went on to reason that the EC must verify whether any proposed commitments are proportionate in respect of the contractual rights of implicated third parties and held that any failure to do so cannot be remedied by any review undertaken by national courts on a domestic level.

Following the CJEU's judgment, the EC withdrew its commitments decision in March 2021.[75] This aligns the status of the case law with the actual scope of the Geo-blocking Regulation, which expressly excludes audiovisual services and content from its scope.

75 Decision of the EC in Case AT.40023 - Cross-border access to pay-TV dated 31 March 2021.

CHAPTER 4

E-Commerce: Retail MFN Clauses

Philippe Chappatte and Kerry O'Connell[1]

What are retail MFNs?

This chapter considers the use of retail parity provisions, otherwise known as retail most favoured nation (MFN) clauses, in agreements between suppliers of products or services and price comparison tools on which they are listed, and between retailers and online marketplaces, which relate to the conditions under which products are offered to end users.

Two main types of retail MFN clauses have been considered by competition authorities across Europe:

- 'wide' MFNs: typically require suppliers and retailers to publish on a price comparison tool or online marketplace the same or better prices and conditions as those published on any other third-party sales channel; and
- 'narrow' MFNs: typically require suppliers and retailers to publish on a price comparison tool or online marketplace the same or better prices and conditions as those published on its own (direct) website.

MFN clauses can also be distinguished according to the factor regulated – price being the most common. Non-price MFN clauses may require the supplier and retailer to offer the same product range, availability, conditions and customer services.

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1 Philippe Chappatte and Kerry O'Connell are partners at Slaughter and May. The authors would like to thank Sarah de Morant, former associate at Slaughter and May, and Shweta Vasani and Katie Hudson, associates at Slaughter and May, for their contributions.

Key European MFN cases and legislation to date

The use of retail MFNs by price comparison tools and online marketplaces has been the target of a number of antitrust enforcement cases and market studies in Europe.

Online hotel bookings

Starting in 2010, several European national competition authorities (NCAs) have investigated MFN clauses in agreements between online travel agents (OTAs) and hotels, and have taken different approaches. The French, Italian and Swedish NCAs accepted five-year commitments from the OTA Booking.com to replace wide MFNs with narrow MFNs in April 2015.[2] The narrow MFN commitments were unilaterally extended by Booking.com throughout the European Union – an approach that Expedia followed shortly thereafter.

In August 2020, Booking.com and Expedia voluntarily agreed to extend their formal commitments not to impose 'wide' parity clauses. The German NCA, however, issued prohibition decisions both in respect of the use of the wide MFN by the hotel booking OTA HRS in December 2013 and in respect of Booking.com's narrow MFN in December 2015. While its decision against the narrow MFN was overturned on first appeal,[3] it has since been endorsed by the German Federal Court of Justice, which held that even the narrow MFNs used by Booking.com until 2016 restricted competition.[4]

Insurance PCWs and DCTs (UK)

The UK NCA carried out a market investigation into the private motor insurance (PMI) market between 2012 and 2014.[5] Aspects covered included the use of wide MFNs in agreements between PMI providers and price comparison websites (PCWs). The investigation led to the prohibition of wide MFNs in relation to motor insurance (with PCWs relying instead on narrow MFNs). More recently,

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2 French Competition Authority, Decision 15-D-06 dated 21 April 2015; Italian Competition Authority, Decision dated 21 April 2015; and Swedish Competition Authority Decision 596/2013 dated 15 April 2015.

3 German Competition Authority, Decisions B 9 – 66/10 dated 20 December 2013 and B 9 – 121/13 dated 22 December 2015; Press release, Ministry of Justice of Nordrhein-Westfalen, 'Higher Regional Court of Düsseldorf: Online Hotel Bookings: "Narrow" MFNs are Permitted' (19 June 2019).

4 German Federal Court of Justice, 18 May 2021: www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021099.html (full text decision yet to be published).

5 UK Competition and Markets Authority (CMA), Private motor insurance market investigation, Final Report dated 24 September 2013 (UK CMA PMI investigation).

the UK NCA published further analysis on MFNs as part of its digital comparison tools (DCT) market study[6] and fined CompareTheMarket £17.9 million for its use of wide MFNs,[7] although this has since been overturned on appeal.

Amazon Marketplace (UK and Germany)

In 2012 and 2013, the UK and German NCAs both launched investigations into the use of wide MFNs on Amazon Marketplace. As a result of these proceedings, Amazon announced in August 2013 that it would no longer be enforcing Marketplace parity provisions across the European Union,[8] although it continued to use such parity provisions in the US until recently.

Apple e-books (EU)

The Commission investigated Apple and a number of international e-book publishers in relation to retail price MFNs and other pricing clauses introduced by Apple in its iBookstore contracts after switching from a wholesale to an agency model. The Commission was concerned that those arrangements formed part of a strategy aimed at raising e-book prices. The case was settled by way of commitments, including a commitment by Apple not to enter into or enforce any retail price MFN clauses in agreements with e-book retailers or publishers for five years.[9]

Amazon e-books MFN (EU)

The Commission initiated antitrust proceedings in June 2015 examining MFN clauses in agreements between Amazon and e-book publishers. The Commission considered that those clauses, which covered price as well as a number of other aspects, such as distribution model, innovative features and promotions, could impede the ability of other e-book platforms to compete with Amazon. The case was settled by way of commitments in May 2017, under which Amazon offered not to enforce or include such clauses in respect of any e-book distributed in the EEA for five years.[10]

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6 UK CMA, Digital comparison tools (DCT) market study, Final Report dated 26 September 2017; UK CMA, price comparison website: use of most favoured nation clauses (opened 26 September 2017).

7 Decision of the UK CMA, Price comparison website: use of most favoured nation clauses (Case 50505) (dated 19 November 2020).

8 German Competition Authority, Decisions B 6 – 46/12 dated 26 November 2013 and B 9 – 121/13 dated 22 December 2015; Office of Fair Trading, Case CE/9692/12 (closed November 2013).

9 AT.39847 *E-books*, Decision dated 12 December 2012.

10 AT.40153 *E-book MFNs and related matters (Amazon)*, Decision dated 4 May 2017.

E-commerce Report (EU)

In 2017, the Commission briefly assessed MFNs as part of its wide-reaching sector inquiry into e-commerce.[11]

DMA and revised VABER (EU)

The Digital Markets Act (DMA) text adopted by the European Parliament in December 2021 prohibits the use of both wide and narrow parity clauses by large online platforms identified as 'gatekeepers'. The Vertical Agreements Block Exemption Regulation (VABER)[12] only comes out strongly against retail wide parity clauses, but recognises that parity clauses at other levels of the distribution chain or narrow retail parity clauses could deliver efficiencies that would justify a block exemption.

The UK equivalent of the VABER – the Vertical Agreements Block Exemption Order (VABEO) – takes an even harder stance on wide parity clauses, designating such clauses (whether online or offline), or measures that have the same effect as a wide retail parity obligation, as a hardcore restriction. There is, therefore, recognition at the policy level of efficiencies that narrow parity clauses can deliver, although both block exemptions note that the benefit of the exemption may be withdrawn in individual cases and cite narrow MFNs in concentrated markets as an example.

In respect of gatekeepers, the debate on narrow parity clauses has, for now, effectively ended on the basis that their market power is considered to mean that any efficiencies will not outweigh the anticompetitive effects of those clauses.

The position in the UK may begin to diverge from the EU. In November 2020, the UK NCA found that insurance PCW CompareTheMarket's use of wide MFNs violated both Section 2(1) of the UK Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union (TFEU), and imposed a fine of £17.9 million.[13] CompareTheMarket appealed this to the UK Competition Appeal Tribunal (CAT).

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11 COM(2017) 229, Final Report on the E-commerce Sector Inquiry dated 10 May 2017.

12 Commission Regulation (EU) 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 (VABER). This Regulation entered into force on 1 June 2022.

13 See footnote 7.

In August 2022, the CAT handed down its judgment on CompareTheMarket's appeal, which successfully overturned the decision of the Competition and Markets Authority (CMA).[14] The CAT criticised the CMA's findings, concluding that wide MFNs are not by-object infringements and that the UK NCA had failed to establish that the clauses had the anticompetitive effects articulated in its decision.

What are the competition issues raised by MFNs?

MFN clauses have largely been analysed as potentially anticompetitive agreements under Article 101 of the TFEU and national equivalents (see below for an overview of Article 102 of the TFEU analysis to date).

Wide MFNs – theories of harm

Two theories of harm have been advanced by European competition authorities in respect of wide MFNs: they soften competition between platforms and impede innovation, entry and expansion by new platforms.

Softening of competition between platforms

Wide MFNs have been alleged to reduce the incentive for platforms to compete on the basis of commission levels by creating 'price floors'.[15] According to this theory, a platform can increase the commission charged to a supplier who is subject to a wide MFN without the constraint that this supplier could retaliate by setting a higher price and less advantageous conditions on the platform compared with other channels; instead, short of delisting themselves, suppliers are faced with two options: pass on the commission increase by raising prices across all their distribution channels or maintain current prices and absorb the loss.

In addition, wide MFNs typically spread across a market: competing platforms will have a strong incentive to implement similarly wide MFNs to protect themselves against the risk of rates on their websites exceeding those listed elsewhere. This can result in low levels of price differentiation (i.e., suppliers displaying the same price across all platforms).

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14 Judgment of the UK Competition Appeal Tribunal (CAT), *BGL (Holdings) Limited & Others v Competition and Markets Authority* (Case [2022] CAT 36) (published 8 August 2022): www.catribunal.org.uk/judgments/138011221-bgl-holdings-limited-others-v-competition-and-markets-authority-judgment-2022.

15 UK CMA PMI investigation, Paragraph 8.40-43.

Barrier to entry and innovation

Wide MFNs have been alleged to constitute a barrier to entry, on the basis that online platforms are prevented from entering the market or expanding through a strategy based on offering low commission rates in exchange for better prices and conditions from suppliers (who are constrained by the wide MFNs agreed with other platforms).[16] Platforms can still differentiate themselves based on factors such as quality and brand image; however, these typically require significant upfront investments. These effects are said to be strengthened when MFN clauses spread and become industry standard.

Narrow MFNs – theories of harm

While narrow MFNs have largely been treated positively by NCAs on the basis of associated efficiencies, these potential concerns have been explored: the potential for narrow MFNs to replicate the effects of the wide MFN and restrictions on competition from the direct channel.

Potential to replicate the effects of the wide MFN

Competition authorities have noted that narrow MFNs could have anti-competitive effects if suppliers are not willing to undercut their direct channel (possibly to avoid the cannibalisation of their direct sales).[17] Faced with an increase in commission, these suppliers might opt to raise prices not only on the platform with a narrow MFN and their own website, but also across other channels – thereby replicating the price floor effects of a wide MFN. In particular, where competition for the supply of online intermediation services is limited, narrow MFNs may allow platforms to maintain a higher price for their services, leading to higher retail prices for the intermediated goods or services on all sales channels.[18]

Restricting competition from the direct channel

Narrow MFNs have the potential to produce anticompetitive effects by limiting the competitiveness of suppliers' direct sale channels;[19] however, the extent to which direct channels have the potential to exercise a constraint on platforms varies greatly across markets, as it will depend on factors such as the extent to

16 ibid., Paragraphs 8.35–39.

17 UK CMA, DCT market study, 'Paper E: Competitive landscape and effectiveness of competition' dated 26 September 2017 (UK CMA DCT study, Paper E), Paragraphs 3.34–37.

18 European Commission Guidelines on Vertical Restraints, Paragraph 370.

19 See, for example, UK CMA PMI investigation, Paragraph 8.55.

which consumers shop around between platforms and the visibility of direct channels. Narrow MFNs are likely to have a greater anticompetitive effect if a significant share of sales takes place through the direct channel, and narrow MFNs are imposed by multiple platforms.[20]

Justifying MFNs

Can smaller platforms and suppliers rely on VABER?

The EU VABER[21] provides a safe harbour for agreements that would otherwise fall under the Article 101(1) prohibition, provided certain conditions are satisfied – including a 30 per cent market share threshold on both the upstream and downstream markets.

It was previously unclear whether wide MFNs could be exempted under the VABER, and NCAs had often rejected this notion on the basis that these clauses do not relate to conditions of sale or resale.[22] The UK NCA dismissed the possibility of applying VABER during its private motor insurance (PMI) market investigation into wide MFNs on the basis that PMI providers and PCWs were competing undertakings that both provide PMI quotes on their websites and compete for customers through advertising.[23]

This point can now be considered settled as in the new VABER, the Commission explicitly excludes cross-platform parity agreements (wide MFNs) from benefiting from the safe harbour, although these are not considered hardcore restrictions.[24] The UK has gone further, as the VABEO does categorise wide retail MFNs (including those that apply offline) as hardcore restrictions. In both jurisdictions, it is therefore for parties to individually assess the legal compatibility of their wide MFNs.

Narrow MFNs, however, benefit from the safe harbour under VABER and VABEO, provided neither of the parties' market share exceeds the 30 per cent threshold, subject to the proviso that each states that the benefit of the block exemption could be withdrawn in certain cases. Narrow MFNs in concentrated platform markets are cited as one such example.[25]

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20 European Commission Guidelines on Vertical Restraints, Paragraph 374.

21 See footnote 12.

22 Higher Regional Court of Düsseldorf Administrative proceedings VI-Kart 1/14 [V], Decision dated 9 January 2014, Paragraphs 164–165.

23 UK CMA PMI investigation, Annex 12.1 Paragraph 38.

24 Article 5(1)(d) of revised VABER.

25 European Commission Guidelines on Vertical Restraints, Paragraphs 259 and 374.

Efficiencies analysis

Article 101(3) of the TFEU provides for an individual exemption for otherwise anticompetitive agreements on the basis of associated efficiencies. Four specific conditions must be met for an agreement or concerted practice to be exempted from Article 101(1) in this way. In particular, it must:

- 'contribute to improving the production or distribution of goods or to promoting technical or economic progress';
- allow consumers 'a fair share of the resulting benefit';
- not impose restrictions 'which are not indispensable to the attainment of these objectives'; and
- not 'eliminate competition in respect of a substantial part of the products in question'.

The Commission's Guidelines on the Application of Article 101(3) provide that an assessment of efficiencies involves a balancing act, taking into account the extent of relevant restrictions of competition and balancing them against the efficiencies that flow from those restrictions to determine whether the efficiencies outweigh the harm caused by the arrangement.[26] This provides a framework within which to apply the specific conditions of Article 101(3).

In the context of wide and narrow MFNs, given that narrow MFNs are contractually less restrictive than wide MFNs, the Article 101(3) threshold should generally be lower.

Assessment of narrow MFN clauses under Article 101(3)

There has been divergence within Europe regarding how NCAs have assessed the efficiency benefits of narrow MFNs.

The UK NCA undertook a detailed analysis of narrow MFNs in its PMI market investigation, and found that such clauses did meet the requirements of Article 101(3). In particular, it found that:

- Narrow MFNs enhanced competition between PMI providers through increased transparency and reduced search costs for consumers.[27] Without narrow MFNs, the existence of PCWs might be threatened with a consequent

26 Commission Guidelines on the Application of Article 81(3) of the Treaty (101(3)) (OJ C101/97, 27.4.2004), Paragraphs 11–12.

27 UK CMA PMI investigation, Paragraph 8.82-83.

reduction in inter-brand competition.[28] In particular, the credibility of PCWs could be undermined, and providers could free-ride on the investments of PCWs, if providers were able to undercut the PCWs on which they advertise.[29]

- Consumers would benefit from enhanced inter-brand competition (provided the PCW market was also competitive).[30]
- Narrow MFNs would not eliminate competition: in fact, the UK NCA found that 'if there are any anticompetitive effects from narrow MFNs in the PMI market, these effects are unlikely to be significant' on the basis that providers would offer lower prices on low commission PCWs despite the narrow MFN, and the websites of PMI providers did not appear to be a significant restraint on PCWs.[31]
- The narrow MFN was indispensable to achieving the efficiency gains. While there may be alternative mechanisms to prevent free-riding (e.g., anonymous quotes or an alternative charging model),[32] the UK NCA stated that it could not:

> *identify an alternative mechanism for PCWs to protect their credibility as a comparison tool. Rather it appeared to us that the ability to offer prices which were the same as those available online directly was part of the essential, customer-attracting proposition of a PCW. Overall, we found that even if narrow MFNs had some anti-competitive effects, they might be necessary for PCWs to survive.*[33]

As set out above, in the online hotel bookings investigations, several NCAs recognised the efficiency benefits associated with narrow MFNs, and their decisions leave the impression that the decision to accept Booking.com's commitments was driven by efficiency considerations. For example, the Swedish NCA stated that OTAs can attract customers that the hotels themselves have difficulty reaching, and 'offer consumers a search and comparison function that individual hotels are unable to offer'.[34] It found that this contributed to 'price transparency on the market and to increased competition between hotels'[35] and that without narrow MFNs,

28 ibid., Paragraph 8.82.
29 ibid., Paragraphs 8.89–107.
30 ibid., Paragraph 8.7.
31 ibid., Paragraph 8.118.
32 ibid., Paragraph 8.100.
33 ibid., Paragraph 8.102.
34 Swedish Competition Authority Decision 596/2013 dated 15 April 2015 (English version), Paragraph 16.
35 ibid., Paragraph 27.

these efficiency benefits would be put at risk through free-riding.[36] The French and Italian NCAs also recognised that hotel booking OTAs give rise to important efficiencies, which would be protected through narrow MFN commitments.[37]

The German NCA, by contrast, has been unconvinced by the benefits of narrow MFNs, finding instead that narrow MFNs restrict competition and that harm is not outweighed by efficiency gains. In particular, it found in its decision against Booking.com that none of the conditions of Article 101(3) were met, noting that:

- The general efficiency gains that hotel booking OTAs bring do not result from the narrow MFN.[38] The German NCA was unconvinced by evidence put forward by Booking.com that the removal of the narrow MFN would result in free-riding or increased search costs, and considered that Booking.com would continue to operate successfully without the narrow MFN.[39] As a consequence, consumers did not share in any 'resulting benefit'.[40]
- Even if efficiency benefits were attributed to the narrow MFN, they were not indispensable. The German NCA's view was that in the absence of the narrow MFN, Booking.com could take steps to secure its position in the marketplace; for example, through increased innovation, reducing its commission rate or, if necessary, by changing its business model (e.g., by implementing a usage fee for consumers or a pay-per-click model for hotels).[41]

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36 ibid., Paragraph 30: 'The Competition Authority's assessment, which is supported by analysis . . . is in view of the above that the vertical price parity substantially reduces the risk that hotels free-ride on investments made by Booking.com. This in turn allows Booking.com to receive remuneration for its search and compare services so that the services continue to be offered on the market for the benefit of consumers.'

37 See, for example, French Competition Authority, Decision 15-D-06 dated 21 April 2015 (English translation), Paragraph 289: 'The commitments allow restoring a balance in the sector, and ensure efficient competition likely to lead to a decrease in the amount of commissions of OTAs while respecting the positive contribution that the latter bring to the sector in terms of economic efficiency'; and Italian Competition Authority, Decision dated 21 April 2015 (English translation), Paragraph 67: 'the said commitments are able to remove the anti-competitive concerns that had been identified in the notice of commencement of the investigation. At the same time, we believe that they are able to ensure that consumers have the opportunity to keep using the comparison, research and booking services that it offers for free'.

38 German Competition Authority, Decision B 9 – 121/13 dated 22 December 2015, Paras. 261–267.

39 ibid., Paragraphs 268–281.

40 ibid., Paragraphs 283–285.

41 ibid., Paragraphs 286–298.

- Narrow MFNs 'palpably restrict price competition and . . . quality competition', but whether the fourth condition of Article 101(3) (the agreement does not eliminate competition in respect of a substantial part of the products in question) was met was left open on the basis that the German NCA considered it irrelevant given the first three conditions were not fulfilled.[42]

In May 2021, the German Federal Court of Justice in substance endorsed the above position of the German NCA.

Support studies commissioned by the European Commission for its ongoing evaluation of the VABER, published in May 2020, carried out a detailed review of the potential pro-competitive and anticompetitive effects of both wide and narrow MFNs. The study again noted the well-documented efficiencies of narrow MFNs, such as protecting platform investments against free-riding, reducing consumer search costs, strengthening inter-brand competition, preventing 'rent-seeking' behaviours from suppliers and protecting both platforms and suppliers against demand uncertainty;[43] however, it also noted a risk that these pro-competitive effects could be replaced by negative effects in more concentrated markets or where the parties have high market shares.[44]

Wide MFNs – any incremental benefits over and above narrow MFNs?

The UK NCA considered whether the wide MFN had any incremental benefits over the narrow MFN in its PMI investigation. In particular, it considered efficiency arguments that consumers would not trust PCWs unless they had the best prices across all providers; a wide MFN provides a 'one stop shop', further reducing search costs for consumers; and wide MFNs prevent other distribution channels from free-riding on the advertising investments of PCWs.[45]

The UK NCA found that these claimed efficiency benefits were not supported by evidence. In particular, it found that many consumers searched across multiple PCWs, 'suggesting that they did not expect the prices returned through each PCW to be the same'[46] and that PCWs did not currently operate as a 'one-stop shop'.

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42 ibid., Paragraphs 300–302.

43 DG Comp, Support Studies for the evaluation of the VABER – Final Report, Paragraph 3.4.2.3.1

44 ibid.

45 UK CMA PMI investigation, Annex 12(1)-7, Paragraph 30.

46 UK CMA PMI investigation, Paragraph 8.104.

With respect to free-riding, the UK NCA drew a distinction between narrow and wide MFNs, stating that:

> *as PCWs do not provide a link to other PCWs when they produce their search results, there was not the same possibility for another PCW to free-ride on the first PCW's investment as other PCWs would still need to invest in advertising to attract customers. Therefore, we did not see that a wide MFN added any protection from free-riding to that provided by a narrow MFN.*[47]

Ultimately, the UK NCA found that even if there were some incremental benefits of wide MFNs 'such incremental benefits would be unlikely to outweigh the anti-competitive effects of wide MFNs'.[48]

The UK NCA reaffirmed its assessment that wide MFNs were not necessary to deliver any potential benefits to consumers over and above those of narrow MFNs in its DCT market study.[49] It states in the VABEO Guidance that an agreement containing wide MFNs is unlikely to fulfil the conditions for exemption, although undertakings have the possibility to raise an efficiency justification. The burden is on the parties to substantiate any efficiencies and to demonstrate that all the criteria for exemption are fulfilled.

However, the findings in the CAT's August 2022 judgment overturning the *CompareTheMarket* case in the UK cast that into doubt, suggesting that the UK NCA may, in future, struggle to prove anticompetitive effects of wide MFNs. Other authorities have also found that wide MFNs do not meet the requirements of Article 101(3).[50]

Analysis under the ancillary restraints doctrine

Another potential approach to justifying MFNs is under the ancillary restraints doctrine. There are arguments that a narrow MFN could be justified as an ancillary restraint, which is a clause that is objectively necessary and proportionate for the implementation of a competitively neutral transaction;[51] therefore, the same arguments that have been used by PCWs to justify that narrow MFNs under an

47 ibid., Paragraph 8.106.

48 ibid., Paragraph 8.116.

49 UK CMA DCT study, Paper E, Paragraph 3.16.

50 See, for example, French Competition Authority, Decision 15-D-06 dated 21 April 2015 (English translation), Paragraphs 134–141.

51 See, for instance, European Court of Justice (ECJ), *Remia*, Decision dated 11 July 1985 (C-42/84), Paragraph 20; ECJ, *Oude Luttikhuis*, Decision dated 12 December 1995 (C-399/93)

Article 101(3) analysis – namely, that narrow MFNs are necessary to prevent free-riding and ensure credible search and comparison – could also be argued to be a necessary and proportionate restriction for the provision of services by PCWs.

This position was also taken by the Higher Regional Court of Düsseldorf in the *Booking.com* case on narrow MFNs. It found narrow parity clauses to be compatible with competition law on the basis that they are a necessary 'ancillary agreement' in the contracts with hotels that enable performance of the (pro-competitive) overall contract, and thus considered them exempt from Article 101.[52]

Without specifically mentioning efficiencies, the court noted that Booking.com is obliged to perform its part of the contract in advance and must, therefore, be able to prevent the 'evident and serious risk' that hotels disloyally divert customers to their own sales channels to make the final booking – depriving Booking.com of its commission and disrupting the 'fair and balanced exchange of services'.[53] The court considered it irrelevant whether Booking.com would be able to prevent the occurrence of free-riding through a different remuneration agreement such as a usage fee, as had been suggested by the German NCA; the starting point is that the disputed price parity clause is a necessary ancillary agreement to implement the contract, and the clause does not go beyond what is proportionate in doing so.[54]

The German Federal Court, however, overturned this decision in May 2021 on the grounds that it did not consider Booking.com's narrow MFN to be 'objectively necessary' for the performance of the main contract, which is the provision of online intermediary services.[55] The Court considered that the balancing of pro-competitive aspects of narrow MFNs, such as securing an appropriate remuneration for the platform by solving the free-rider problem or increased market transparency for consumers against their anticompetitive aspects should only happen within the framework of Article 101(3).

Paragraph 14; and ECJ, *MasterCard*, Decision dated 11 September 2014 (C-382/12 P), Paragraph 89.

52 Higher Regional Court of Düsseldorf Administrative proceedings VI-Kart 2/16 [V], Decision dated 4 June 2019, p. 6.

53 ibid., pp. 15–16.

54 ibid., p. 24.

55 German Federal Court of Justice, Decision of 18 May 2021 – KVR 54/20: www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/18_05_2021_BGH_KVR_54-20_Booking.com.pdf?__blob=publicationFile&v=3.

The interesting legal quirk here is that the burden of proof under Article 101(3) is on the parties to show that the pro-competitive gains of the agreements outweigh the anticompetitive effects, whereas the burden of establishing a restriction of competition in an ancillary restraints analysis rests with the regulator. It remains to be seen how other courts and regulators will approach narrow MFNs in the future, and which framework of analysis they seem most persuaded by.

Are there any other considerations for dominant companies?

Although MFNs have largely been considered under Article 101, the use of wide MFNs in standard contracts with suppliers by dominant companies could also be found to constitute abuse under Article 102 TFEU because of concerns about associated exclusionary effects.

In particular, the Commission analysed MFNs under Article 102 in the Amazon e-books MFN investigation.[56] The Commission took the preliminary view that Amazon may have abused its dominant position through a number of MFN clauses requiring e-book publishers and suppliers to inform Amazon about more favourable or alternative terms given to competing platforms (relating to price, promotions and e-book features) and to offer Amazon similar (or better) terms. The Commission considered that such clauses could strengthen Amazon's position by reducing the ability and incentive of e-book suppliers and competing platforms to develop new business models.

The relevance of Article 102 was also raised in the online hotel bookings cases. In particular, the French NCA noted that the imposition of wide MFNs by one or multiple platforms could be deemed to constitute individual or collective abuse of a dominant position.[57]

More recently, pursuant to a complaint from a hotels association, the Spanish NCA has launched an investigation into whether Booking.com has abused its dominant position by imposing narrow MFNs.[58] In any event, the EU's DMA[59] now envisages that gatekeepers designated under the Act would not be able to impose wide or narrow MFNs, as well as measures that have equivalent effect.[60]

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56 AT.40153 *E-book MFNs and related matters (Amazon)*, Decision dated 4 May 2017.

57 French Competition Authority, Decision 15-D-06 dated 21 April 2015, Paragraphs 142–146.

58 See the Madrid Hotel Business Association's press release dated 22 June 2020, available at: https://aehm.es/aehm-denuncia-a-booking-ante-la-cnmc-por-practicas-detrimento-hoteles-asociados/.

59 https://competition-policy.ec.europa.eu/sectors/ict/dma_en.

60 Article 5 (Obligations for Gatekeepers).

What type of economic analysis has been conducted by NCAs on the impact of the switch from wide to narrow MFNs?

In the online hotel bookings sector, a European Competition Network (ECN) working group conducted a year-long monitoring exercise with a view to assessing and comparing the impact of the switch from wide to narrow MFNs across Europe on the one hand, and the prohibition of MFNs in Germany and France on the other. The working group carried out a difference-in-differences analysis of room price data obtained from metasearch websites and found that 'the switch from wide to narrow parity clauses by Booking.com and Expedia led to an increase in room price differentiation between OTAs by hotels in eight of the 10 participating Member States.'[61] The ECN indicated that it would continue to monitor the online hotel sector and 're-assess the competitive situation in due course'.[62]

Subsequently, in July 2020, the European Commission announced a call for tenders for a second market study into the marketing and sale of hotel accommodation in Austria, Belgium, Cyprus, Poland, Spain and Sweden. The market study was intended to provide up-to-date information on how hotels market and sell their rooms, including whether (1) distribution arrangements differ between Member States, (2) there have been changes relative to the findings of the monitoring exercise carried out by the ECN in 2016 and (3) national laws banning MFNs have led to changes in distribution arrangements. The results of that market study, published in August 2022, did not indicate any significant change in the competitive situation in the hotel accommodation distribution sector in the EU compared to 2016.

The UK NCA also reviewed the impact of the switch from a wide to a narrow MFN by PCWs in agreements with PMI providers as part of its DCT market study in 2017. The econometric analysis carried out showed that 'commissions have been lower than they would have been since the removal of the wide MFNs . . . this suggest[s] that the impact of narrow MFNs has not (or not fully) replicated that of wide MFNs.'[63]

61 European Competition Network (ECN), Report on the monitoring exercise carried out in the online hotel booking sector dated 6 April 2017, Paragraph 11.

62 ECN, Outcome of the ECN DGs on 17 February 2017.

63 UK CMA DCT study, Paper E, Paragraph 3.48.

As noted above, in May 2020, the European Commission published support studies it had commissioned as part of its ongoing review of the VABER.[64] These studies found that while the VABER and the Vertical Guidelines remain relevant, they do not adequately address the new issues raised by the development of the digital economy and online sales.

In their assessment of MFNs (analysed in detail along with other types of vertical restraints), the studies' authors undertook an analysis of the hotel sector. The studies, which also relied on a qualitative assessment of stakeholder interviews, ultimately concluded that it was not possible to draw general conclusions regarding the effect of narrow as compared to wide MFNs, with the effects varying depending on the characteristics of the market. Nonetheless, the studies' authors posited that the empirical analysis carried out on the hotel sector suggested that a ban on narrow MFN clauses may decrease prices in that sector, although they acknowledged that such clauses do have important welfare effects for consumers (as discussed in the above section on Article 101(3) efficiencies) and give rise to fewer competition concerns than wide MFNs.

Practical considerations when drafting narrow MFN clauses

The UK NCA provided guidance on the scope of narrow MFN clauses as part of its DCT market study. In the NCA's view, narrow MFNs should not go beyond the scope of what is strictly necessary to achieve related efficiencies. In particular, the UK NCA noted that narrow MFNs should not apply to existing customers (customers with whom the supplier already has a contract or who participate in a supplier's loyalty programme) on the basis that free-riding efficiencies are less likely to apply to those customers.[65]

Are any new developments expected over the coming months?

MFN clauses will undoubtedly remain a hot topic in Europe:

- NCAs are continuing to take enforcement action against wide MFN clauses. In August 2021 Russia's antitrust authority fined Booking.com for abusing its market power by imposing wide parity clauses. In November 2020, the UK NCA found that the insurance PCW CompareTheMarket's use of wide MFNs violated both Section 2(1) of the UK Competition Act 1998 and Article 101 TFEU, and imposed a fine of £17.9 million.[66] CompareTheMarket success-

64 DG Comp, Support Studies for the evaluation of the VABER – Final Report.

65 ibid., dated 26 September 2017, Paragraph 3.88.

66 See footnote 7.

fully appealed the decision after the CAT held that, among other things, the market definition incorrectly included narrow MFNs and that the UK NCA had failed to establish that wide MFNs had the anticompetitive effects articulated in its decision.[67] This muddies the waters considerably in the UK, where wide MFNs have been categorised as hardcore restrictions under the VABEO and, therefore, are subject to individual assessment under Section 9(1) of the Competition Act 1998 with, according to the VABEO Guidance (further to the CMA's findings in its *CompareTheMarket* decision and the earlier PMI investigation), a presumption that they are anticompetitive. The CAT's decision confirms that wide MFNs are not a by-object infringement, and shows that it is challenging for NCAs to establish the anticompetitive effects of (even wide) MFNs, meaning that businesses operating in the UK have to undertake their own complex effects analysis to get comfortable on this front.

- Legislation has been introduced in Switzerland in addition to the already existing legislation in France,[68] Austria,[69] Italy[70] and Belgium[71] prohibiting MFN clauses (including narrow MFNs) in contracts between accommodations and hotel booking OTAs.
- As discussed above, support studies published in conjunction with the ongoing VABER review, which assessed the impact of MFNs, concluded that their effects in general are ambiguous and that inconsistencies in the approach taken by NCAs, Member States and courts at various points in time have led to different enforcement and legislative outcomes. The studies' authors conclude that it would therefore be preferable if 'clear guidance could be provided on the circumstances in which the use of MFNs should not raise competition concerns, such as safe harbours, as well as the circumstances where the presumption would be of illegality'.[72]

67 See footnote 14.

68 Law No. 2015-990 for Growth, Activity and Equal Economic Chances, adopted on 10 July 2015.

69 Draft Federal Act amending the Federal Act Against Unfair Competition 1984 and the Federal Act on Price Marking, adopted on 17 November 2016.

70 Annual Bill for Market and Competition, adopted on 2 August 2017.

71 Act on pricing freedom for tourist accommodation operators in contracts concluded with online reservation platform operators, adopted on 19 July 2018.

72 DG Comp, Support Studies for the evaluation of the VABER – Final Report, Paragraph 3.4.3.1.

- The EU's platform-to-business regulation, which came into force on 12 July 2020, requires online platform intermediaries to include an explanation of the 'main economic, commercial or legal considerations' for using MFNs (if any) in their terms and conditions for business users (such as suppliers), and make this explanation publicly available.[73]
- In the EU, the position on wide (cross-platform) MFN clauses at least appears more or less settled. In its VABER Guidelines, the European Commission has also provided detailed guidance on its approach to assessing efficiencies of narrow MFNs. In parallel, the DMA has gone a step further and prohibited the imposition of narrow MFNs by gatekeepers. We continue to watch this space, as non-gatekeepers may still be able to self-assess and use narrow – and even wide – parity clauses to the extent they are efficiency-generating and indispensable for their purpose.

73 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ 2019 L 186/57) (11 July 2019), Article 10.

CHAPTER 5

Self-Preferencing in Digital Markets

Matt Hunt, Safter Burak Darbaz and Robert Scherf[1]

Introduction

Since the European Commission (EC)'s milestone *Google Shopping* decision,[2] self-preferencing theories of harm have taken a key role in European competition enforcement in digital markets. The recent judgment by the General Court (GC) upholding the EC's decision confirmed that self-preferencing by a dominant firm can be a stand-alone abuse in certain circumstances.

Which types of conduct exactly constitute self-preferencing is still a hotly debated topic. Enforcement activity in Europe so far has cast a relatively wide net, with various national competition authorities and the EC focusing their investigative efforts on cases where dominant vertically integrated platforms have given more favourable treatment to their own products or services to the detriment of non-affiliated rivals.[3]

Recent regulatory efforts at national and EU levels have also targeted various forms of self-preferencing by dominant digital platforms. For example, Germany revamped its competition rules at the beginning of 2021, banning 'Undertakings of Paramount Significance' in multi-sided markets from presenting their own offers more favourably than those of rivals, and from pre-installing their own

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2 Commission Decision of 27.6.2017 – Case AT.39740 (EC *Google Shopping* Decision).

3 Not all such conduct was labelled as self-preferencing, however. For example, in a recent decision concerning a dispute between Google and Enel where the conduct under investigation was Google's refusal to allow Enel's electric car recharging app (Juicepass) on the Google Android Auto platform, the Italian Competition Authority framed its decision as an outright refusal to supply abuse, even though it noted that Google's conduct had the consequence of favouring its own Google Maps app. See the ICA press release, case A529 (https://en.agcm.it/en/media/press-releases/2021/5/a529).

offers on devices when providing access to supply and sales markets.[4] Similarly, the UK is moving towards a regulatory regime where a Digital Markets Unit (DMU), which is part of the Competition Markets Authority (CMA), can designate certain undertakings as having 'Strategic Market Status'. The DMU can then specify bespoke codes of conduct for each of these undertakings, which could include requirements to not engage in undue self-preferencing of its own services and, if necessary, impose 'pro-competitive interventions' such as imposing functional separation remedies to remove self-preferencing incentives.[5] At the EU level, the Digital Markets Act (DMA) that entered into force in November 2022 prohibits digital platforms designated as a 'gatekeeper' from ranking their own products and services more favourably than those of third parties.[6]

This chapter gives an overview of the key issues relating to self-preferencing theories of harm in digital markets. We begin by providing a brief summary of the key points in the EC's *Google Shopping* decision and the GC's subsequent upholding of it.[7] We then present a brief overview of recent competition enforcement cases that have considered self-preferencing. In particular, we summarise the main findings from three recent self-preferencing investigations that were concluded at the national level but are ongoing at the EU level with respect to the conducts considered. Next, we explain the broad economic theory of harm associated with self-preferencing. Finally, we discuss the regulatory approach adopted by the DMA with respect to self-preferencing.

Self-preferencing as an abuse of dominant position

Following a seven-year investigation, the EC fined Google €2.4 billion for infringing Article 102 TFEU. The investigation was opened in 2010 and reinvigorated in 2016 with a refreshed focus on Google's comparison-shopping service (CSS) after a failed market test of commitments proposed by Google.[8] While Article 102 TFEU prohibits dominant firms from 'applying dissimilar

4 10th Amendment to the German Act against Restraint on Competition, Section 19(a), Para. 2.1.

5 'A new pro-competition regime for digital markets' (July 2021), Presented to the UK Parliament by the Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, Para. 106.

6 Article 6(5) of the agreed text of the DMA, dated 11 May 2022.

7 Google appealed the GC's judgment at the European Court of Justice on January 2022.

8 CSSs are platforms that allow users to search for products to compare their prices and characteristics across different online retailers, and possibly provide links to such retailers. Google's CSS was named 'Froogle', 'Google Product Search' and 'Google Shopping' at various points in time. See the EC *Google Shopping* decision, Paras. 28, 31, 192.

conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage', it was the EC's 2017 *Google Shopping* decision that put self-preferencing on the radar of European competition enforcement as a standalone abuse of dominance.[9]

Having established Google's dominance in the relevant national markets for general search services and having identified distinct national product markets for CSSs,[10] the EC found that Google abused its dominance in general search services in each of the 13 national EEA markets under consideration, by positioning and displaying its own CSS on its general search engine results page (SERP) more favourably compared to rival CSSs.

First, the EC found that web pages of rival CSSs could only appear as text-based results in Google's SERP, and their SERP ranking was prone to demotion by Google's algorithms.

Second, the EC found that Google's own CSS was prominently positioned at the top of the SERP, displayed in richer format and was not subject to demotion by its own algorithm.[11]

The EC concluded that Google's conduct was capable of extending its dominant position in the national markets for general search services into the national markets for CSSs,[12] and capable of having anticompetitive effects in both sets of markets. In addition to the fine, the EC ordered Google to comply with the principle of equal treatment by implementing a measure of its own choosing that would subject its CSS to the same process of determining the positioning and display on the Google SERP as rival CSSs.[13]

The EC's decision was almost entirely upheld by the GC in its judgment dismissing Google's appeal in November 2021.[14] In doing so, the GC made two points confirming that self-preferencing by a dominant firm could be considered, in certain circumstances, as a stand-alone abuse of dominance.

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9 Note that the EC does not use the term 'self-preferencing' explicitly but refers to 'more favourable positioning and display by Google, in its general search results page, of its own comparison service compared to competing comparison shopping services'. See the EC *Google Shopping* decision, Para. 2.

10 Importantly, EC rejected Google's claim that CSSs and online merchant platforms (such as Amazon Marketplace and eBay) were in the same market. See the EC *Google Shopping* decision, Para. 246.

11 EC *Google Shopping* Decision, Paras. 344, 390, 395.

12 EC *Google Shopping* Decision, Para. 342.

13 EC *Google Shopping* Decision, Para. 700.

14 The only part of the EC's decision annulled by the GC was the finding of possible anticompetitive effects of Google's conduct on the national general search services

The GC clarified that self-preferencing is one of the many ways in which leveraging can manifest,[15] and found that abusive self-preferencing as implemented by Google is distinct from an express refusal to supply.[16]

The GC confirmed that leveraging is not necessarily abusive and certain conditions must be met for it to be considered as an abuse of dominance.[17]

The GC has also found that Google's conduct did not amount to an express refusal to supply and ruled that the EC was therefore not required to establish that the criteria of the essential facilities doctrine (as laid out by the Court of Justice in the *Bronner* judgment, which include the requirement of indispensability) were met to show that an abuse has taken place.[18,19]

The GC's judgment highlights two conditions for self-preferencing to constitute an abuse of dominance:

- the conduct must have actual or potential anticompetitive effects;[20] and
- the conduct must depart from what would be expected under normal competition.[21]

The GC ruled that the EC's investigation ticked both of these boxes (with the first condition relating to the national markets for CSSs). In doing so, the GC also clarified that a causal link relating to the first condition can be established by showing that there is a correlation between the conduct and market outcomes and there is additional corroborating information (such as assessments of market

markets. The GC argued that the evidence relied upon by the EC was too imprecise to show that there were even potential anticompetitive effects in general search services markets attributable to the conduct in question. See Judgment of the General Court of 10 November 2021 – T-612/17 (GC *Google Shopping* judgment), Para. 457.

15 The GC states that leveraging is a generic term describing practices taking place in one market and having an impact on another market (see GC *Google Shopping* judgment, Para. 163). Also note that the GC does not use the term 'self-preferencing', but rather the term 'internal discrimination' (see GC *Google Shopping* judgment, Para. 237).

16 GC *Google Shopping* judgment, Para. 232.

17 GC *Google Shopping* judgment, Paras. 163–164.

18 See Deutscher, E (2021) – Google Shopping and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU, European Papers, 6(3), pp. 1345–1361.

19 Notwithstanding this, the GC also notes that Google's general search 'has characteristics akin to those of an essential facility'. See GC *Google Shopping* judgment, Para. 224.

20 GC *Google Shopping* judgment, Para. 438.

21 GC *Google Shopping* judgment, Paras. 195, 437.

participants).[22,23] Further, in relation to the second condition ('abnormality'), the GC noted that a 'product improvement' defence should be considered only at the stage where objective justification and potential efficiencies are examined, when the conduct is capable of having anticompetitive effects.[24]

Competition enforcement involving tech giants is increasingly focusing on self-preferencing

Since the EC's *Google Shopping* decision, there has been an increasing number of investigations in Europe that rest on abusive leveraging theories of harm, as well as enforcement of self-preferencing (or closely related derivatives). The EC initiated an investigation in November 2020 into Amazon's practices of self-preferencing its logistics services, which is currently at the stage of market-testing the commitments proposed by Amazon.[25] Further, in June 2021 the EC also started investigating whether Google abused its dominant position by favouring its own ad tech services.[26] These types of conduct, or closely related ones, were also the subject of three recent decisions by different European national competition authorities, which we summarise below.

In the first of these decisions, the French Competition Authority (FCA) concluded a two-year investigation into Google's practices relating to its ad tech business in June 2021, following a complaint filed by several media groups. The investigation related to the allocation of display ads. Typically, when a user visits a website or an app, slots for display ads on the website (the 'publisher') are allocated to advertisers via a series of almost-instantaneous auctions that are run by ad tech intermediaries.[27] The investigation focused on two of the several interrelated markets that make up the supply-side (i.e., publisher side) of this intermediation

22 GC *Google Shopping* judgment, Para. 382.

23 See also https://theplatformlaw.blog/2021/11/15/general-court-of-the-eu-delivers-landmark-google-shopping-judgment-google-and-alphabet-v-commission-t-612-17/.

24 GC *Google Shopping* judgment, Para. 188.

25 Case AT.40703 – *Amazon - BuyBox*.

26 Case AT.40670 – *Google Adtech and Data-related practices*.

27 This is the case unless the website has an agreement to sell its ad inventory to advertisers directly. If not, the intermediation works as follows: first, the publisher notifies its ad server about the available ad slots. The publisher's ad server then requests offers from multiple ad space sales platforms and evaluates them to determine the winner and notifies the winning advertiser's ad server, which serves the ad to the publisher website. Each ad space sales platform in turn requests, receives, and evaluates offers from multiple demand-side ad space purchase platforms (also called a demand-side platform, or 'DSP'). These DSPs make offers by evaluating their participant advertisers' bids contingent on their pre-sets and the available information on the visitor. Platforms at each side of the chain

chain:[28] first, the market for publisher ad servers where the FCA found that Google held a dominant position with its DoubleClick for Publishers (DFP) service; and second, the market for ad space sales platforms (also called a supply-side platform (SSP)) where the FCA found that Google's Ad Exchange (ADX) service held at least a pre-eminent position (without establishing dominance).[29] The FCA then established two distinct but closely related abusive practices by Google.

First, the FCA found that Google's publisher ad server DFP self-preferenced by consistently giving more favourable conditions to its SSP ADX than those given to rival SSPs, which allowed ADX to consistently outbid its rivals.[30,31] The FCA saw this as an act of abusive leveraging, extending Google's market power from the dominated market for publisher ad servers into the market for SSPs.

Second, the FCA found that Google's ADX self-preferenced its DFP service by withholding full interoperability with rival SSPs, which led to publishers preferring Google's DFP over other publisher ad servers. The FCA viewed this conduct as strengthening Google's dominance in the market for publisher ad servers.

Based on the above, the FCA concluded that Google infringed Article 102 TFEU by abusing its dominant position in the market for publisher ad servers, imposed a fine of €220 million on Google, and accepted binding commitments from it.

In November 2021, shortly after the GC's upholding of the EC's *Google Shopping* decision, the Italian Competition Authority (ICA) concluded its investigation into Amazon's practices of self-preferencing its e-commerce logistics

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(i.e., SSPs and DSPs) compete against each other on the offers they send (by subtracting a commission from the winning bid).

28 The EC's analogous investigation into Google's ad tech and data-related practices (AT.40670) brings the demand-side (i.e., advertiser side) of the intermediation chain in the picture and seems to be emphasising YouTube ads. In its press release, the EC stated that it would be focusing on, inter alia, the obligation to use Google's DSPs DV360 or Google Ads when purchasing ads in YouTube, the obligation to use Google's publisher ad server Google Ad Manager (which was called Google DFP prior to 2018) when serving display ads in YouTube, and the apparent favouring of Google's AdX by its own DSPs and vice versa.

29 See Autorite de la Concurrence Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector (FCA Google AdTech Decision), Para. 346.

30 ibid., Paras. 374–381.

31 The way in which DFP did this differed over the review period. For example, the FCA established that DFP only allowed ADX to submit real-time bids, whereas rival SSPs could only participate with estimated bids. FCA also established that Google configured its publisher ad server DFP to create an informational asymmetry favouring AdX, allowing AdX to consistently outbid rival SSPs by having a 'last look' advantage until late 2019. See FCA *Google AdTech* decision, Paras. 105, 180, 194.

services that it offers to merchants selling on its Amazon Marketplace platform. The ICA first established the 'super-dominance' of Amazon in the narrowly defined Italian national market for intermediation services on online marketplaces (i.e., a market including e-commerce platforms such as eBay.it where third-party merchants can sell their products).[32] The ICA then established an abusive conduct that rests on two legs.

First, the ICA found that Amazon tied the allocation of the Prime badge to third-party merchants to the use of Amazon's own logistics service Fulfilment by Amazon (FBA) for a large part of the review period.[33] Obtaining the Prime badge is important to merchants because it makes it easier to access a large number of high-spending Prime consumers and it allows the merchant to participate in special events promoted by Amazon (such as Black Friday sales).[34]

Second, the ICA also established that the algorithm Amazon uses for selecting featured offers that appear in the 'BuyBox' (a box positioned at a highly visible place on Amazon's product search results page) discriminates against merchants who are not using FBA as their logistics provider for products that they sell on Amazon's marketplace.[35]

The ICA found that Amazon's conduct had a dual effect by extending Amazon's dominance in the market for intermediation services on online marketplaces to the market for e-commerce logistics, and also strengthening Amazon's dominant position by discouraging merchants from selling their goods in other online marketplaces.[36] Based on this, the ICA concluded that Amazon

32 See L'Autorita Garante della Concorrenza e Del Mercato Decision No. 29925 – Amazon FBA, 30 November 2021 (ICA *Amazon* FBA decision), Para. 680. This market definition excludes online retailers that directly sell to consumers through their inventories.

33 This condition was changed in 2021 to allow merchants using logistics service providers approved by Amazon as part of the Seller-fulfilled Prime programme (SFP). The ICA, however, found that the SFP programme was not able to end the contested conduct, mainly because the participation of independent logistics service providers to the programme did not depend on predefined, objective and monitorable quality standards, and Amazon interfered excessively in the contractual agreements between merchants and SFP-qualified logistics service providers. See ICA *Amazon* FBA decision, Paras. 786–789.

34 ICA *Amazon* FBA decision, Paras. 762, 811.

35 IICA *Amazon* FBA decision, Paras. 774–778.

36 ICA found that selling in other online marketplaces would require merchants who purchase Amazon's FBA service to either replicate their logistics cost, or purchase Amazon FBA's expensive multi-channel management services. See ICA *Amazon* FBA decision, Para. 702.

infringed Article 102 TFEU by abusing its dominant position, and imposed a fine of €1.1 billion on Amazon as well as behavioural remedies intended to restore competitive conditions in the relevant markets.[37]

The CMA recently concluded an investigation into Google's 'Privacy Sandbox' proposals. The CMA had previously expressed concerns about these proposals in its online platforms and digital advertising market study.[38,39] Six months after publishing the study, and following the complaints from various stakeholders who alleged that Google's proposals amounted to an abuse of dominance, the CMA's investigation was opened on 10 January 2021. Unusually, the investigation concluded before Google's proposals were implemented. Google's proposals concerned replacing its cross-site tracking of users on Chrome (Google's web browser) via third-party cookies and other methods with alternative tools that would provide similar functionalities.[40] Two of the CMA's main concerns in regard to Google's proposals related to self-preferencing.[41]

The CMA highlighted the risk that these proposals would limit the information collection and targeting abilities of rival publishers and ad tech providers. Meanwhile Google's own abilities would be unaffected as it would maintain advantageous access to first-party data.[42]

The CMA pointed out that some of the functionalities currently performed by ad tech providers would move to Google Chrome under the proposals. The CMA argued that this would give Google the opportunity to leverage its 'likely

37 The ICA obliged Amazon to establish a system where merchants receive sales and visibility benefits according to uniform and non-discriminatory criteria in line with the level of service provided to Prime customers (i.e., not explicitly conditioning on the choice of logistics service providers), mainly by modifying the structure of its SFP programme. The ICA also ordered Amazon to refrain from any form of intermediation of the relationship between merchants and independent logistics service providers. See ICA *Amazon* FBA decision, Paras. 890–902.

38 CMA Online Platforms and Digital Advertising Market Study (1 July 2020), Paras. 5.322-5.326.

39 The EC's investigation into Google's ad tech and data-related practices (AT.40670) is also looking into Google's Privacy Sandbox proposals.

40 CMA Decision to Accept Commitments Offered by Google in Relation to its Privacy Sandbox Proposal, Case Number 50972, 11 February 2022 (CMA *Google Privacy Sandbox* decision), fn. 6.

41 The third concern the CMA expressed is the possible imposition of unfair terms to Google Chrome users, if they are deprived of the choice to adjust the level of privacy and ad targeting in line with their preferences. See CMA *Google Privacy Sandbox* decision, Para. 3.83.

42 CMA *Google Privacy Sandbox* decision, Para. 3.39.

dominant' position in the market for web browsers into relevant markets relating to open market advertising,[43] by self-preferencing its own ad tech services or the ad inventories that it manages.

The CMA found that the Privacy Sandbox proposals, if adopted, would likely amount to an abuse of dominant position without sufficient regulatory oversight. Furthermore, the CMA found that the announcement of the proposals itself as well as the preliminary steps that Google has taken to implement them likely constituted an abuse in the specific circumstances of the case.[44] The CMA decided to close the investigation after agreeing to the final set of commitments offered by Google.[45]

Recent investigations focusing on self-preferencing are not limited to Amazon and Google. Apple was fined by the Dutch Competition Authority in 2021 for prohibiting dating app developers from using third-party payment systems in their iOS apps, and is facing an EC investigation for the same conduct *vis-à-vis* music streaming app developers.[46] German and Polish competition authorities recently started to look into whether Apple's App Tracking Transparency (ATT) Framework, which obliges third-party apps to ask for their users' content, constitutes abusive self-preferencing on the basis that it does not seem to affect Apple's ability to use and combine user data from its own ecosystem.[47] Apple also faces an EC investigation for preventing mobile wallet app developers from accessing software and hardware components necessary for implementing contactless payments, to the benefit of its own mobile wallet Apple Pay.[48] Similarly, Meta faces an investigation by the EC relating to its use of the data it collects from online classified ads providers who offer their services via Facebook, as well as

43 Open market advertising refers to the process of buying and selling ad space in the open market via ad tech intermediaries. The relevant markets in this case are the same markets considered in the FCA investigation.

44 CMA *Google Privacy Sandbox* decision, Para. 3.39.

45 The accepted commitments include behavioural restrictions to ensure that Google does not engage in self-preferencing and does not gain an advantage over rivals when third-party cookies are removed, as well a commitment to involve the CMA and the Information Commissioner's Office in the shaping of the proposals. See CMA *Google Privacy Sandbox* decision, Para. 5.64.

46 Case AT.40437 – Apple – App Store Practices (music streaming).

47 Polish competition authority UOKiK initiated its investigation on 13 December 2021. Germany's Bundeskartellamt's investigation was launched more recently on 14 June 2022. In addition, the French authority, in response to complaints by advertisers and a French startup lobby, considered but declined to block Apple's launch of ATT but stated that it would continue investigating it.

48 Case AT.40452 – Apple – Mobile payments.

its integration of Facebook Marketplace into its social network platform, which could constitute a form of tying.[49] While the EC did not explicitly label Meta's conduct as self-preferencing, its concerns relate to the same underlying consideration of a platform using its dominance in the market where its core platform services operate (the social network) to potentially foreclose third-party suppliers in an adjacent market within its ecosystem (online classified ad services). The precise conduct via which leveraging takes place, or the label chosen to describe it, is becoming of secondary importance.[50] Overall, competition authorities are increasingly eager to challenge the core strategies of the 'big tech' companies, including those that may have helped them build their ecosystems in the first place, with overarching concerns about potentially abusive leveraging and distorting competition in adjacent markets, as well as strengthening of existing dominant positions.

Theories of harm in self-preferencing cases

The theories of harm in cases concerning self-preferencing or leveraging have two central elements: foreclosure and consumer or user harm. The foreclosure part of the story typically follows a similar pattern. First, a vertically-integrated platform operator implements a discriminatory mechanism that can generate input or customer foreclosure effects, depending on whether the platform is upstream or downstream *vis-à-vis* its ancillary service within the supply chain.[51] This may then lead to the partial or full exclusion of current (and potentially future) rivals in the market where the ancillary service is provided. Exclusion may occur via a combination of reduced access, increased costs or diminished incentive to innovate, depending on the severity of the discrimination strategy and whether rivals can substitute to inputs or customers from other sources (which in turn depends on the extent of the platform's dominance). As a consequence, competition is distorted at the upstream or downstream market to the benefit of the platform

49 Case AT.40684 – Facebook leveraging.

50 This is perhaps best highlighted by the example of several cloud providers who have relied on the label self-preferencing in their recent complaints against Microsoft's practice of bundling its cloud service OneDrive with its operating system Windows.

51 Input and customer foreclosure are competition concerns that are often considered as potential concerns in relation to vertical mergers. Input foreclosure refers to the situation where the upstream entity of the vertically integrated firm restricts access to products or services that it would supply to downstream rivals absent the merger, causing restriction of competition in the downstream market. Customer foreclosure refers to the situation where the downstream entity of the vertically integrated firm restricts the purchase of inputs from rival upstream firms, thereby weakening them and distorting upstream competition.

operator's vertical affiliate (leveraging). Distortion of competition in the upstream or downstream market can lead to indirect foreclosure effects in the platform market, further strengthening the platform operator's dominance. In all the recent cases that are summarised above, the foreclosure parts of the theories of harm fit into this framework.

Google Search is an upstream supplier of 'traffic', which is a key input for CSSs including Google Shopping. Google's practice of demoting the organic ranking of rival CSSs in the Google SERP and only allowing Google Shopping to benefit from a position at the top of the SERP and within a box displaying product links in richer format could be interpreted as a case of input foreclosure. The EC's assessment indicates that Google's conduct foreclosed rivals both directly – by reducing their supply of free clicks from the SERP and increasing the supply of free clicks to Google Shopping – and indirectly by increasing their costs since non-affiliated CSSs had to rely more on paid clicks by purchasing search ads.

Amazon Marketplace is a platform enabling third-party merchants to make sales to consumers. Third-party merchants purchase services from logistics providers, which include Amazon's FBA service. The ICA found that Amazon treated third-party merchants who used its FBA service more favourably by providing them with enhanced access to consumers (compared to merchants who used alternative logistics providers' services) and that this created a strong incentive for third-party merchants to choose FBA over the services of alternative logistics providers. The ICA also found that Amazon's conduct had exclusionary effects in the market for e-commerce logistics by hindering integrated logistics operators' ability to innovate,[52] and by preventing the ability of non-integrated delivery operators' capability to improve their product offerings by reaching a sufficient scale of deliveries.[53] This could be interpreted as a form of customer foreclosure, since the practices in question were found to restrict rival upstream logistics providers' demand.

Further, the ICA also assessed that foreclosure in the e-commerce logistics market was capable of distorting competition in the market for intermediation services on online marketplaces by discouraging third-party merchants on the

52 Integrated logistics operators are those providing services at both upstream (e.g., warehouse management) and downstream (e.g. delivery, collection for returns) levels of the logistics supply chain.

53 ICA *Amazon FBA* decision, Para. 806.

Amazon Marketplace from selling on other e-commerce platforms, as that would either require replicating logistics costs, or purchasing Amazon FBA's expensive multi-channel management services.[54]

Google's publisher ad server DFP sells the ad inventory it manages to the highest-bidding advertisers. It determines the highest bids by procuring auction intermediation services from publisher-side SSPs, including its own ADX. More specifically, different SSPs submit offers (which reflect the underlying bids by advertisers and platform commissions) to Google's DFP, and DFP picks the highest offer. As explained above, the FCA identified that Google implemented various mechanisms that grant an informational advantage to its own SSP ADX *vis-à-vis* its rivals, allowing ADX to consistently outbid competing SSPs in auctions organised by Google's DFP. Given the dominant position of Google's DFP, the FCA found that this led to the foreclosure of ADX's competitors. This could be interpreted as a case of customer foreclosure since the mechanisms implemented by Google were found by the FCA to limit DFP's purchasing of intermediation services from non-affiliated SSPs.

In addition, the FCA also established that Google ADX granted full interoperability only to Google's DFP so that the latter was the only publisher ad server that had full access to ADX. This could be considered as an input foreclosure finding given the role of ADX as an upstream supplier to publisher ad servers.[55] The FCA found that this hindered the ability of rival publisher ad servers to compete against Google by forcing them to use Google's DFP as their primary ad server, since ADX's offers are generated from a larger pool of advertiser bids compared to competing SSPs.[56]

A self-preferencing (and leveraging) theory of harm would be incomplete from an economics standpoint without a description of how the actual harm to consumers materialises. In the recent decisions that are summarised above, competition authorities have offered varying degrees of detail when analysing the mechanisms through which consumer harm arises.

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54 ibid., Para. 702. The ICA also highlighted that orders from other platforms fulfilled by Amazon FBA's multi-channel service are packaged with Amazon branding, which could have the effect of creating consumer confusion and steering consumers ordering from other platforms back to Amazon, reducing the profitability of a multi-homing strategy of listing its products in more than one marketplace. See ICA *Amazon* FBA decision, Para. 836.

55 ibid., Paras. 218–225.

56 According to the FCA, this is because Google submits most of the bids from its own DSP (Google Ads) exclusively to its own SSP Google AdX, and because most advertisers engage in single-homing behaviour and only use Google Ads when participating in auctions. See FCA *Google AdTech* decision, Paras. 227–228.

In its *Google Shopping* decision, the EC found that Google's conduct could lead to higher fees for merchants by eliminating competition and increasing *Google Shopping*'s market power, as well as to higher consumer prices if merchants reflected the higher fees in their own prices.[57] The EC also stated that the conduct was likely to reduce CSSs' incentives to innovate, indirectly harming consumers through reduced quality or relevance.[58] In addition, the EC found that the conduct would likely diminish consumers' ability to access the most relevant comparison shopping service, explaining that Google's CSS did not always show the most relevant results to users and that some consumers in some periods may not have been aware of this.[59]

In its *Amazon FBA* decision, the ICA highlighted that Article 102 TFEU also covers indirect consumer harm through distortion of the competitive process,[60] and emphasised how Amazon's conduct was capable of distorting competition in two separate markets: e-commerce logistics and intermediation services on online marketplaces. While the ICA noted that this would negatively affect consumers, it did not explicitly explain how.[61]

The ICA focused on how the conduct deprived third-party merchants of the freedom to choose the logistics operator best suited for their business needs,[62] and pointed to evidence that seems to indicate that this may have hindered their ability and incentives to minimise their logistics costs.[63,64] In addition, the ICA highlighted that Amazon FBA increased its share of deliveries in the Amazon Marketplace despite significantly increasing its storage and delivery fees in 2018 and 2019.[65] In conjunction with the ICA's finding that Amazon's conduct hindered

57 EC *Google Shopping* decision, Paras. 593–594.

58 ibid., Paras. 595–596.

59 ibid., Paras. 597–599.

60 ICA *Amazon FBA* decision, Para. 707.

61 ibid, Para. 724.

62 ibid., Para. 802.

63 For example, the ICA highlights complaints from third-party merchants regarding high storage costs (in particular for lower turnover goods – ibid., Para. 325) and points out to claims by some third-party logistics operators that they could offer lower storage fees (ibid., Para. 351). The ICA highlights complaints about high and unpredictable inbound shipping costs (ibid., 328), and also points out to how lack of packaging customisation in Amazon FBA leads to duplication of warehouse costs for some merchants (ibid. Para. 327).

64 The ICA points out to a survey showing 77 per cent of current FBA retailers saying that they would keep using Amazon FBA even if there were alternative and cheaper logistics service providers (ibid., Para. 319).

65 Ibid., Paras. 810–811.

innovation by logistics operators, it may be inferred that one of the ICA's concerns regarding consumer harm could have been that higher logistics costs were passed on to consumers shopping on Amazon.[66]

The ICA also focused on the impact on rival e-commerce platforms and presented evidence that Amazon Marketplace was able to increase its market share substantially between 2016 and 2019. While the ICA did not elaborate on how this might have led to consumer harm, it argued that the market share trends reflected third-party merchants' increasing propensity to single-home on Amazon Marketplace, because of their reliance on Amazon FBA.[67] With this in mind, another of the ICA's concerns may be increasing prices of goods sold by third-party merchants due to diminished inter-platform competition. That is, more merchants selling only on Amazon may reduce the competitive pressure to lower merchant fees, which in turn could exert upward pressure on merchants' downstream prices.

In its *Google AdTech* decision, the FCA focused on the harm to Google's ad tech rivals and publishers. First, the FCA found that Google's DFP was able to increase its market share while the market shares of rival publisher ad servers declined and some exited the market.[68] Similarly, the FCA found that Google's ADX was able to sustain higher prices than its competitors without slowing its growth relative to rivals.[69] Second, the FCA found that publishers, particularly press groups, were deprived of higher competitive prices from SSPs and thus lost revenues that they could have earned by selling their ad inventories.[70] While the FCA did not discuss potential consumer harm that could result from this, the CMA notes that publishers' incentives and ability to invest in content would likely decrease if they received a lower share of advertising revenues than they should, which would harm consumers who value this content.[71]

66 However, the ICA also notes that Amazon can use its bargaining power vis-à-vis couriers to secure cheaper delivery prices when it is outsourcing FBA delivery (ibid., Para 351), which would be an offsetting effect.

67 Ibid, Paras. 844–846.

68 FCA *Google AdTech* decision, Paras. 326–328.

69 ibid., Paras. 391–395.

70 ibid., Para. 450.

71 Separately, the CMA highlights the potential harm to broader society as a result of potential deterioration in high-quality and plural news content. See CMA Online Platforms and Digital Advertising Market Study (1 July 2020), Para. 6.39.

A first necessary condition for conduct to harm consumers is that it forecloses a substantial part of the market.[72] This depends on the importance of the platform as a supplier (input foreclosure) or buyer (customer foreclosure), as well as on the lack of availability of sufficiently large alternative routes to market that would allow foreclosed rivals to mitigate the loss of access to inputs and/or customers. A second necessary condition is the absence of offsetting efficiencies from the conduct.

In the cases referred to above, the competition authorities tended to focus their evidence collection efforts on the existence and significance of foreclosure rather than actual consumer harm.[73] This may be because they found it harder to show harm to consumers in the context of digital platforms, which may be for a variety of reasons, including that many platforms offer their services to users for free (i.e., the absence of a price parameter to measure), or the indirect and/or dynamic nature of the harm.[74]

Regarding efficiencies, we mentioned above that the GC considered in its *Google Shopping* judgment that efficiency arguments, including those relating to product improvement, should be brought in at the objective justification and efficiencies stage. In the investigations summarised above, both Google and Amazon proposed various efficiency and objective justification arguments to defend their conduct. These were not accepted by the competition authorities, which considered that the arguments were not sufficiently substantiated or that the efficiencies were not demonstrably linked to the conduct under investigation.[75]

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72 Foreclosure does not necessarily mean strict exclusion. It could also mean imposing a restriction on the ability to compete effectively, eg, by raising rivals' costs – see Salop, S C and Scheffman, D T (1983) – Raising Rivals' Costs: Recent Advances in the Theory of Industrial Structure, *American Economic Review*.

73 For example, in *Google Shopping*, the EC conducted a detailed set of analyses on the evolution of traffic from Google SERP to CSSs, as well as whether the traffic lost by independent CSSs as a result of Google's conduct was not effectively replaceable from other sources (EC *Google Shopping* decision, Paras. 539–588).

74 Some researchers have suggested to use natural or controlled experiments to test whether self-preferencing increases consumer welfare. See, eg, Edelman and Lai (2016) who use a natural experiment to study whether Google's prominent placement of its Flight Services above organic search result increased clicks on sponsored search advertising compared to clicks on organic search results; see also Luca et al. (2015) who use randomised controlled trials to identify whether consumers prefer search results from Google's 'specialised search' over those generated by its organic algorithm.

75 For example, in Amazon FBA, the ICA argued that Amazon's comparison of delivery speed between orders fulfilled via FBA and by all other merchants not using FBA was irrelevant since it reflected a comparison of FBA performance against the average of all other logistics

However, it should not always be assumed that this would be the case. A relevant counterpoint is the dispute between Streetmap.EU and Google in the English High Court related to Google's exclusive positioning of its own mapping service Google Maps into a graphical display box (Maps OneBox) prominently placed on top of its SERP, which can be considered to be an example of self-preferencing case, although it was not argued in that way, and indeed the case pre-dated the EC's *Google Shopping* decision. In that case, Mr Justice Roth found that Google's conduct corresponded to a technical improvement to the benefit of consumers, and it was objectively justified because there was no alternative, less restrictive way of achieving similar improvements without adopting a less practical design or incurring disproportional costs.[76]

With this in mind, efficiency and objective justification arguments could still play a role in the future enforcement activity concerning self-preferencing. However, as we discuss below, the agreed final text of the DMA may mean that such considerations are no longer relevant in relation to digital markets.

Self-preferencing in the Digital Markets Act

The DMA shifts the focus of European authorities' enforcement activities towards ex ante regulation of dominant vertically integrated digital platforms.[77] The text of the DMA specifies a list of behavioural obligations that platforms designated as 'gatekeepers' must comply with.[78]

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operators. The ICA stated that there was no technical link between the conduct and the claimed efficiencies, and that Amazon allowing other logistics service operators into the newly introduced SFP programme showed the existence of alternative logistics operators that can comply with the standards set by Amazon. See ICA Amazon FBA Decision, paras. 717, 720, 722.

76 The judgment includes a detailed assessment of the various alternative ways proposed by Streetmap.EU's expert and agrees with Google regarding their inferiority, impracticality, or disproportionality in terms of costs. See England and Wales High Court Google Maps Judgment of 12 February 2016 (EWHC 253), Paras. 151–176.

77 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

78 Designation of gatekeeper status are reserved to providers of core platform services (defined in Article 2(2) of the DMA) who satisfy three criteria: having a 'significant impact on the internal market', constituting an 'important gateway for business users to reach end users', and enjoying (or will be enjoying in the near future) 'an entrenched and durable position'. These criteria are subject to presumptions of satisfaction of quantitative thresholds specified in Article 3(2) of the DMA.

The list of behavioural obligations provided in Articles (5)-(7) of the DMA includes per se prohibitions of various types of self-preferencing and leveraging conduct. Several examples are provided below:

- Article 6(5) prohibits gatekeepers from ranking their own products and services more favourably than those of third parties.
- Article 5(7) prohibits gatekeepers from requiring that business users use the payment service of the gatekeeper.
- Articles 5(9) and 5(10) imposes fee transparency requirements on gatekeepers operating in the ad tech supply chain vis-à-vis advertisers and publishers.[79]
- Article 6(2) prohibits gatekeepers from using non-public data that are provided or generated by business users (in the context of core platform services or ancillary services provided by the platform operator) in competition with those business users.

The context of these prohibitions is that they relate to behaviour that had been considered in various different investigations by the EC and national competition authorities. These include the three cases considered above, the Dutch Competition Authority's investigations into Apple's practice of obliging the usage of its own in-app payment services to third-party app developers, as well as investigations into Amazon's and Facebook's use of data generated by their business customers (merchants and advertisers respectively) in their respective platforms.

The DMA's per se prohibition of self-preferencing by gatekeepers is consistent with the recommendations of the EC's panel of economic experts,[80] but it goes beyond the recommendations of the 'Vestager Report', in which the authors acknowledged that self-preferencing may have pro-competitive rationales and recommended it being subject to an effects test with the burden of proof falling on the dominant platform.[81] It also stands in contrast to the effects-based approach endorsed in the *Google Shopping* judgment, where the GC ruled that self-preferencing by a dominant undertaking is not abusive per se, and in case its conduct was shown to be capable of restricting competition by an effects assessment, the undertaking may still show that its conduct generated mitigating

79 CMA Online Platforms and Digital Advertising Market Study (1 July 2020), Paras. 5.334–5.340.

80 Cabral, L. et al. (2021) – The EU Digital Markets Act: A Report from a Panel of Economic Experts, p. 13.

81 Cremer, J, de Montjoye, Y-A., Schweitzer, H. (2019) – Competition Policy for the Digital Era, pp. 66, 69.

efficiencies or convincingly that its conduct was objectively justified.[82] Except in relation to a limited set of behavioural obligations and within pre-defined limits,[83] the text of the DMA does not seem to contain a mechanism by which a gatekeeper can justify its behaviour on objective justification or efficiency grounds.

The recitals of the DMA highlight promoting innovation as a key regulatory goal and justify the behavioural obligations imposed in Articles (5) to (7) as necessary to increase contestability by reducing barriers to entry and expansion. With this reasoning, the DMA takes the view that weak contestability is embedded in the nature of the core platform services in the digital sector due to structural characteristics such as economies of scale, network externalities and learning-by-doing effects enabled by data and algorithms,[84] and that regulatory intervention is necessary to strengthen contestability.

The link between innovation and contestability (in a low-entry barriers sense) in the economics literature is not as straightforward as intuition would suggest. The DMA's position that 'weak contestability reduces the incentive to innovate and improve products and services for the gatekeeper, its business users, its challengers and customers' has in its roots a view first introduced by Arrow who suggested that a monopolist would have a reduced incentive to innovate compared to a competitive firm because the former would lack the latter's business-stealing motive.[85] Later, this perspective was complemented by the view that if the monopolist is threatened by entry, then it would have an incentive to innovate, sometimes even a stronger incentive than the prospective entrant because it has more to lose.[86] At the other side of this debate is the Schumpeterian view, which stresses the importance of a prospect to achieve higher market power for spurring innovation.[87] The critics of the DMA, accordingly, argue that ex ante regulation

82 GC *Google Shopping* judgment, Para. 577.

83 An example for exception is provided in Article 6(4), which obliges gatekeepers to allow third-party apps and app stores to be installed on its operating system, grants an exception by allowing the gatekeeper to implement proportionate measures (possibly including imposing constraints on installations or limiting inter-operability) if installation would threaten the integrity of the hardware or the operating system.

84 Recital (32) of the DMA.

85 Arrow, K (1962) – Economic Welfare and the Allocation of Resources for Invention, in: The Rate and Direction of Inventive Activity: Economic and Social Factors, pp. 609–625. Princeton, NJ: Princeton University Press.

86 This view is largely based on Gilbert and Newbery (1982) (Gilbert, J R and Newbery, D M G (1982) – Preemptive patenting and the persistence of monopoly, *The American Economic Review*, 72(3), pp. 514–526).

87 Schumpeter, J A (1942) – Capitalism, Socialism and Democracy, Harper & Brothers (New York).

can weaken a platforms incentive to invest by reducing its ability to appropriate future rents associated with its innovation. We note that the empirical literature suggests that both the Arrowian and Schumpeterian views may co-exist.[88] We also note that the recent theoretical economics literature is ambiguous on the broader welfare effects of self-preferencing and leveraging in the context of vertically integrated digital platforms.[89,90,91]

The case for a per se approach in regulation is that it offers clarity and allows for speedy and effective enforcement. Proponents of the DMA have argued that this is especially important in digital markets since restorative remedies for abusive self-preferencing are particularly difficult to design and enforcement decisions might come too late to provide any effective remedy or to restore competition. In other words, enforcement may be neither effective nor timely enough to prevent competition from disappearing. However, there is a risk that a blanket ban on

88 One of the most cited papers in the economics literature on innovation, Aghion et al. (2005), finds an increasing relationship between innovation and competition at low levels of competitive intensity, turning into a decreasing relationship at high levels of competitive intensity (Aghion, P, Bloom, N, Blundell, R, Griffith, R and Howitt, P (2005) – Competition and Innovation: An Inverted-U Relation, *Quarterly Journal of Economics*, 120(2), pp. 701–728).

89 De Corniere & Taylor (2019) specify a theoretical model where they show that favouring of its own ancillary products or services in rankings by an intermediary providing search services reduces consumer welfare if the ancillary products or services compete in price, but it can increase or decrease consumer welfare if they compete in quality, depending on the trade-off between the preference mismatch induced by the ranking bias and the magnitude of quality differences between products or services (De Corniere, A and Taylor, G (2019) – A Model of Biased Intermediation, *RAND Journal of Economics*, 50(4), pp. 854–882).

90 Hagiu et al. (2022) study a stylised economic model where an intermediary that runs a digital marketplace for third-party seller can additionally act as a retailer itself, and potentially self-discriminate in two ways: (1) imitating third-party sellers' superior products without incurring costs (which they argue captures leveraging data advantage); or (2) introducing ranking bias. The authors show that banning imitation will never decrease consumer welfare or total welfare but banning ranking bias may result in the platform reverting to a pure retailer model, leading to a decrease in total welfare without an increase in consumer welfare (Hagiu, A, Teh, T-H., Wright, J (2022) – Should Platforms Be Allowed to Sell on Their Own Marketplaces?, *RAND Journal of Economics*, 53(2), pp. 297–237).

91 Padilla et al. (2022) study a theoretical model where a device seller can exclude third-party firms' access to its app store. The authors show that even if the device seller has an inferior app competing with a third-party app, it could have an incentive to exclude the third-party app (to the detriment of consumers and at the expense of reducing the value of its device to consumers) if demand growth for the device is slow. On the other hand, their results also imply that the device seller's incentive to exclude will be stronger if the quality of its own app is higher (Padilla, J, Perkins, J, Piccolo, S (2022) – Self-Preferencing in Markets with Vertically Integrated Gatekeeper Platforms, *The Journal of Industrial Economics*, 70(2), pp. 371–395).

widely defined categories of self-preferencing may have a negative impact on innovation and prevent outcomes that are in the interests of consumers, such as the development of new products. This may be especially true in the case of the DMA due to its lack of flexibility to consider potential evidence that gatekeepers' self-preferencing activities have a strong efficiency rationale and adjust its prohibitions accordingly. In contrast, the CMA's proposed regulatory regime for digital markets allows for a more flexible approach and is expected to allow the regulator to take on board potential efficiencies and impose more targeted remedies.

There is still some flexibility embedded in the text of the DMA, however. The behavioural obligations specified in Article (6) (as opposed to Articles (5) and (7)) are considered 'susceptible of being further specified', and Article (8) states that gatekeepers may request a regulatory dialogue (at the EC's discretion) regarding their implementation. Further, Article (12) allows the EC to update gatekeepers' obligations. Whether this flexibility will help with the risk of over-enforcement and the impact that the DMA will have on competitive dynamics and innovation in digital markets more generally will be clearer in the years to come.

Conclusion

In this chapter we have reviewed the key developments relating to self-preferencing conduct. Specifically, we have considered the *Google Shopping* decision and the subsequent judgment by the GC, as well as the decisions in three recent investigations by the national authorities. We then explained the broader considerations underlying the theories of harm related to self-preferencing. Finally, we discussed the regulatory approach adopted in the DMA with respect to self-preferencing, and contrasted its per se approach against the effects-based approach endorsed by EU competition law.

Self-preferencing went from being a rarely heard concept to a key issue in any discussion concerning competition in digital markets. The GC has developed new case law and opened the door for competition authorities to develop cases with self-preferencing as a stand-alone abuse. The DMA has also placed self-preferencing in the limelight, with potentially highly significant implications for the business models of dominant digital platforms, as well as those of their competitors. We expect that the enforcement and regulation of self-preferencing will remain a hotly debated topic in the years to come, as the EC will develop new cases with wind in its sails from the GC's *Google Shopping* judgment, and newly proposed regulation will come into effect and be tested in practice. It remains to be seen how open the authorities will be to considering arguments and evidence regarding the efficiencies associated with self-preferencing behaviour.

CHAPTER 6

Data and Privacy in EU Merger Control

Gerwin Van Gerven, Annamaria Mangiaracina, Will Leslie and Lodewick Prompers[1]

Data has become a *cause célèbre* of competition policy. Dubbed the 'new oil' by *The Economist* in 2017, companies with data at the heart of their business models now make up seven of the world's 10 most valuable companies.[2] Responding to the economic change engendered by the rise of the data economy, competition regulators, practitioners and academics have assessed how novel competition concerns may arise in data-intensive markets, whether regulators have the tools to tackle such concerns, and the potential implications for remedies.[3] Competition

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2 *The Economist*, 'The world's most valuable resource is no longer oil, but data' (6 May 2017), available at: www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data; *Statista*, 'The 100 largest companies in the world by market capitalization in 2021' (31 May 2021), available at: www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization.

3 Notable examples include Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era – Final report' (2019) (Commission digitalisation report), available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; UK Digital Competition Expert Panel, 'Unlocking digital competition' (2019) (Furman report), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Geoffrey Parker, Georgios Petropoulos and Marshall van Alstyne, 'Platform mergers and antitrust' (January 2021) Bruegel working paper 01/2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3763513; Jörg Hoffmann and Germán Johannsen, 'EU Merger Control & Big Data – On Data-Specific Theories of Harm and Remedies' (2019), Max Planck Institute for Innovation and Competition Research

regulators have also had to grapple with the sometimes competing pressures of data regulation, notably data protection rules for personal data, when regulating markets in data-intensive sectors.[4]

This Chapter outlines developments in European merger control policy concerning data and data protection. The past two years have seen the European competition regulators put key ideas concerning data-intensive markets into practice. In particular, the conditional clearances by the European Commission (the Commission) of *Google/Fitbit* (2020) and *LSE/Refinitiv* (2021) have set new ground rules that the Commission has subsequently put into practice in cases including *S&P/IHS Markit* (2021), *Microsoft/Nuance* (2021) and *Facebook/Kustomer* (2022). These cases articulate new theories of harm pertaining to data markets, develop the relationship between competition law and data protection and contain new access and behavioural remedies for concerns pertaining to data.[5]

Setting the scene: what do we mean by 'data' and the interplay between competition and data protection?

All businesses collect and use data. But this begs the question: what do we mean by 'data' for merger control purposes if all mergers involve data? As the Commission's expert report on digitalisation opined, it is 'futile' to analyse 'data' in the abstract: the importance of data varies depending on the relevant market while the likelihood of competition concerns depends on the characteristics of the data under scrutiny and the relevant market. For merger control policy, this means that 'data' concerns are focused on markets where (1) the merged entity would have market power for data where it is either the 'product' or a significant input and (2) where data is driving the competitive assessment.

Paper Series No. 19-05, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3364792; and Anca D Chirita, 'Data-Driven Mergers Under EU Competition Law' (June 2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3199912.

4 See, for example, OECD Competition Committee, 'Consumer data rights and competition – Summaries of contributions' (July 2020), DAF/COMP/WD(2020)59; Maria C Wasastjerna, 'The Implications of Big Data and Privacy on Competition Analysis in Merger Control and The Controversial Competition-Data Protection Interface' (2019) 30(3) European Business Law Review pp. 337–366; and Gabriela Zanfir-Fortuna and Sînziana Ianc, 'Data Protection and Competition Law: The Dawn of "Uberprotection"' (December 2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290824.

5 *Google/Fitbit* (Case M.9660) [2020] OJ C 194/7; *LSEG/Refinitiv Business* (Case M.9564) [2021] OJ C 434/9; *S&P Global/IHS Markit* (Case M.10108) [2022] OJ C 49/3; *Microsoft/Nuance* (Case M.10290) [2021] OJ C 296/1; and Commission, 'Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions' (2022) IP/22/652.

Merger control concerns pertaining to data are, moreover, not specific to any particular sector. The use of data in digital markets has no doubt been a key focus of regulatory scrutiny. But 'data-intensive' markets are not synonymous with digital markets. Financial data in wholesale markets has, for example, long been a product sold by a range of firms and subject to significant competition scrutiny; personal data has been a key input for providing personal financial products such as credit and insurance; and the Commission's digitalisation report highlights data as a core input factor for production processes and logistics as well as smart products and services.[6]

Data-intensive markets are also dynamic: technological developments such as the internet of things and the rise of artificial intelligence also mean that data is becoming an increasingly important facet of more conventional businesses such as mobility and healthcare, such that data may well feature more heavily in the review of transactions in those sectors in the future.

A consequence of European competition regulators probing data-intensive markets with growing frequency is also an increasing assessment of how data regulation (1) sets the boundaries in which competition in data-intensive market takes place and (2) imposes limits on competition policy. Data regulation is not, however, a single body of legislation applicable to all data: data protection, for example, concerns personal data but does not regulate the swathes of industrial data that are of increasing importance with the development of products such as autonomous vehicles. Data regulation is also evolving, with the EU Data Governance Act, which recently entered into force, and the proposed Data Act likely to impact competitive dynamics in the future.[7] The implications of data protection on competition policy concerning personal data have elicited particular interest owing to a perception that the regulatory framework of the General Data Protection Regulation (GDPR) has hampered effective competition.

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6 See, for example, *Thomson Corporation/Reuters Group* (Case Comp/M.4726) [2008] OJ C 212/5; *Blackstone/Thomson Reuters F&R Business* (Case M.8837) [2018] OJ C 123/1 and most recently *LSEG/Refinitiv Business* (n 5).

7 The Data Governance act entered into force in June 2022 and will start to apply from 24 September 2022, see Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU 2018/1724 (Data Governance Act). See also the Commission's 'Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)' COM(2022) 68 final.

European regulators' expanding jurisdictional powers to capture transactions in data-intensive markets

Transactions in data-intensive markets are already frequently captured by the jurisdictional thresholds of the EU Merger Regulation (EUMR) as well as the Member States' merger control regimes.[8] European regulators are, however, introducing reforms to give themselves leeway to intervene in a wider set of transactions. Their targets are 'killer acquisitions': transactions involving the acquisition of fast-growing, high-value firms with limited turnover that will or may challenge existing incumbents (notably in pharmaceutical and technology markets).[9] The reforms are thus not targeted at data-intensive markets nor intended to capture data-specific theories of harm; however, the focus on digital markets and, in particular, companies with high-value data means that data-intensive markets are prime candidates for review.[10]

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8 A very recent example of a case that was directly caught by the EU Merger Regulation (EUMR) turnover thresholds is *Google/Fitbit* (2020) (n 5). Importantly, the Commission, Member State merger control authorities, as well as notifying parties themselves have also increasingly used the different referral mechanisms under the EUMR to refer transactions in data-intensive markets to the Commission for review where they did not meet the EUMR's turnover thresholds but met those of one or more Member States. Several of the Commission's landmark merger control decisions in data-intensive markets have followed this route, including: *Microsoft/GitHub* (Case M.8994) [2018] OJ C 428/1, *Apple/Shazam* (Case M.8788) [2018] OJ C 417/4; *Amadeus/Navitaire* (Case M.7802) [2016] OJ C 151/1; *Facebook/WhatsApp* (Case M.7217) [2014] OJ C 417/4; *Google/DoubleClick* (Case COMP/M.4731) [2008] OJ C 184/10; *TomTom/TeleAtlas* (Case COMP/M.4854) [2007] OJ C 237/6 and *Nokia/Navteq* (Case COMP/M.4942) [2007] OJ C 13/8.

9 Notable examples are the Commission's updated Article 22 referral guidance (discussed in Section 2) and the UK government's current stakeholder consultation on its proposed new bespoke jurisdictional thresholds for firms with strategic market status (SMS Firms), which would include a transaction-value threshold in the region of £100 million or £200 million (UK government consultation document, 'A new pro-competition regime for digital markets' (July 2021) Paragraphs 178–181, available at: www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets). The US FTC has described such acquisitions as a 'buy-or-bury' in its ongoing antitrust complaint accusing Facebook of having unlawfully acquired a series of innovative competitors with mobile features over the last decade, such as Instagram and WhatsApp. See FTC, 'FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate' (August 2021), available at: www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush.

10 See, for example, in European Commission, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' C(2021) 1959 final, Paragraphs. 9 and 19.

European regulators have, however, expanded their jurisdictional powers in different ways.

The Commission's approach has been to resurrect the use of the existing Article 22 referral process, which had until recently fallen into abeyance. Article 22 EUMR permits one or more Member States to request the Commission to review transactions that affect trade between Member States and threaten to significantly affect competition in the relevant Member State.[11]

While the Commission has discretion over whether to accept such referrals, it previously discouraged them where the relevant Member State lacked jurisdiction to review the transaction under its own national merger control rules. The Commission's Article 22 Guidance Paper (2021) announced a policy change to 'encourage and accept referrals' where: (1) the conditions for referral are met and (2) the turnover of 'at least one of the undertakings concerned does not reflect its actual or future competitive potential' (irrespective of whether the referring Member State has original jurisdiction under its own merger control rules).[12]

The approach meant that the EU did not have to amend the jurisdictional thresholds in the EUMR while simultaneously giving the Commission a residual power to pick and choose when to intervene in perceived potential killer acquisitions in digital, pharma and other high-tech markets (provided at least one Member State is willing to issue a referral).

While the specific target may not be data-intensive markets, the Commission's focus on digital markets means that such markets are likely to receive greater scrutiny: the Article 22 Guidance Paper highlights access or ownership of data as a key criterion in assessing an undertaking's competitive potential while the Commission's Phase 2 review of Facebook's acquisition of Kustomer following an Article 22 referral from Austria focused on, *inter alia*, access to data in digital advertising markets.[13]

Following the General Court's endorsement of the Commission's Article 22 policy change in its landmark *Illumina/Grail* ruling in July 2022, the Commission is now on firmer ground to review a greater proportion of transactions in

11 The Article 22 mechanism, or the 'Dutch clause', was introduced in the EUMR in 1989 because certain Member States, such as the Netherlands, lacked a national merger control regimes at that time.

12 C(2021) 1959 final (n 11), Paragraph 8.

13 ibid., Paragraph. 19; see, also, Commission, 'Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions' (2022) IP/22/652.

data-intensive markets (although Ilumina has announced its intention to appeal the judgment so there will remain some uncertainty over the policy until the outcome of any such appeal).[14]

Germany and Austria have, in contrast, introduced transaction value-based jurisdictional thresholds to complement their existing turnover-based thresholds in 2017. Although the use of transaction-value thresholds provides clear boundaries for the expansion of Germany's and Austria's merger control thresholds in contrast to the Commission's Article 22 reforms, their main objective is the same: capturing killer acquisitions by large players in the pharmaceutical, digital and other high-tech sectors.[15] The thresholds are, therefore, likely to capture acquisitions of nascent businesses in data-intensive markets; indeed, Germany's Explanatory Memorandum for the reforms specifically cites *Facebook/WhatsApp* (2014) as the type of transaction that the new thresholds are intended to bring within scope.[16]

That said, in practice, the thresholds have had limited effect: since their introduction in Germany, only 32 transactions were notified pursuant to the new threshold out of 5,355 notified cases (with a slightly higher proportion in Austria).[17]

The practical consequence of the reforms, and similar reforms being contemplated elsewhere, has, however, the same broad implications: (1) merger control authorities have greater scope to probe transactions in data-intensive markets and (2) the acquisitions of nascent data-focused businesses, particularly by large digital platforms, may now trigger filings or attract discretionary intervention where previously they would not have been reviewable.

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14 Judgment of 13 July 2022, *Illumina and Grail v Commission*, T 227/21, ECLI:EU:T:2022:447.

15 Explanatory Notes from the German legislator to the ninth amendment to the German Competition Act (2016) pp. 70 *et seq.*, available at: https://dserver.bundestag.de/btd/18/102/1810207.pdf.

16 ibid., p. 71.

17 For more detailed information, see Annual Activity Report 2017/2018 and Annual Activity Report 2019/2020 as well as the Information memorandum from the German Government (January 2021) p. 4, available at: https://dserver.bundestag.de/btd/19/261/1926136.pdf. For more detailed information see the annual activity reports of the Bundeswettbewerbsbehörde in 2018, available at: www.bwb.gv.at/fileadmin/user_upload/Downloads/taetigkeitsbereich/Taetigkeitsbericht_der_BWB_2018_final.pdf; 2019, available at: www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB_Taetigkeitsbericht_2019.pdf; and 2020, available at: www.bwb.gv.at/fileadmin/user_upload/Downloads/taetigkeitsbereich/BWB_Taetigkeitsbericht_2020_barrierefrei.pdf.

Emergence of a quasi-horizontal 'data' theory of harm in European merger control

Turning to substance, the Commission and the NCAs have previously investigated transactions in data-intensive markets involving conventional unilateral and coordinated effects.[18] The Commission's decision in *Google/Fitbit* put forward, however, a quasi-horizontal theory of harm, whereby the acquisition of complementary data can strengthen an entity's market power in downstream markets or give rise to foreclosure concerns.[19] The Commission also subsequently explored whether the same concern in *Facebook/Kustomer*, but concluded that the data that Meta would obtain from Kustomer's customers, if any, would be insufficiently significant to raise concerns and, furthermore, there was no risk of Meta foreclosing access to such data.[20]

The theory of harm has roots over the past decade: the Commission had explored similar concerns in *Facebook/WhatsApp* and *Microsoft/LinkedIn* (2016) before dismissing them. In *Google/Fitbit*, the Commission found that Google's acquisition of Fitbit's health and wellness data would have strengthened Google's existing market power for digital advertising, in particular its dominant position for search advertising. The novelty of the theory of harm is that it assessed horizontal unilateral effects, notwithstanding that:

- neither Fitbit nor Google made their respective data available to third parties (i.e., there was no conventional antitrust market for the relevant data); and
- the two data sets were complementary inputs rather than substitutable data sets (Fitbit's services generated health and wellness data whereas Google's range of data includes, notably, data generated by users' search queries but is not focused on health and wellness data).

Fitbit was not active in the downstream markets for digital advertising, and the Commission did not seek to characterise it as a potential entrant. As such, the Commission's decision establishes that combining ostensibly complementary data

18 See, among other cases, *Publicis/Omnicom* (Case COMP/M.7023) [2014] OJ C 84/1 and *Telefónica UK/Vodafone UK/Everything Everywhere/JV* (Case COMP/M.6314) [2012] OJ C 66/4.

19 As previously also outlined in the Commission digitalisation report (n 3) p. 110.

20 Commission, 'Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions' (2022) IP/22/652.

sets may nevertheless increase a firm's market power in a downstream market, irrespective of whether the undertakings concerned make the underlying data available to third parties or compete in the relevant downstream market.[21]

This has raised three conceptual challenges for merger control as applied to data-intensive markets: (1) whether and, if so, how to define antitrust markets for untraded 'data'; (2) the conditions for such quasi-horizontal concerns to arise; and (3) how to balance the efficiencies with any potential anticompetitive effects.

A new approach to market definition where data is an important input

The market definition for conventional data markets, where data is traded between counterparties as the 'product', is well established.[22]

This does not hold for the Commission's data theory of harm in *Google/Fitbit*, which poses significant challenges for conventional market definition as it concerns the effects of combining data sets divorced from any real market. The Commission's ongoing evaluation of its market definition notice analyses the difficulties posed by such concerns, namely, that there is, in principle, no plausible antitrust market on which to assess the horizontal effects absent supply and demand for the data.[23]

To overcome this bar, commentators have proposed defining hypothetical markets. First put forward by FTC Commissioner PJ Harbour in her dissenting opinion for the clearance of *Google/DoubleClick* (2008), the proposal has attracted

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21 *Google/Fitbit* (n 5) Paragraphs 419, 421, 422, 427–429.

22 The Commission has notably defined a range of financial data markets in significant detail in, for example, *Thomson Corporation/Reuters Group* (n 7); *Blackstone Group/Thomson Reuters F&R Business* (n 7) and *LSE/Refinitiv* (n 5), Paragraphs 17 ff. and *S&P Global/IHS Markit* (n 5) Paragraphs 22–26. It has also done so in relation to car navigation data in *TomTom/Tele Atlas* (n 9) Paragraphs 17–38 and 45–51 and *Nokia/Navteq* (n 9) Paragraphs 64 and 89. Note that, in these cases, the data sets concerned are traded or licensed to intermediate business customers who use them as an input for their own downstream product or service. There is also a wider debate on zero price markets and whether user data forms 'payment in kind' for such services. In the absence of any price, the Commission has used analytical tools such as the SSNDQ test (small but significant non-transitory decrease in quality) as a hypothetical model to assess the boundaries of the relevant market for such services. A good overview on this separate debate is provided in Pierre Hausemer e.a., 'Support study accompanying the evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law – Final report' (2021) pp. 63–72, available https://ec.europa.eu/competition-policy/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf.

23 P Hausemer e.a. (2021) (n 21) p. 91.

support from a number of corners.[24] Using this approach, regulators would define hypothetical markets for data used for the same purpose in downstream markets (e.g., data used for targeting advertising).

The Commission also briefly assessed the effects of *Microsoft/LinkedIn* in a 'hypothetical market' for the supply of data used for online advertising.[25] The practical challenge posed by such hypothetical data markets is determining their boundaries absent any direct evidence of supply and demand.

The alternative approach is to simply assess the effects of non-traded inputs, such as data on downstream markets in the competitive assessment. The Commission took this approach in *Google/Fitbit*: considering the effects of Fitbit's data in its competitive assessment of the effect of the merger on digital advertising markets. The approach is consistent with the Commission's Digitalisation Report, which advocated 'less emphasis on analysis of market definition' in digital markets and 'more emphasis on theories of harm and identification of anti-competitive strategies'.[26] This has the benefit of sidestepping the conceptual question of whether antitrust markets only exist where there is supply and demand for the relevant product or innovation.[27]

However, ignoring market definition in these circumstances arguably omits the rigour of confirming that the data under scrutiny are sufficiently likely to increase market power for the relevant downstream market (as well as the relevant competing types of data). For some, at least, this results in an uneasy compromise and leaves open the prospect that the Commission's conclusions may not be the final word in the debate.[28]

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24 Dissenting Statement of Commissioner Pamela Jones Harbour, *Google/DoubleClick*, FTC File No. 071-0170 (December 2007) p. 9.

25 Case M.8124 *Microsoft/LinkedIn* (Case M.8124) [2016] C(2016) 8404 final, Paragraph. 179.

26 EC digitalisation report (n 3) p. 46.

27 In *Facebook/WhatsApp* (n 9) Paragraphs 70–72, the Commission held that it should not investigate possible separate markets for the provision of user data because neither Facebook nor WhatsApp provided these as stand-alone products or services to advertisers or other third parties.

28 *Google/Fitbit* (n 5), Paragraphs 399 and 427.

What are the conditions for the Commission to substantiate the theory of harm?

The Commission's articulation of a quasi-horizontal data theory of harm for the first time in *Google/Fitbit* left open a number of questions on the conditions for such concerns to arise. Its finding of competition concerns in *Google/Fitbit* rested on five broad findings:

- Google had significant market power in a number of digital advertising markets;
- Fitbit's health and wellness data was a valuable input and would 'strengthen' Google's position in such markets;
- Google's competitors in such markets could not obtain straightforward access to similar data;
- there was no plausible prospect of significant countervailing buyer power from Google's digital advertising customers; and
- the long-term anticompetitive effects of the diminution of such competition outweighed the short-term benefits from Google being able to offer superior digital advertising services to consumers.[29]

The unconventional context means that the theory of harm raises a number of practical questions for when such concerns are capable of arising. Given that neither Fitbit nor its data exercised a competitive constraint per se on Google for digital advertising, by how much must the complementary data strengthen the market position of the undertaking active in the downstream market? How should the balancing exercise between short-term benefits and long-term harm be conducted? In particular, to what extent does the uncertainty around any putative longer-term harm mean that it is discounted against the more certain short-term benefits?

These questions also raise more practical questions: do the conceptual difficulties posed by the theory of harm mean that the Commission is only likely to invoke it in limited circumstances? For example, is it only relevant where the relevant undertaking holds a dominant position in the downstream market and the data is unique? Or does the theory of harm have much wider application?

29 *Google/Fitbit* (n 5), Paragraph 428.

Efficiencies and efficiency offences when combining different data sets

A final challenge posed by the Commission's theory of harm is assessing merger efficiencies in circumstances when combining the merging parties' data frequently enables firms to improve their related products. As the Commission recognised in *Microsoft/LinkedIn*, integrating Microsoft's and LinkedIn's data sets offered the merged entity the prospect of delivering products 'based on a dataset to which otherwise no one would have access'.[30]

However, under the Commission's theory of harm in *Google/Fitbit*, the ability to combine data to offer improved products was both an efficiency (the merging parties could offer a higher quality product than would have been the case absent the merger) and the source of the unilateral anticompetitive effects (the merger raised barriers to entry and thereby strengthened the merging parties' market position).

The Commission observed in *Google/Fitbit* that the theory of harm accordingly entails an arguably axiomatic balancing exercise between the alleged anticompetitive and pro-competitive effects of the transaction. Google itself submitted that this meant that the Commission bore the burden of both 'quantifying the efficiency', which gave rise to the alleged anticompetitive effects, and proving that the efficiency 'would be outweighed by the anticompetitive effects'. While the Commission did not seek to quantify either the harm or the anticompetitive effects, the Commission did assess and conclude that the short-term efficiencies derived from the transaction because of 'better ads targeting' were 'likely' more than outweighed by the long-term effects on innovation.[31]

Input foreclosure concerns in data-intensive markets

In keeping with the increasing importance of data as an input for a range of (digital) markets, the Commission has continued to focus on whether mergers may give rise to input foreclosure concerns resulting from a loss of access to key data sets. In *Google/Fitbit*, the Commission found that Google would have the ability and incentive to foreclose access to Fitbit's health and wellness data with the risk of anticompetitive foreclosure of businesses offering digital healthcare. In *LSE/Refinitiv*, the Commission found that the LSE would have the ability and incentive to foreclose access to data generated by LSE's venues, its FTSE Russell

30 *Microsoft/LinkedIn* (n 24), Paragraph 249.

31 *Google/Fitbit* (n 5), Paragraphs 427–429.

UK equity indices and Refinitiv's WM/R FX benchmark data with the risk of foreclosure in downstream markets for consolidated data feeds, desktop services and index licensing.[32]

Similar concerns also played a role in *S&P Global/IHS Markit*, where the Commission's market investigation revealed that S&P Global would have the ability and incentive to (partially) refuse access to IHS Markit's 'LoanX ID' loan identifiers, which enable firms to track loan pricing and loan reference data products to rival providers of leveraged loan market intelligence where S&P Global was active.[33]

To evaluate its data foreclosure concerns in *Google/Fitbit*, the Commission has applied a conventional input framework, namely whether:

- the merged entity would have the ability to foreclose or degrade access to the relevant data, in particular because the data is an important input and the merged entity would have significant market power for its supply;
- the merged entity would have the incentive to foreclose or degrade access to the relevant data to benefit its own services in related markets; and
- foreclosure in such markets would have anticompetitive effects.[34]

In assessing whether Google would have the ability to foreclose access to important user health and wellness data, the Commission acknowledged that businesses in digital health would still have access to user data from other wearable original equipment manufacturers, including Apple, Garmin, Samsung, Polar and Suunto. The Commission still, however, concluded that Google had sufficient ability to foreclose by withholding or degrading access to Fitbit's user data, in part, because 'a number of players' accessed such data through Fitbit's web API.[35] In so doing, the decision articulates a low threshold for establishing that a firm would have significant market power for data where, in particular, such data is already available to the market.

In contrast, in *LSE/Refinitiv*, the Commission found Refinitiv's WM/R FX benchmarks had associated network effects that made the benchmarks unique;[36] thus, notwithstanding the presence of similar FX data sets, the Commission concluded that the use of such data in downstream markets – notably for index licensing – meant that the merged entity would have had significant market

32 *LSE/Refinitiv* (n.5), Paragraphs 903–949.

33 *S&P Global/IHS Markit* (n 5), Paragraphs 411–418, 512–547.

34 See, for example, the assessment in *Microsoft/LinkedIn* (n 24) Paragraphs 246–277.

35 *Google/Fitbit* (n 5), Paragraphs 511 and 516.

36 *LSE/Refinitiv* (n 5), Paragraph 1724.

power.[37] The Commission similarly pointed to IHS Markit's LoanX IDs benefitting from network effects, which meant it was a de facto market standard for loan identifiers, and one of the reasons why it constituted a 'very important input' for downstream loan market intelligence.[38]

In relation to incentives, the Commission in both *LSE/Refinitiv* and *Google/Fitbit* considered the ability of the relevant parties to selectively degrade the quality of access to data as a salient factor in assessing whether the merged entities would have an incentive to foreclose. It has considered this scenario in relation to Refinitiv's rivals' access to LSE's venue data,[39] as well as in relation to rival downstream digital healthcare providers' access to Fitbit's users' data, through degraded access to its Web API.[40] Flowing from the inherent flexibility that characterised the data under scrutiny, the ability to selectively degrade access meant that the merged entities would have had the ability to target any foreclosure strategy at their respective competitors and thus reduce any potential costs of a foreclosure strategy (and hence make it more attractive).

In *S&P Global/IHS Markit*, the Commission also cited possible partial foreclosure strategies in the past as evidence of S&P Global's potential ability and incentive to foreclose access to LoanX IDs post-merger.[41]

While sometimes treated as an afterthought, the Commission's assessment of anticompetitive effects in *Google/Fitbit* exhibited a focus on the nature of the firms that foreclosure would allegedly impact and what that would mean for effects on dynamic competition. The Commission specifically highlighted that interruption of access to Fitbit's web API would negatively affect, in particular, 'start-ups and small players that . . . would capitalise even on relatively small amounts of Fitbit users' data to compete and contribute to innovation and diversification of the digital healthcare'.

In so doing, the Commission seemingly drew a causal link between the potential foreclosure effects of the merger on small and medium-sized enterprises and deleterious effects on innovation and product diversification. Applied more broadly, the Commission's stance implies that the risk of input foreclosure of smaller players in fast-growing and dynamic markets may attract particular scrutiny given its perceived negative effects on innovation.

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37 *LSE/Refinitiv* (n 5), Paragraphs 1734–1781.

38 *S&P Global/IHS Markit* (n 5), Paragraphs 413–414, 519 and 521.

39 IP/21/103 (n 32); *LSE/Refinitiv* (n 5), Paragraphs 940–947.

40 *Google/Fitbit* (n 5), Paragraphs 515–520.

41 *S&P Global/IHS Markit* (n 5), Paragraph 541.

Remedy design in a data-driven age

Increasing scrutiny of data intensive markets is also driving new approaches to the suitability and design of remedies. Commissioner Margrethe Vestager opined that the 'equally important' and often more difficult part of competition policy 'is finding the right remedies'.[42] Such sentiments are particularly apposite for data and data-intensive markets where the greater prevalence of vertical and conglomerate concerns means access and other behavioural remedies are more frequently potential options.

The most novel development is the 'data silo' remedy in *Google/Fitbit*, which addressed the Commission's horizontal concerns over the aggregation of Google's and Fitbit's data for digital advertising markets. Google committed to hold Fitbit's health and fitness data separate from Google's advertising business in a virtual storage environment for a period of 10 years (extendable by a further 10 years).[43] The concept as such is not new: the Commission has previously accepted hold separate remedies to address bundling concerns.[44] The novelty is its use to address allegedly (quasi-)horizontal concerns in relation to data.[45]

The Commission's Remedies Notice stipulates that commitments concerning a merged entity's future conduct are only acceptable 'exceptionally in very specific circumstances.'[46] The novelty of the theory of harm is thus mirrored in the novelty of the remedy, which, as Commissioner Vestager has commented, is intended

42 Speech of Commissioner Vestager at the Florence Competition Summer Conference, 'Defending competition in a digital age' (June 2021), available at: https://protect-eu.mimecast.com/s/ozpeCjDltnzr6YtGoY6y?domain=ec.europa.eu.

43 Access to this environment will be restricted (through internal firewalls) and logged, and these restrictions must be auditable by the monitoring trustee.

44 See, for example, *Wegener/PCM/JV* (Case COMP/M.3817) [2005] OJ C 191/3, *EDF/Louis Dreyfus* (Case No. COMP/M.1557) [1999] OJ C 323/11 and *American Home Products/Monsanto* (Case No. IV/M.1229) [1998] OJ C 109/4.

45 Since Google didn't sell wearables, and Fitbit's position in the market was not significant, the Commission found that the merger did not lead to meaningful overlaps on the wearables market itself. But it did have concerns that combining the companies' data might harm competition, if Google could use Fitbit's health and fitness data for advertising. Although Google is not allowed to access Fitbit's health and fitness data for advertising, it can do so for other purposes, as the Commission's theory of harm only related to advertising.

46 European Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 [2008] OJ C 267/01, Paragraph 17.

to function as a de facto structural remedy (albeit time-limited).[47] As such, the remedy breaks new ground and offers a potential new approach for managing concerns relating to the aggregation of (complementary) data sets.

While more conventional, the Commission's data access and interoperability remedies in both *Google/Fitbit* and *LSE/Refinitiv* nevertheless illustrate an emphasis on preserving a level playing field despite the complexities of (some) data markets.[48] First, the commitments contain extensive future-proofing measures in keeping with their extended duration: in particular, both data access remedies can expand to capture data outside the scope of the commitment at the time of the Commission's decision. For example, the web access API in *Google/Fitbit*, which grants third parties access to Fitbit's health and wellness data, requires Google not only to provide access to data currently collected through Fitbit's services but to update the types of data available during the lifetime of the commitment.

Second, both sets of commitments embed the principle of non-discriminatory access to key data inputs alongside the merged entity. In so doing, the non-discrimination provisions seek to protect a level playing field and the quality of access for third parties (an important factor when, for some data, factors such as latency are critical for maintaining competitiveness).

The use of access and behavioural remedies for concerns pertaining to data is also part of a wider debate on whether there is greater scope for use of access and behavioural remedies. While such remedies, in principle, preserve access to key data inputs while simultaneously allowing merging parties to realise the potential efficiencies of their transactions, some regulators have indicated their opposition to a greater use of behavioural remedies to solve data-related concerns.

The Australian competition regulator rejected the remedies accepted by the Commission in *Google/Fitbit* as too behavioural and complex, a position supported by the head of the UK regulator. They also attracted rare criticism from the European Parliament in its annual report on competition policy.[49]

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47 See also the Speech of Commission Vestager at the Florence Competition Summer Conference, 'Defending competition in a digital age' (June 2021).

48 See in particular *Intel/McAfee* (Case COMP/M.5984) [2011] OJ C 98/1, Paragraphs 297 ff. and *Daimler/BMW/Car sharing JV* (Case M.8744) [2019] OJ C 142/19, Paragraph 335 et seq.

49 On the other hand, the remedies garnered support from a large majority of national competition authorities in the advisory committee meeting that preceded the adoption of the Commission's decision (only two of the 15 Member State authorities present voted against). This suggests that national competition authorities in the EU are not hostile to behavioural remedies in digital markets.

The outcome is, as yet, unclear. But data access and other behavioural remedies cannot be viewed in isolation. The EU's Digital Markets Act provides, for example, for far-reaching data access remedies and also a number of the Commission's ongoing cases in digital markets may result in data access remedies. The success of these remedies is likely to dictate the degree to which such remedies become commonplace in data markets in the future.

The role of privacy and data protection in the competitive assessment of mergers

The increased merger control scrutiny of data-intensive markets has also increasingly posed questions of the relationship between competition law and European data protection rules (most notably the GDPR). As European Competition Commissioner Vestager put it at the European Data Protection Supervisor's conference in June 2022: 'when it comes to digital markets the wider link between competition and privacy will always be there. After all, the more concentrated markets become, the more consumer data is held in the hands of fewer and fewer businesses - and the higher are the risks for privacy.'

The topic is relevant for mergers concerning personal data that are subject to European data protection rules and has raised three issues:

- the degree to which privacy is a relevant parameter of competition (as a facet of competition on the 'quality' of products and services);
- the implications of data protection rules for assessing competitive dynamics and the implications of mergers in data-intensive markets; and
- the implications of data protection rules for merging parties and the Commission when designing and assessing remedies.

The Commission's *Google/Fitbit* decision has shed significant light on, if not quite settled, these questions for European merger control purposes.

The Commission's conclusions in *Google/Fitbit* significantly limit, in the first instance, the relevance of privacy as a potential parameter of competition. A number of participants in the proceedings had raised concerns that the merger would reduce competitive pressure pertaining to privacy.[50] Such concerns channelled the Bundeskartellamt's *Facebook* (2019) decision, which had held that

50 *Google/Fitbit* (n 5), recital 452.

Facebook's collection and use of user data had exploited a dominant position by violating European data protection rules, raising whether competition law is a de facto means of enforcing data protection.[51]

The Commission reasoned, however, that commercial decisions concerning privacy would be subject to the GDPR, which 'provides a high standard of privacy and data protection . . . and leaves little room for differentiation'.[52] While not definitive, the Commission's broad reasoning indicates a developing policy position concerning the boundary between merger control and data protection.[53] A stance also seen at the EU institutional level where Commissioner Vestager decided that it would not be appropriate to give the European Data Protection Board a formal role in the review of *Google/Fitbit*.[54]

The Commission also adopted a more robust position that European data protection rules do not protect against competition concerns arising in relation to data, by preventing effective data integration between the merging parties. In *Microsoft/LinkedIn*, the Commission had opined that the advent of the GDPR might limit Microsoft's ability to integrate personal data collected by its services with those of LinkedIn: nevertheless, conducting an assessment of the relevant data overlap because the potential risk to competition could not be entirely ruled out.[55]

However, in *Google/Fitbit*, the Commission 'predicated' its assessment on the parties being able to 'lawfully combine their datasets'.[56] The Commission then went further to observe that, even if this assumption did not hold, its assessment 'would be the same' but that the merging parties would be 'accountable for any breach' of European data protection rules. The gist of the Commission's position seems to be that, notwithstanding any ambiguity over the implications of European data protection rules for integration of data sets, it will assume that such integration is possible. This has significant practical implications as it suggests that merging parties will need to be wary of relying on data protection rules, and indeed other data regulation, as a shield to potential competition concerns.

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51 Bundeskartellamt, 'Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing' (B6-22/16) [2019].

52 *Google/Fitbit* (n 5) Paragraph 452, footnote 300.

53 *Facebook/WhatsApp* (n 9) Paragraph 164.

54 Aoife White and Hamza Ali, 'Google-Fitbit probe isn't for Data Watchdogs, Vestager says', *Bloomberg* (25 February 2020).

55 *Microsoft/LinkedIn* (n 24) Paragraphs 177–179.

56 *Google/Fitbit* (n 5) Paragraphs 410–412.

Successfully relying on data protection rules to rebut such concerns seems to work only in specific circumstances and if corroborated with strict contractual obligations. In *Microsoft/Nuance*, for example, the Commission was comfortable that Microsoft would not be able to foreclose Nuance's rival healthcare software providers as the latter was under strict contractual and data protection obligations not to use the healthcare information transcribed via its software for other purposes than the actual provision of its transcription service.[57]

Finally, data protection sets limits on the remedies that parties can submit to address competition concerns in merger control proceedings. The limitations imposed by data protection are well illustrated by the web API access commitment in *Google/Fitbit*, which conditioned third-party access to Fitbit's health and wellness data on privacy and security requirements.[58] That remedies must be compatible with wider regulation is unsurprising.

Data protection rules have, however, significant practical implications as they limit, *inter alia*, firms from sharing personal data with other third parties. In so doing, the rules set boundaries on what is feasible for data access and interoperability remedies that might otherwise be practical solutions to competition concerns pertaining to data-intensive markets.

Conclusions

The past two years have seen significant developments in how European merger control policy applies to data-intensive markets: the Commission's recent decisions have set a new precedent on market definition for data markets, the theories of harm that may be relevant, and the remedies that can solve such concerns.

The Commission is, however, likely to have ample opportunity to develop its approach. The intensifying shift towards digital commerce, the growth of the internet of things, and the need for vast amounts of data in new products such as autonomous vehicles are all driving the increased use of data and, in turn, are likely to result in the Commission reviewing more transactions involving data-intensive markets.

57 *Microsoft/Nuance* (n 5), Paragraphs 150–164.

58 *Google/Fitbit* (n 5) Paragraphs 977, 980 and Commitment A.2 'Web API Access Commitment', Paragraph 7.

Part 2

Americas

CHAPTER 7

Key Developments in the United States

George L Paul, D Daniel Sokol and Gabriela Baca[1]

Key developments in the United States

In 2022, the US Department of Justice (DOJ) and the US Federal Trade Commission (FTC) (collectively, the US Antitrust Agencies) increased scrutiny on technology companies and digital services.[2] In particular, the US Antitrust Agencies, buoyed by the White House, have embraced the 'big is bad' philosophy when assessing antitrust issues in the technology sector.

Leadership within the US Antitrust Agencies, namely FTC chair (Chair) Lina Khan and DOJ Antitrust Division Assistant Attorney General (AAG) Jonathan Kanter believe that traditional antitrust laws, such as the 'consumer welfare standard' are inadequate to address modern challenges facing the technology sector,[3] and they are increasingly unified in developing 'multidimensional'

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1 George L Paul is a partner, D Daniel Sokol is a senior adviser and Gabriela Baca is an associate at White & Case LLP. Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP. The authors gratefully acknowledge the contributions of Sameer Sabougi.

2 For an overview of enforcement between 2020 and 2021, see, for example, A Kertesz, White & Case LLP, 'US antitrust policy targets the technology sector', 28 September 2021, available at: www.whitecase.com/publications/insight/taiwanese-investors-and-businesses/us-antitrust-policy-targets-technology-sector; Rebecca Farrington, Anna Kertesz and Heather Greenfield, White & Case LLP, 'Key Developments – United States', 21 May 2021, available at: www.whitecase.com/publications/insight/global-merger-control/united-states; J Mark Gidley et al., White & Case LLP, 'US antitrust spotlight on the technology industry: Is 2021 a year of change?', 10 May 2021, available at: www.whitecase.com/publications/insight/us-antitrust-spotlight-technology-industry.

3 See, for example, US Department of Justice (DOJ), 'Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section', 24 January 2022, available at: www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york. ('Antitrust

approaches to challenging anticompetitive conduct and mergers in the tech space, including deals that are neither horizontal nor vertical and are instead 'ecosystem-driven, concentric, or conglomerate' deals.[4]

As a result of these views, one of the key developments of 2022, was the DOJ's and the FTC's joint announcement to revise the agencies' Horizontal and Vertical Merger Guidelines (the Merger Guidelines). This announcement is an attempt by US Antitrust Agency leadership to address what it perceives to be current gaps in merger enforcement of digital markets and digital gatekeepers, such as addressing zero-price dynamics, the competitive significance of data and network effects.[5] This new approach to antitrust enforcement drives a strategic vision that aims to bring and win big cases against major technology companies, while developing new and creative ways to do so.

In addition to revising the Merger Guidelines, AAG Kanter and Chair Khan have promised aggressive enforcement to address what they believe to be 'modern market realities' in digital markets acquisitions.[6] In March 2022, in separate speeches, AAG Kanter and Chair Khan each outlined strategies targeted at

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law enforcement has not succeeded in keeping pace with these massive changes in our economy. In my view, the only way to reinvigorate antitrust enforcement is to adapt our approach to reflect the obvious economic and transformational technological changes that now define our economy.')

4 US Federal Trade Commission (FTC), 'Keynote Remarks of Lina M. Khan International Competition Network Berlin, Germany', 6 May 2022, available at: www.ftc.gov/system/files/ftc_gov/pdf/Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20the%20ICN%20Conference%20on%20May%206%2C%202022_final.pdf.

5 id.; FTC, 'Request for Information on Merger Enforcement', 18 January 2022, available at: www.regulations.gov/document/FTC-2022-0003-0001.

6 Sarah Forden and David McLaughlin, 'Biden's New Antitrust Cop Threatens to Slam Brakes on Mergers, Bloomberg' (1 April 2022, 7:00 AM), available at: www.bloomberg.com/news/articles/2022-04-01/biden-s-new-antitrust-cop-threatens-to-slam-brakes-on-mergers; and DOJ, 'Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference' in Brussels, Belgium, 31 March 2022, available at: www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

addressing competition in digital markets.[7] In summary, their remarks focused on the following goals, which signal how US Antitrust Agencies and the Biden Administration will continue to pursue action against technology companies:

- closely scrutinise acquisitions of nascent competitors in digital markets, even if they are not 'purely vertical or horizontal' and consider concepts beyond foreclosure and exclusion when developing theories of harm in acquisitions of emerging rivals;[8]
- assess 'moat-building strategies' and examine the 'whole course of exclusionary conduct by dominant platforms,'[9] rather than as separate actions in isolation;
- focus on discriminatory strategies that digital platforms use to maintain their monopoly power, such as self-preferencing, restrictions on interoperability, data aggregation and unreasonable pricing for access;[10] and
- develop early and swift remedies that prevent bad actors from achieving an early lead or locking up certain parts of the market.

In addition to these statements and proposed revisions to the Merger Guidelines, the US Antitrust Agencies have started to factor in labour, racial and other social considerations when assessing mergers and anticompetitive conduct. Beyond this, the US Antitrust Agencies have implemented several changes in the merger review and remedy process, including scrutiny of certain transactions that traditionally would not be scrutinised, more in-depth second requests, longer agency investigation periods (which implicate financing considerations and closing timelines) and refusal to consider divestitures in some instances.

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7 DOJ, 'Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference' in Brussels, Belgium, 31 March 2022, available at: www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

8 Id.; FTC, 'Remarks of Chair Lina M. Khan Charles River Associates Conference Competition & Regulation in Disrupted Times Brussels, Belgium', 31 March 2022, available at: www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf.

9 DOJ, 'Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference' in Brussels, Belgium, 31 March 2022, available at: www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

10 FTC, 'Remarks of Chair Lina M. Khan Charles River Associates Conference Competition & Regulation in Disrupted Times Brussels, Belgium', 31 March 2022, available at: www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf. ('After achieving a gatekeeper position, these firms . . . can exploit their leverage over dependent users by increasing the price of access, such as by hiking fees, demanding valuable data, or imposing oppressive contractual terms.')

In addition to these changes, the US Antitrust Agencies are actively using Section 2 of the Sherman Act when challenging mergers, and the DOJ is considering bringing criminal Section 2 cases despite the limited use of civil Section 2 cases prior to 2020. Collectively, these recent positions signal how the DOJ and the FTC will find aggressive and creative ways to enforce US antitrust laws against technology companies and digital platforms.

Despite this renewed focus and attention on technology and digital platform enforcement, serious questions remain about the capacity for the agencies to fulfil their vision. A key issue is the lack of resources for the agencies to bring and win large and complex cases.[11] Lawmakers from both parties and in both chambers of the US Congress have introduced antitrust legislation signalling some bipartisan appetite for legislative antitrust reform to target tech companies and digital platforms.

There are at least seven separate bills across both chambers. Some provisions in the bills propose an increase in the fees charged to merging parties with the proceeds going to fund more aggressive enforcement, especially in the digital space.[12] Others propose establishing a Bureau of Digital Markets within the FTC.[13] Other bills propose amending the standards set forth in Section 7 of the Clayton Act and the removal of the requirement to define a relevant market unless explicitly required by another statute.

One of the key bills, the American Innovation and Choice Online Act, has the strongest bipartisan support. This bill has been introduced in the Senate, but the Senate Majority Leader, Senator Schumer, has not put it up for a vote and is not expected to in the short-term, citing concerns that it does not have the votes to pass.[14] As such, the US Antitrust Agencies remain critically understaffed and under-resourced.

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11 See, for example, Chairman Nadler Statement for Markup of H:R. 3843, the Merger Filing Fee Modernization Act of 2021, 23 June 2021.

12 Merger Filing Fee Modernization Act, S. 228, 117th Cong. (2021), available at: www.congress.gov/bill/117th-congress/senate-bill/228/text.

13 See, for example, H.R.3816 - American Choice and Innovation Online Act, available at: www.congress.gov/bill/117th-congress/house-bill/3816.

14 Emily Birnbaum, 'Senate's Antitrust Crackdown Sputters as Schumer Signals Doubts', Bloomberg (26 July 2022, 8:47 PM), available at: www.bloomberg.com/news/articles/2022-07-27/schumer-tells-donors-tech-antitrust-measure-is-unlikely-to-pass#xj4y7vzkg.

In addition, morale at the FTC has suffered in the past year, leading to the departures of several high-level leaders and staff within a number of bureaus.[15]

In summary, the leadership of the US Antitrust Agencies have adopted a more aggressive vision for antitrust enforcement, especially in the digital realm, and despite their resource constraints, they are moving toward achieving their policy vision.

White House policy initiatives and developments

Under US President Joe Biden, the administration has ushered increased attention and cohesiveness to competition policy, with efforts to strengthen and coordinate antitrust enforcement across the US federal government. Over a year ago, on 9 July 2021, the White House issued the landmark Executive Order on Promoting Competition in the American Economy.[16] The Order directed a number of government agencies – beyond the DOJ and the FTC – to adopt rules and regulations to accomplish the competition-enhancing goals set forth in the Order.[17]

The Order aims to address the administration's concerns about purported increased consolidation and abuse of market power.[18] Among other initiatives, it encourages the DOJ and the FTC to challenge consummated mergers – including technology and digital platform mergers – that prior administrations did not challenge. It also encourages agencies to focus enforcement on a perceived lack of competition in labour markets, agricultural markets, healthcare markets and technology markets.[19]

The Order establishes the White House Competition Council, which is tasked with implementing a 'whole-of-government' approach to competition policy.[20] The White House Competition Council has been in force for a year, and

15 See Cat Zakrzewski, 'Sinking FTC workplace Rankings Threaten Chair Lina Khan's Agenda', *The Washington Post* (13 July 2022, 12:05 AM), available at: www.washingtonpost.com/technology/2022/07/13/ftc-lina-khan-rankings.

16 White House, Executive Order on Promoting Competition in the American Economy, 9 July 2021, available at: www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.

17 See, for example, White & Case LLP, 'Sweeping US Order on Promoting Competition', 12 July 2021, available at: www.whitecase.com/publications/insight/sweeping-us-order-promoting-competition.

18 White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy, 9 July 2021, available at: www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy.

19 id.

20 id.

since its establishment, it has brought unprecedented levels of coordination across the US federal government on competition policy. For example, in January 2022, the DOJ and the US Department of Agriculture released a statement of principles and commitments to 'protect against unfair and anticompetitive practices' in the agriculture sector.[21]

In March 2022, the DOJ and the US Labour Department signed a memorandum of understanding designed to 'protect workers from employer collusion, ensure compliance with the labour laws and promote competitive labour markets and worker mobility.'[22] In May 2022, the US Treasury Department's Office of the Comptroller of the Currency announced efforts to work with the DOJ and other US federal banking agencies to review frameworks to analyse bank mergers.[23]

The White House Competition Council has also continued to advance the notion that new frameworks are warranted to address 'new industries and new technologies – including the challenges posed by the rise of the dominant Internet platforms.'[24] In remarks celebrating the one-year anniversary of the launch of the White House Competition Council, Brian Deese, Chair of the White House Competition Council and Director of the National Economic Council, emphasised that a 'key area is promoting competition in the tech sector' and urged the US Congress to pass the bipartisan tech antitrust legislation.

DOJ and FTC policy changes and initiatives

Buttressed by the White House Competition Council, the US Antitrust Agencies have implemented a number of policy changes and initiatives targeting technology companies. As noted above, the DOJ and the FTC announced a review of

21 US Department of Agriculture Press Release 0001.22, Agriculture Department and Justice Department Issue Shared Principles and Commitments to Protect Against Unfair and Anticompetitive Practices, 3 January 2022, available at: www.usda.gov/media/press-releases/2022/01/03/agriculture-department-and-justice-department-issue-shared.

22 DOJ, Memorandum of Understanding Between the US Department of Justice and US Department of Labor, 10 March 2022, available at: www.justice.gov/opa/press-release/file/1481811/download.

23 Office of the Comptroller of the Currency, 'Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings "Bank Mergers and Industry Resiliency"', 9 May 2022, available at: www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf.

24 White House, 'Brian Deese Remarks on President Biden's Competition Agenda', 14 July 2022, available at: www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/brian-deese-remarks-on-president-bidens-competition-agenda.

the Merger Guidelines in January 2022. They issued a public call, a 'Request for Information,' for comments on how the US Antitrust Agencies can modernise enforcement of antitrust laws.[25]

Their questions to the public broadcast their focus on technology companies as they revamp the Merger Guidelines. For example, they specifically request comments on how the US Antitrust Agencies should view potential or nascent competitors, innovation and digital markets. They request information about how the guidelines should approach market definition in zero-price markets or negative-price markets, and they ask for views on 'competition for attention' and the 'appropriate indicia of market power in complex and multi-sided markets'.

Although it is not clear when the US Antitrust Agencies will announce the new guidelines, the comment period concluded in April 2022, with the agencies receiving over 5,000 responses. In the meantime, the FTC's and the DOJ's statements in announcing review of the Merger Guidelines suggest how the FTC and the DOJ may begin to approach their analysis of technology mergers in the coming months.

In May 2022, the FTC and the DOJ conducted a 'listening forum' on the effects of mergers in the technology sector. The forum was an opportunity for AAG Kanter and Chair Khan to hear from smaller business leaders, investors and workers in the technology sector. During the forum, AAG Kanter and Chair Khan reiterated their commitment to antitrust enforcement in digital markets.[26]

More generally, the US Antitrust Agencies have announced other policy changes that, while not specific to technology companies, will nonetheless have an impact. For example, the FTC recently rescinded the 1995 FTC policy statement that removed the requirement for prior approval as a matter of course. This policy meant that the FTC would only issue prior approval notice for cause. Now, however, the FTC is using this tool to target more conduct, especially in digital

25 FTC, Request for Information on Merger Enforcement, 18 January 2022, available at: www.regulations.gov/document/FTC-2022-0003-0001; see also FTC Press Release, 'Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers', 18 January 2022, available at: www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

26 FTC, 'FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions- Technology', 12 May 2022, available at: www.ftc.gov/system/files/ftc_gov/pdf/FTC%20and%20Justice%20Department%20Listening%20Forum%20on%20Firsthand%20Effects%20of%20Mergers%20and%20Acquisitions-%20Technology%20-%20May%2012%-2C%202022_0.pdf.

markets, as the rescinding of this policy could require a lengthy prior approval process even for transactions that would not be reportable under the Hart-Scott-Rodino Act (HSR).

As another example, in September 2021, the FTC issued a statement announcing that it would make the Second Request process 'more streamlined and more rigorous' to help the agency cope with the recent surge in merger filings.[27] The FTC has promised 'heightened scrutiny' and a more analytically rigorous review of transactions.

In December 2021, speaking at the FTC and the DOJ workshop on labour markets, Chair Khan and AAG Kanter advocated for the US Antitrust Agencies to evaluate the effects of mergers in labour markets and how these transactions may affect workers' wages and working conditions. In practice, this has meant Second Requests that are broader in scope, and more costly and time-consuming review processes for merging parties.

Legislative developments

Both houses of Congress have proposed a raft of potential new bills to address competition in the digital arena. Most notably, the desire for reform has come from both Republicans and Democrats, despite the fractious nature of Congress. The following is a summary of key legislation introduced impacting digital markets:

- American Innovation and Choice Online Act: This bill would prohibit certain large online platforms from engaging in self-preferencing, unfairly limiting the availability on the platform of competing products from another business or discriminating in the application or enforcement of the platform's terms of service among similarly situated users. The bill proposes restricting a platform's use of non-public data obtained from or generated on the platform and prohibits the platform from restricting access to platform data generated by the activity of a competing business user. [28]

27 Holly Vedova, FTC, 'Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave', 28 September 2021, available at: www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave.

28 See American Innovation and Choice Online Act, S. 2992, 117th Cong. (as reported by S. Comm. on the Judiciary, 2 March 2022), available at: www.congress.gov/bill/117th-congress/senate-bill/2992/text.

- Augmenting Compatibility and Competition by Enabling Service Switching Act: This bill would require some of the most dominant social media platforms to make user data portable and their services interoperable with other platforms.[29]
- Competition and Antitrust Law Enforcement Reform Act: Although not specific to digital markets, this bill proposes to remove the requirement that the FTC or the DOJ need to define a relevant market, which is particularly relevant to digital platforms, as it could make it easier for the agencies to bring and win lawsuits.[30]
- Competition and Transparency in Digital Advertising Act: This bill would prohibit companies from owning more than one portion of the digital advertising ecosystem (e.g., buy-side, sell-side and ad exchange) if they process more than US$20 billion in digital ads.[31]
- Consolidation Prevention and Competition Promotion Act: This bill would apply a stricter standard for permissible mergers by prohibiting mergers that create an appreciable risk of materially lessening competition or unfairly lower the prices of goods or wages because of a lack of competition among buyers or employers (i.e., a monopsony).[32]
- Digital Platform Commission Act: This bill would establish a commission responsible for assuring 'the fairness and safety of algorithms on digital platforms' as well as promoting competition. It would also have the authority to conduct investigations, impose penalties and to set new rules, such as those that ensure moderation transparency and the protection of consumers.[33]
- Ending Platform Monopolies Act: This bill would change the interlocking directorate rules under Section 8 of the Clayton Act to cover employees and agents of a digital platform. It would also prevent certain online platforms

29 Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021, H.R. 3849, 117th Cong. (2021), available at: www.congress.gov/bill/117th-congress/house-bill/3849/text.

30 Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. §13(a) (2021), available at: www.congress.gov/bill/117th-congress/senate-bill/225/text.

31 Competition and Transparency in Digital Advertising Act, S. 4258, 117th Cong. (2022), available at: www.congress.gov/bill/117th-congress/senate-bill/4258/text.

32 Consolidation Prevention and Competition Promotion Act of 2021, S. 3267, 117th Cong. (2021), available at: www.congress.gov/bill/117th-congress/senate-bill/3267.

33 Digital Platform Commission Act of 2022, S. 4201, 117th Cong. (2022), available at: www.congress.gov/bill/117th-congress/senate-bill/4201/text.

from offering certain products or services from another line of business that is owned or controlled by the platform (i.e., it would prevent Amazon.com from selling Amazon Essentials or Amazon basics).[34]

- Merger Filing Fee Modernization Act: This bill would change pre-merger filing fees and would increase enforcement resources.[35]
- Open App Markets Act: This bill prevents app stores from (1) requiring developers to use an in-app payment system owned or controlled by an app store as a condition of distribution or accessibility, (2) requiring that pricing or conditions of sale be equal to or more favourable on its app store than another app store or (3) taking punitive action against a developer for using or offering different pricing terms or conditions of sale through another in-app payment system or on another app store.[36]
- Platform Competition and Opportunity Act: This bill would permit the US Antitrust Agencies to block acquisitions by dominant platforms that are direct or potential competitors or expand a platform's market position.[37]
- Prohibiting Anticompetitive Mergers Act: This bill would ban mergers valued at US$5 billion or more and deals resulting in market shares over 33 per cent for sellers or 25 per cent for employers, and deals resulting in highly concentrated markets under the 1992 Horizontal Merger Guidelines. This bill would also establish procedures for US Antitrust Agencies to conduct retrospective reviews and break up harmful deals.[38]
- Trust-Busting for the Twenty-First Century Act: This bill proposes that acquisitions by 'dominant digital firms' (i.e., those with a 'dominant market power') be made presumptively illegal – short-circuiting the established presumption under the antitrust laws.[39]

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34 Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021), available at: www.congress.gov/bill/117th-congress/house-bill/3825/text.

35 Merger Filing Fee Modernization Act, S. 228, 117th Cong. (2021), available at: www.congress.gov/bill/117th-congress/senate-bill/228/text.

36 Open App Markets Act, S. 2710, 117th Cong. (as reported by S. Comm. on the Judiciary, 17 February 2022), available at: www.congress.gov/bill/117th-congress/senate-bill/2710/text.

37 Platform Competition and Opportunity Act of 2021, S. 3197, 117th Cong. (2021), available at: www.congress.gov/bill/117th-congress/senate-bill/3197/text.

38 Prohibiting Anticompetitive Mergers Act of 2022, S. 3847, 117th Cong. (2022), available at: www.congress.gov/bill/117th-congress/senate-bill/3847/text.

39 Trust-Busting for the Twenty-First Century Act, S. 1074, 117th Cong. §4 (2021), available at: www.congress.gov/bill/117th-congress/senate-bill/1074/text.

Of these bills, the American Innovation and Choice Online Act, sponsored by US Senator Amy Klobuchar (Democratic) and co-sponsored by US Senator Chuck Grassley (Republican) and other Republican and Democratic senators, has received the most traction, but it has not been put up to a vote owing to other legislative priorities.[40]

Trends in decisional practice, including key investigations against tech companies

As part of the US Antitrust Agencies' broader push to increase their enforcement in technology, the DOJ and the FTC have developed a much more sceptical and aggressive approach to digital enforcement. This trend is exemplified in several key lawsuits from the past year. Some key cases will be summarised in this chapter, and the 'United States: Tech Merger' chapter will analyse other key tech mergers in more detail.

The first is *United States v. Google*, which was brought by the DOJ and several states against Google on 20 October 2020. The DOJ alleges that Google has engaged in anticompetitive behaviour in search services and search advertising.[41] In particular, the DOJ has focused on the use of self-preferencing in advertising on Google's search results, as well as an alleged web of exclusivity agreements that tied users' mobile searches to Google.[42] As of October 2022, the case is still in discovery. The trial for the case is tentatively scheduled for September 2023.

The FTC has also sued Meta Platforms (formerly known as Facebook), alleging that Meta holds monopoly power in an alleged market for 'personal social networking services'.[43] On 19 August 2021, a US district court dismissed the FTC's complaint as vague and lacking facts sufficient to support its allegations. On 8 September 2021, the FTC filed an amended complaint alleging the same product market.[44] The US district court did not dismiss the amended complaint, and as at October 2022, the case is still in discovery.

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40 David McCabe and Stephanie Lai, 'Clock Running Out on Antitrust Bill Targeting Big Tech', *The New York Times* (5 August 2022), available at: www.nytimes.com/2022/08/05/business/antitrust-bill-klobuchar.html.

41 Complaint, *United States v. Google*, No. 1:20-cv-03010 (D.D.C. 20 October 2020), available at: www.justice.gov/opa/press-release/file/1328941/download.

42 id.

43 Complaint at 1, 51-52, *Federal Trade Commission v. Meta Platforms, Inc.*, 1:20-cv-03590 (D.D.C. 9 December 2020) (ECF No. 3).

44 Substitute Amended Complaint, *Federal Trade Commission v. Meta Platforms, Inc.*, 1:20-cv-03590 (D.D.C. 9 December 2020) (ECF No. 82).

On 1 August 2022, the court ordered FTC to categorise for Meta the features or activities available on Facebook, Instagram, WhatsApp and Messenger that are included or excluded from the FTC's definition of 'personal social networking', and to supplement its response if it takes a different position on any such feature or activity in the future.[45] Most recent is the FTC's lawsuit to block Meta's acquisition of Within Unlimited on 27 July 2022. That case will be analysed in more detail in the 'United States: Tech Mergers' chapter.

The DOJ is also considering bringing a second monopoly lawsuit against Google, this time focused on Google's ad business and digital advertising practices.[46] Google already faces a similar lawsuit filed by the attorneys general for 16 states and Puerto Rico in December 2020, alleging that Google monopolises the online digital advertising market.[47] The DOJ's lawsuit would come after years of DOJ investigation of Google's alleged anticompetitive behaviour in the digital advertising market.

In addition to these tech merger cases, there are a number of vertical merger decisions with implications for technology and digital markets.

For example, in March 2021, the FTC filed an administrative complaint to block the acquisition of GRAIL by Illumina, alleging that this transaction would reduce competition for certain key cancer therapies.[48] The FTC alleged that the merger would give Illumina the incentive and ability to disadvantage GRAIL's multi-cancer testing competitors by raising their costs for, or by foreclosing them from, accessing Illumina's must-have technologies. The parties maintained that this transaction would bring more innovation to the cancer market and would increase patient access to advance cancer therapies and tests.[49] The parties decided not to wait for clearance from the FTC before closing and closed the deal on

45 Minute Order at 2, *Federal Trade Commission v. Meta Platforms, Inc.*, 1:20-cv-03590 (D.D.C. 9 December 2020) (ECF. No. 165).

46 See Leah Nylen and Gerry Smith, 'DOJ Is Preparing to Sue Google Over Ad Market as Soon as September', *Bloomberg* (9 August 2022, 3:45 PM), available at: www.bloomberg.com/news/articles/2022-08-09/doj-poised-to-sue-google-over-ad-market-as-soon-as-september.

47 *In re Google Digital Advertising Antitrust Litigation*, 1:21-md-03010 (S.D.N.Y. 12 August 2021). On 13 September 2022, the district court granted Google's motion to dismiss for one count – the allegation that Google entered into an unlawful restraint of trade with non-party Facebook – and denied it for all other counts.

48 *Illumina, Inc. and Grail, Inc.*, Docket No. 9401, F.T.C. 201 0144 (30 March 2021).

49 See Illumina Press Release, 'Illumina Acquires GRAIL to Accelerate Patient Access to Life-Saving Multi-Cancer Early-Detection Test', 18 August 2021, available at: https://investor.illumina.com/news/press-release-details/2021/Illumina-Acquires-GRAIL-to-Accelerate-Patient-Access-to-Life-Saving-Multi-Cancer-Early-Detection-Test/default.aspx.

18 August 2021.[50] Trial began in August 2021, and on 1 September 2022, the administrative law judge (ALJ) issued an initial decision dismissing the FTC's challenge.[51] The ALJ found the FTC's alleged evidence unconvincing with regard to Illumina's acquisition of GRAIL substantially lessening competition or providing Illumina with an incentive to act in an anticompetitive way. [52]

Even if this was true, the ALJ argued that Illumina's actions would be effectively constrained by a binding 'open letter' (supply contract) it has with all its customers, including current GRAIL rivals, that provides substantial enforcement mechanisms to prevent Illumina from withholding supplies or ending relationships with competitors.[53] Moreover, the ALJ noted that Illumina actually has an incentive to maintain positive relationships with GRAIL's competitors since they could stop choosing to invest in Illumina's platform, which would limit the further growth of Illumina's sales.[54]

In December 2021, the FTC sued to block US chip supplier NVIDIA's US$40 billion acquisition of Arm Ltd semiconductor chips. The FTC alleged that the transaction would give one of the world's largest chip suppliers control over key computing technology and design that rival firms rely on to develop their own competing chips. The FTC also alleged that the transaction would stifle innovation in next generation technologies, including those used to power data centres and driver assistance systems in cars. In February 2022, the parties terminated the transaction.

In January 2022, the FTC sued to block Lockheed Martin's US$4.4 billion proposed vertical acquisition of Aerojet. The FTC alleged that the transaction would allow Lockheed to control critical components that could harm rivals and would further consolidate the defence and national security markets. In its complaint, the FTC observed that the '[t]he US missile industry is highly concentrated up and down the supply chain' and that 'it has unique characteristics that make it difficult—if not impossible—for prime contractors to switch to alternate suppliers for [the input technology].' In the upstream relevant markets,

50 id.

51 FTC Press Release, 'Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail' (12 September 2022), available at: www.ftc.gov/news-events/news/press-releases/2022/09/administrative-law-judge-dismisses-ftcs-challenge-illuminas-proposed-acquisition-cancer-detection?utm_source=govdelivery.

52 *Illumina, Inc., and Grail, Inc.*, Docket No. 9401, F.T.C. 201 0144 (9 September 2022) (pub. redacted initial decision), at 2.

53 id. at 178.

54 id. at 174.

there were effectively only two competitors: Aerojet and Northrop, with Aerojet as the only independent supplier of critical components because Northrop also competed downstream against Lockheed. In the downstream relevant markets, there were only four competitors: Lockheed, Northrop, Boeing and Raytheon. In February 2022, the parties terminated the transaction.

These cases signal an appetitive for bringing vertical challenges and show that the US Antitrust Agencies will not shy away from alleging vertical theories of harm when assessing digital markets.

In addition to these cases, there have been a number of other cases brought by private litigants against tech and digital market companies. These cases may have a bearing on other tech litigation and investigations initiated by the US Antitrust Agencies, as they could influence how the authorities view relevant product markets, competitive theories of harm and effects on innovation.

CHAPTER 8

United States: Tech Mergers

George L Paul, D Daniel Sokol and Gabriela Baca[1]

Between 2019 and 2022, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) (collectively, the US Antitrust Agencies) have been active in issuing Second Requests and filing challenges to block mergers and acquisitions involving digital services and technology companies. This Chapter addresses recent technology and digital sector merger cases and highlights key trends emerging from enforcement in those sectors.

US merger cases with a digital aspect between 2019 and 2022

Amazon (2022)

In the span of a month, Amazon announced it would acquire One Medical for US$3.5 billion and Roomba for US$1.65 billion. One Medical is a tech-focused, primary-care healthcare company, and its acquisition, combined with Amazon's 'existing online pharmacy and nascent telehealth and house call services', could play a role in raising Amazon's profile in the health industry and in the segment for virtual healthcare offerings.[2] Roomba is the manufacturer of the iRobot vacuums,

1 George L Paul is a partner, D Daniel Sokol is a senior adviser and Gabriela Baca is an associate at White & Case LLP. Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP. The authors gratefully acknowledge the contributions of Sameer Sabougni.

2 John Tozzi and Matt Day, Amazon Gets 'Amazon Gets "Whole Foods of Primary Care" With One Medical Deal', *Bloomberg* (21 July 2022, 12:36 PM), available at: www.bloomberg.com/news/articles/2022-07-21/amazon-gets-whole-foods-of-primary-care-with-one-medical-deal.

and Amazon announced its plans to acquire Roomba after introducing its own similar offering, the Amazon Astro, a camera-equipped robot device powered by Amazon's Alexa smart home system.[3]

The FTC is closely reviewing the proposed acquisitions. Amazon is facing data-related scrutiny in both its acquisitions, similar to the FTC's concerns over user data in Microsoft's acquisition of Activision Blizzard.

On 2 September 2022, it was reported that the FTC has launched an investigation into Amazon's acquisition of iRobot, with one of its concerns being 'whether the data generated about a consumer's home by iRobot's Roomba vacuum will give [Amazon] an unfair advantage over a wide variety of other retailers'.[4]

On the same day, One Medical's parent company disclosed in a US Securities and Exchange Commission filing that One Medical and Amazon each received requests for additional information and documentary material (Second Requests) in connection with Amazon's acquisition of One Medical.[5] '[T]he FTC is asking questions about the data Amazon would have access to, querying insurance companies and others about how One Medical's patient data would potentially give it an advantage over competitors and customers,' especially since Amazon has received criticism over its previous use of data collection and acquisitions to grow its position in the e-commerce segment.[6] The FTC's scrutiny will not necessarily result in a lawsuit to block both deals, though. US Antitrust Agencies might not have a strong case against Amazon's acquisitions of either company and might elect not to challenge the deals. Both acquisitions could be a test for Chair Khan's enforcement priorities, and the FTC's ability to execute on its stated policy positions.[7]

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3 Brad Stone, 'What Amazon's Roomba and One Medical Deals Have in Common', *Bloomberg* (8 August 2022, 6:45 AM), available at: www.bloomberg.com/news/newsletters/2022-08-08/amazon-s-roomba-and-one-medical-deals-explained.

4 Josh Sisco, 'FTC digs in on Amazon's iRobot deal', *POLITICO* (2 September 2022), available at: www.politico.com/news/2022/09/02/amazons-ftc-problem-keeps-growing-with-irobotone- medical-probes-00054749.

5 AP Staff, 'FTC investigating Amazon's $3.9B purchase of One Medical' *AP News* (2 September 2022), available at: https://apnews.com/article/technology-health-federal-trade-commissiongovernment- and-politics-b0f46b92d4a5fabdad0bda542298eabb.

6 See footnote 4; see also Leah Nylen, 'Amazon's iRobot Deal Seen Facing Tough FTC Antitrust Review', *Bloomberg* (5 August 2022).

7 For example, Amazon closed its deal to acquire MGM Studios in March 2022 after the Federal Trade Commission (FTC) decided not to sue to enjoin the transaction, and European regulators cleared the deal; however, the FTC lacked a Democratic majority at that time. Now that current FTC Chair Lina Khan has a Democratic majority on the commission, the FTC might more easily decide to block either transaction. See Leah Nylen, 'U.S. antitrust

In March 2022, Amazon closed its US$8.5 billion acquisition of MGM. As a result of the transaction, Amazon's Prime Video, its online streaming service, will acquire the rights to more than 4,000 movies and 17,000 TV shows. Amazon announced the acquisition in May 2021.

On 15 March 2022, the EU granted Amazon unconditional approval, stating that the transaction would not raise competition concerns in Europe.[8] The FTC did not challenge the transaction by the mid-March 2022 deadline, and Amazon moved to close the transaction; however, the FTC has the ability to challenge acquisitions post-consummation, and recent reports suggest that the FTC may still be reviewing the transaction and could challenge the acquisition.[9]

Meta/Within (2022)

On 27 July 2022, the FTC sued in US district court to enjoin Meta Platforms' proposed acquisition of Within.[10] According to the complaint, Meta is a provider of virtual reality (VR) devices and apps in the United States. Previously, Meta had acquired several VR apps, including fitness app Beat Saber and Oculus VR, Inc., a VR headset manufacturer and owner of a distribution platform for VR software apps.

Within is a software company that develops apps for VR devices, such as the fitness app Supernatural.[11] The FTC alleged that Meta's proposed acquisition of Within would 'combine the makers of two of the most significant VR fitness apps',

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enforcers won't challenge Amazon's MGM deal, dashing hopes of monopoly critics', Politico (17 March 2022, 4:12 PM), available at: www.politico.com/news/2022/03/17/u-s-antitrust-enforcers-amazons-mgm-deal-00018252; see footnote 6; Veronica Irwin, 'European regulators say Amazon can buy MGM because it's not a "must-have"', Protocol (15 March 2022), available at: www.protocol.com/bulletins/amazon-mgm-acquisition-eu.

8 European Commission Press Release IP/22/1762, 'Commission approves acquisition of MGM by Amazon' (15 March 2022), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1762.

9 Tim Baysinger, F'TC probes Amazon's MGM deal as part of antitrust investigation', *Axios* (1 June 2022), available at: www.axios.com/pro/media-deals/2022/06/01/ftc-amazon-mgm-deal-antitrust-investigation; Joe Flint et al., 'Amazon Moves to Force FTC Antitrust Decision on MGM Deal', *The Wall Street Journal* (3 March 2022, 4:19 PM), available at: www.wsj.com/articles/amazon-moves-to-force-ftc-antitrust-decision-on-mgm-deal-11646341124.

10 See Complaint, *FTC v. Meta Platforms, Inc. et al.*, 3:22-cv-04325 (N.D. Cal. 27 July 2022), available at: www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf.

11 Within's Supernatural app would be considered a 'dedicated fitness app', while Meta's Beat Saber would be considered an 'incidental fitness app'. The complaint alleges that '[p]ublicly, Meta has acknowledged a VR Fitness App market comprising both dedicated and incidental fitness apps. Meta includes Beat Saber in this market.' id. at 15.

thereby significantly reducing competition, or tending to create a monopoly, in two relevant product markets: the VR dedicated fitness app market (with dedicated fitness apps being apps that deliberately provide a structured physical workout), and the VR fitness app market (comprising both VR 'dedicated fitness apps' and 'incidental fitness apps', which are apps whose primary focus is not fitness but that allow users to 'accidentally' get a workout because of the physically active nature of the apps).[12] The FTC also contended that Meta's proposed acquisition would enhance Meta's market power in the already-concentrated VR fitness app market and was part of its effort to 'exploit the network-effects dynamic in VR' to grow its position in the overall VR 'metaverse'.[13]

Moreover, the complaint alleges that since Meta is a potential entrant in the VR-dedicated fitness app market and has the resources to build its own dedicated fitness app, its acquisition of Within would eliminate existing and potential competition, and dampen future innovation, in the VR dedicated fitness app market.[14]

On 5 August 2022, the district court issued a temporary restraining order, and Meta and Within agreed not to close the proposed acquisition until 1 January 2023, or until the court rules on the FTC's injunctive request, whichever comes first. As at September 2022, the court has not ruled on the FTC's request for a preliminary injunction.[15] This is the first time the FTC has pre-emptively challenged an acquisition by Meta.[16]

Broadcom/VMware (2022)

In May 2022, Broadcom Inc., one of the largest semiconductor chipmakers in the world, announced plans to acquire VMware, Inc., a cloud software company, for US$61 billion. After Broadcom withdrew its US$117 billion acquisition of Qualcomm in 2018, Broadcom shifted towards acquiring software and cloud services companies.[17] Broadcom now hopes to combine VMware's multi-cloud

12 See footnote 10 at p. 3 and p. 6.

13 id. at 4–5 and 17–18.

14 id. at 18–19.

15 See Temporary Restraining Order, *FTC v. Meta Platforms, Inc. et al.*, 5:22-cv-04325-EJD (N.D. Cal. July 27, 2022) (ECF No. 56).

16 Sarah Frier, 'Meta Pauses Purchase of Within, Vows to Fight FTC Lawsuit', *Bloomberg Law* (5 August 2022, 4:32 PM), available at: www.bloomberglaw.com/bloomberglawnews/tech-and-telecom-law/X7R7NDR8000000?bna_news_filter=tech-and-telecom-law#jcite.

17 Javier Espinoza et al., 'Broadcom's $69bn VMware Deal Set for Lengthy EU Antitrust Investigation', *Financial Times* (23 June 2022), available at: www.ft.com/content/efc1e0b7-93a8-4189-a503-368193d3fb20.

offerings and Broadcom's software portfolio.[18] VMware's offerings include data centre management, digital infrastructure tools and multi-cloud services. If consummated, Broadcom's acquisition would be 'among the largest in the history of the technology industry, second only to Microsoft's proposed US$75 billion purchase of games maker Activision Blizzard.'[19]

However, according to public filings by both companies, the FTC issued Second Requests for information on 11 July 2022.[20] As at September 2022, the FTC has not commented on its investigation. The EU has indicated that it will be launching a potentially lengthy antitrust investigation into the deal after receiving concerns from some opponents, including existing VMware clients.[21]

Regulators will likely be concerned with, and seek assurances from Broadcom over, tying or bundling arrangements with customers (e.g., exclusivity or loyalty agreements), retaliation against customers for doing business with Broadcom competitors and price increases. Broadcom will likely argue that the proposed acquisition is not a merger between two competitors and that it will not lead to price increases, negatively affect innovation or undermine price or quality competition.

UnitedHealth Group's Optum and Change Healthcare (2022)

On 24 February 2022, the DOJ challenged in US district court UnitedHealth Group's US$13 billion proposed acquisition of Change Healthcare.[22] UnitedHealth is the largest healthcare company by revenue and owner of the largest health insurance company in the United States. Change is the leading source of key technologies to UnitedHealth's health insurance rivals. It also has access to sensitive data about UnitedHealth's rivals in the relevant product market for the sale of commercial health insurance to national accounts and large group employers – markets that the complaint contends satisfy the 'hypothetical monopolist' test.[23]

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18 'Broadcom and VMware: Planning for the next generation of infrastructure software', Broadcom (22 June 2022), available at: www.broadcom.com/blog/broadcom-vmware.

19 See footnote 17.

20 Bryan Koenig, 'Broadcom's $61B Deal For VMware Under FTC Microscope', *Law360* (19 July 2022, 7:13 PM), available at: www.law360.com/articles/1512610/broadcom-s-61b-deal-for-vmware-under-ftc-microscope.

21 See footnote 17.

22 See Complaint, *United States et al. v. UnitedHealth Group Incorporated and Change Healthcare, Inc.*, 1:22-cv-00481 (D.D.C. Feb. 24, 2022), available at: www.justice.gov/atr/case-document/file/1476901/download.

23 id. at 24–25 and 27.

The DOJ alleged that UnitedHealth's acquisition of Change would give UnitedHealth access to this data and control over Change's technologies, thereforw allowing UnitedHealth to co-opt its rival insurers' competitive strategies and raise their costs and deny or delay their access to products, services and improvements supplied by Change. It also alleged that UnitedHealth and Change are the two largest, competing vendors in the relevant product market of first-pass claims editing solutions[24] in the United States, with a combined market share of at least 75 per cent; therefore, according to the complaint, the proposed acquisition would lead to a presumptively anticompetitive market concentration and give UnitedHealth a vertically integrated monopoly.[25]

On 19 September 2022, the district court ruled in UnitedHealth's favour and approved its acquisition of Change, but ordered the companies to divest the only Change business with 'direct competitive overlap' with UnitedHealth – its ClaimsXten unit that provides first-pass claims-editing technology – to private equity firm TPG Capital, as proposed by the companies.[26]

The court's ruling delivers a 'blow to enforcer efforts to contest so-called vertical tie-ups connecting companies at different points of the supply chain' and also indicates that the judge 'was persuaded that concerns of horizontal overlap between [competitors] were completely overriden by plans to sell ClaimsXten to TPG', contrary to the government's general stance against divestitures and consent decrees in problematic transactions.[27] In a statement following the court's decision, Assistant Attorney General (AAG) Kanter said the DOJ is 'reviewing the opinion closely to evaluate next steps.'[28]

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24 First-pass claims editing solutions are software and services that health insurers use to review every claim received and help adjudicate them. First-pass claims editing solutions process claims in real time and determine, almost instantly, whether they should be paid, rejected, or flagged for further review.

25 See footnote 22 at 9-10.

26 Bryan Koenig, 'Judge Won't Block UnitedHealth's Purchase Of Change', *Law360* (19 September 2022, 6:01 PM), available at: www.law360.com/competition/articles/1531918/judge-won-t-block-unitedhealth-s-purchase-of-change; see also Order, *UnitedHealth Group et al.*, 1:22-cv-00481 (D.D.C. February 24, 2022), ECF No. 135.

27 See footnote 26.

28 DOJ Press Release 22-991, 'Statement from Assistant Attorney General Jonathan Kanter on the District Court's Decision in U.S. v. UnitedHealth Group and Change Healthcare' (September 19, 2022), available at: www.justice.gov/opa/pr/statement-assistant-attorney-general-jonathan-kanter-district-court-s-decision-us-v.

Microsoft/Activision Blizzard (2022)

In January 2022, Microsoft Corporation announced plans to buy Activision Blizzard, Inc. for around US$70 billion. Activision is the game developer of the popular Call of Duty, World of Warcraft, Candy Crush and Guitar Hero franchises.

The proposed acquisition has come under the scrutiny of several regulators, including the FTC and the UK Competition and Markets Authority (CMA).[29] Regulators will likely 'focus on the combination of [Activision's] gaming portfolio with Microsoft's consoles and hardware systems' and on whether Microsoft's ownership of Activision could harm rival gaming companies, such as Sony, by limiting their access to Activision's biggest games.[30]

The FTC is also examining the deal 'with an eye to the combined companies' access to consumer data, the game developer labour market and the deal's impact on those workers who have accused Activision of discrimination and a hostile workplace.'[31] In a 9 June 2022 letter to Senator Elizabeth Warren, FTC Chair Lina Khan confirmed that the agency is investigating the proposed deal, with a focus on its potential impacts on Activision workers.[32] Given the allegations of sexual harassment and discrimination lobbed against Activision, as well as the recent unionisation of some of its video game testers, the FTC may focus on whether any non-compete clauses or non-disclosure agreements also violate antitrust or consumer protection laws.

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29 'Microsoft's Activision Blizzard bid faces UK antitrust probe', *AP News* (6 July 2022), available at: https://apnews.com/article/technology-united-kingdom-0e19c4494d1754dc12e23bbf9e68d090. UK authorities have until 1 September 2022 to decide whether to approve the deal or escalate their investigation. id. According to Activision's proxy filing, on 3 March 2022, both Activision and Microsoft received Second Requests for additional information and documents from the FTC. Alessio Palumbo, 'FTC Requested Additional Info on Microsoft + Activision Blizzard Deal,' *Wccftech* (22 March 2022), available at: https://wccftech.com/ftc-requested-additional-info-on-microsoft-activision-blizzard-deal. Microsoft has complied, but it is unclear whether Activision has responded to the request yet; once it has, the FTC has 30 days to review the deal before approving or denying it. See Kyle Campbell, 'Microsoft's acquisition of Activision Blizzard might be approved next month', *USA Today* (18 July 2022, 4:47 PM), https://ftw.usatoday.com/2022/07/microsoft-activision-blizzard-ftc.

30 David McLaughlin, 'Microsoft Deal for Activision to Be Reviewed by FTC in U.S.' (1 February 2022, 10:52 AM), available at: www.bloomberg.com/news/articles/2022-02-01/microsoft-deal-for-activision-to-be-reviewed-by-ftc-in-u-s?sref=mf7tnsts#xj4y7vzkg.

31 Josh Sisco, 'Microsoft-Activision Review to Include Impact on Consumer Data, Game Developers', *The Information* (4 April 2022, 4:18 PM), available at: www.theinformation.com/articles/microsoft-activision-review-to-include-impact-on-consumer-data-game-developers.

32 Leah Nylen, 'FTC Is Scrutinizing Labor Impact of Microsoft-Activision Merger', *Bloomberg* (16 June 2022, 5:00 AM), available at: www.bloomberg.com/news/articles/2022-06-16/ftc-scrutinizing-labor-impact-of-microsoft-activision-merger.

Microsoft has attempted to 'assuage' these potential regulatory concerns by recently stating that it 'would stop using non-competes or confidentiality clauses to bar workers from talking about discrimination or harassment as part of a settlement or separation deal'.[33] It also announced a labour neutrality agreement with regard to employees that are interested in joining a union, which would apply to Activision after the acquisition. As at September 2022, the FTC's investigation is ongoing.

Salesforce/Slack (2021)

On 16 February 2021, the DOJ issued Second Requests to Salesforce and Slack in connection with their US$27.7 billion merger. The merger would make the Slack collaboration tool the interface for Salesforce Customer 360 to compete with Microsoft's similar product.

After a five-month investigation, the DOJ announced that it had completed its review and that it would not challenge the acquisition. The DOJ likely had concerns about Salesforce competitors' future ability to use Slack's messaging service or Salesforce illegally obtaining competitor information through Slack. It may have also had concerns that Salesforce could cross-sell Slack by requiring that any user of its software also use Slack's messaging service, which could have stymied entry for new workplace messaging competitors. The parties closed the transaction on 21 July 2021.

The DOJ's challenge to this transaction could further suggest that the agencies will be interested in non-horizontal mergers in the tech space, and that it could use Second Requests proactively to better understand the general nature of competition in those sectors.

Google/Fitbit (2020/2021)

In 2020, the European Commission and the DOJ investigated Google's US$2.1 billion proposed acquisition of Fitbit. Although the European Commission cleared the transaction in December 2020, the DOJ continued to scrutinise the proposed merger. On 14 January 2021, Google announced that it closed the transaction even though the DOJ continued to investigate the transaction.

There has been limited information about the DOJ's investigation into the *Google/Fitbit* transaction, but it is possible that the merger investigation may have been tied to the DOJ's ongoing lawsuit against Google's allegedly anticompetitive

33 id.

conduct. That the DOJ has not made any announcements about this transaction could also portend that it may have had difficulty defining a relevant product market or articulating theories of harm in a non-horizontal merger.

Visa/Plaid (2020)

On 5 November 2020, the DOJ challenged Visa's proposed US$5.3 billion acquisition of Plaid, alleging that Visa is a monopolist in online debit transactions and that the acquisition represented Visa's attempt to acquire a nascent, innovative competitor.[34] In its complaint, the DOJ described the two-sided nature of online debit platforms: they facilitate online transaction between merchants on one side and consumers on the other. Although the DOJ recognised that Plaid was not a direct competitor, it argued that the relevant market for online debit transactions included both online debit services (e.g., those that Visa traditionally offers) and pay-by-bank debit services (e.g., those that Plaid offers). On 12 January 2021, the parties terminated the agreement.

Intuit/Credit Karma (2020)

On 25 November 2020, the DOJ challenged and required a settlement in the proposed US$7.1 billion merger of Intuit and Credit Karma. Credit Karma operates a personal finance platform that offers free services such as credit monitoring, financial management and digital do-it-yourself (DDIY) tax preparation services. Intuit offers tax preparation, accounting, payroll and finance solutions to individuals and small businesses.

The complaint alleged that Intuit and Credit Karma are direct competitors in the relevant product market of the development, provision, operation and support of DDIY tax preparation products.[35] Under the terms of settlement, filed simultaneously with the complaint on 25 November 2020, the parties agreed to divest Credit Karma's tax business to Square, Inc. for US$50 million. [36] With the divestiture, the transaction between Intuit and Credit Karma closed on 3 December 2020.

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34 Complaint at p. 1, *United States v. Visa Inc. and Plaid Inc.*, 3:20-cv-07810 (N.D. Cal. 5 November 2020), available at: www.justice.gov/opa/press-release/file/1334726/download.

35 See Complaint at p. 6, *United States v, Intuit Inc. and Credit Karma, Inc.*, 1:20-cv-03441 (D.D.C. 25 November 2020), available at: www.justice.gov/atr/case-document/file/1339966/download.

36 See Proposed Final Judgment at pp. 8–14, *United States v, Intuit Inc. and Credit Karma, Inc., 1:20-cv-03441* (D.D.C. 25 November 2020), available at: www.justice.gov/atr/case-

The DOJ's challenge and subsequent settlement with the parties highlights how the US Antitrust Agencies might allow divestitures to other growing, digital platforms, such as Square, to support some of their nascent product offerings, such as Cash App, which was starting to develop a tax preparation offering.

CoStar Group/RentPath Holdings (2020)

On 30 November 2020, the FTC filed a suit to block CoStar Group, Inc.'s US$587.5 million acquisition of RentPath Holdings. CoStar operates listing sites such as Apartments.com and ApartmentFinder.com, whereas RentPath operates listing sites such as Rent.com and ApartmentGuide.com.

The FTC alleged that the acquisition would significantly increase concentration in the already highly concentrated markets for internet listing services advertising for large apartment complexes, which the FTC defined as the relevant product market.[37] The FTC argued that CoStar and RentPath were head-to-head competitors and that the five-to-four merger would bring together the top-two internet listing services for large apartment complexes.[38] A month after the FTC filed its complaint, on 29 December 2020, CoStar and RentPath terminated their merger agreement.

The FTC's suit in this transaction could suggest two trends:

- the US Antitrust Agencies may turn their attention to acquisitions of 'proptech companies' (digital companies emerging in the property industry); and
- the agencies will not shy away from reviewing technology mergers valued at less than US$1 billion.

Sabre/Farelogix (2019–2020)

On 20 August 2019, the DOJ challenged in US district court Sabre's US$360 million proposed acquisition of Farelogix, alleging that Sabre, a dominant provider of airline booking services, was attempting to eliminate a 'disruptive' competitor.[39] The US district court disagreed, reasoning that the DOJ failed to

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document/file/1339991/download; see also Final Judgment, *United States v, Intuit Inc. and Credit Karma, Inc.*, 1:20-cv-03441 (D.D.C. 02 August 2021), available at: www.justice.gov/atr/case-document/file/1420526/download.

37 See Complaint at 9, *In the Matter of CoStar Group, Inc. and RentPath Holdings, Inc.*, No. 201-0061 (F.T.C.), available at: www.ftc.gov/system/files/documents/cases/d09398complaintpublic.pdf.

38 id. at 9–10.

39 See Complaint at 1, *United States v. Sabre Corporation, et al.*, 1:19-cv-01548 (D. Del. 20 August 2019), available at: www.justice.gov/atr/case-document/file/1196836/download.

define adequately a relevant market and that therefore, Sabre did not compete with Farelogix because Sabre is a two-sided platform that interacts with airlines and travel agencies, whereas Farelogix interacts with airlines and is not a two-sided platform.[40] After the UK CMA challenged the transaction, the parties agreed to terminate their merger agreement in April 2020.

The US district court's decision shows that after *Ohio v. American Express*, the US Antitrust Agencies will face difficulties in challenging mergers of digital platforms where the proposed relevant product market does not include both the buy and sell sides of the platform. Even if both platforms were two-sided, however, the anticompetitive effects of a merger between two-sided platforms would need to 'reverberate . . . to such an extent as to make the two-sided . . . platform market, overall, less competitive.'[41]

US Antitrust Agencies challenge acquisitions of nascent competitors and attempt to tackle conglomerate mergers

From 2019 to 2021, the US Antitrust Agencies focused increasingly on acquisitions of nascent competitors. As seen in the government's complaints in *Visa/Plaid*, *Intuit/Credit Karma* and *Sabre/Farelogix*, the agencies raised these concerns in digital industries because, they argue, these markets are more likely to gain increased market share by being a favoured platform through enhanced network effects and economies of scale.[42] The US Antitrust Agencies have also identified creative ways to challenge mergers, such as in *Visa/Plaid*, by bringing allegations under Section 2 of the Sherman Act, which prohibits the wilful acquisition or maintenance of monopoly power, monopolisation or attempted monopolisation.[43]

Between 2021 and 2022, the US Antitrust Agencies have turned their enforcement attention to conglomerate acquisitions (*Microsoft/Activision* and *Broadcom/VMware*) and acquisitions raising concerns about how an acquirer could misuse an acquiring entity's data to harm competitors (*United Healthcare/Change*). The investigations the US Antitrust Agencies have initiated in the past year and the

40 *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 136-137 (D. Del. 2020) (relying on *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285-87 (2018) ('Only other two-sided platforms can compete with a two-sided platform for transactions.')).

41 id. at 138.

42 Rebecca Farrington, Anna Kertesz and Heather Greenfield, 'Key Developments – United States', White & Case LLP (21 May 2021), available at: www.whitecase.com/publications/insight/global-merger-control/united-states.

43 *United States v. Grinnell Corp.*, 384 U.S. 563, 57071 (1966).

recent suit to block Facebook's acquisition of Within show the challenges the US Antitrust Agencies face with defining the relevant market under the existing Merger Guidelines.

Perhaps more notably, the volume of enforcement against technology companies is not what many speculated it would be under FTC Chair Khan and AAG Kanter. If the US Antitrust Agencies publish new Merger Guidelines in 2023, technology companies could continue to see increased scrutiny and continued investigations and challenges that are broader and more creative in scope and reach.

Remedies will remain difficult

Recent DOJ and FTC enforcement actions suggest that the US Antitrust Agencies may continue to demand structural remedies with upfront buyers and divestitures of entire business units; however, the US Antitrust Agencies have expressed a strong preference for litigating a case instead of pursuing remedies.[44]

AAG Kanter has noted that divestitures may be an option only in exceptional circumstances, but also acknowledged that divestitures could be appropriate where 'business units are sufficiently discrete and complete that disentangling them from the parent company in a non-dynamic market is a straightforward exercise, where a divestiture has a high degree of success.'[45] His statements and his use of 'non-dynamic' suggests that remedies in technology mergers or acquisitions may face more intense scrutiny than in previous administrations.

Merging parties, especially in technology and digital platforms, should expect that the US Antitrust Agencies will not support many proposed divestitures and should consider alternatives in advance of structuring a transaction, such as a fix-it-first solution. As seen during the past year, in the face of challenges by US authorities, several merging parties involved in digital or technology mergers (e.g., *Visa/Plaid* and *CoStar/RentPath*) abandoned their transactions.

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44 Assistant Attorney General Kanter stated that in most of those situations, the DOJ 'should seek a simple injunction to block the transaction' because 'it is the surest way to preserve competition.' See 'Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section', 24 January 2022 available at: www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

45 id.

Looking ahead to 2023

From 2019 to the first half of 2022, the US Antitrust Agencies were active in technology and digital market merger enforcement. They continued to focus on both horizontal and vertical mergers across the technology and digital sectors, and they continued to focus on transactions involving innovative competitors.

One dominant principle in the US government's effort to promote competition in the technology sector is ensuring internet platforms do not 'push[] out would-be rivals' and 'scoop[] up intimate personal information that they can use for their own advantage.'[46] The White House has also called for 'clear limits on the ability to collect, use, transfer and maintain . . . personal data, including limits on targeted advertising' and discriminatory algorithms, to address the alleged 'harms caused or magnified' by technology platforms.[47]

Looking forward, with the White House Competition Council, FTC Chair Kahn and AAG Kanter at the helm of antitrust policy in the United States, this merger enforcement trend will likely continue. In addition, the White House and Congress continue to turn their attention to competition and data access and privacy in the technology sector. Technology companies should continue to monitor the changing legislative landscape, which could impose new rules on acquisitions by large technology companies, and the release of new Merger Guidelines, which are slated to target new and creative ways to enforce antitrust laws in digital markets.

Technology companies and digital platforms should anticipate more scrutiny in the form of voluntary access letters, requests for additional information and documentary material, longer periods to negotiate divestitures and other remedies (if even given the opportunity) and potential reviews of past acquisitions. Technology companies should also expect more cohesion in antitrust enforcement across the federal government, including more coordination across agencies (in relation to issues such as labour) and increased coordination with foreign competition agencies on these issues.

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46 Bryan Koenig et al., 'White House Calls For Clear Antitrust Rules For Big Tech', *Law360* (September 9, 2022, 8:00 PM), available at: www.law360.com/competition/articles/1528810/white-house-calls-for-clear-antitrust-rules-for-big-tech.

47 White House, 'Readout of White House Listening Session on Tech Platform Accountability', 8 September 2022, available at: www.whitehouse.gov/briefing-room/statements-releases/2022/09/08/readout-of-white-house-listening-session-on-tech-platform-accountability.

CHAPTER 9

United States: E-Commerce and Big Data Merger Control

Daniel S Bitton, Leslie C Overton, Melanie Kiser and Neelesh Moorthy[1]

Introduction

Mergers and acquisitions in technology industries have garnered even more attention than before in the United States in recent years. In July 2021, President Biden issued an executive order on competition policy that, among other things, raised concern over consolidation in the tech sector and encouraged agency action. Biden said it was:

> *the policy of [his] Administration to meet the challenges posed by new industries and technologies, including the risk of dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.*[2]

Biden's executive order followed a trend towards more aggressive scrutiny of the tech industry and successful internet platforms. In 2020, the House Judiciary Antitrust Subcommittee issued its Majority Staff Report and Recommendations from its Investigation of Competition in Digital Markets, finding that there is excessive concentration in digital markets and that there should be a presumptive prohibition against future mergers and acquisitions by dominant digital platforms.[3]

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1 Daniel S Bitton and Leslie C Overton are partners, Melanie Kiser is counsel, and Neelesh Moorthy is an associate at Axinn, Veltrop & Harkrider LLP.

2 See Executive Order No. 14036, 56 Fed. Reg. 36987, 36988 (9 July 2021).

3 Staff of H. Subcomm. on Antitrust, Commercial and Admin. Law of the Comm. on the Judiciary, 116th Cong., Investigation of Competition in Dig. Mkts., at 11, 20 (2020).

Even some Republican legislators, who have traditionally advocated for greater government restraint in antitrust enforcement, have recently shown concerns over certain tech mergers. For example, on 12 August 2021, Republican Representative Ken Buck of Colorado and Republican Senator Mike Lee of Utah sent a letter to the Federal Trade Commission (FTC), outlining their concerns about online real estate company Zillow's US$500 million acquisition of ShowingTime, a scheduling platform that facilitates real estate showings. Representative Buck and Senator Lee wrote that the acquisition could 'further entrench Zillow's consumer information advantage to the detriment of homebuyers and their competitors', although the deal closed in October 2021 without FTC challenge.[4]

Antitrust regulators have also signalled a more aggressive approach to their review of tech mergers. This is especially the case at the FTC, where big tech critic Lina Khan, in her role as Chair, has taken a number of steps to change how the agency approaches merger review, making it more aggressive and less predictable. Some of this increased stringency may come in the form of challenges to non-reportable transactions.

On 15 September 2021, the FTC presented findings from its retrospective study of acquisitions by tech companies, which looked into past acquisitions of Amazon, Apple, Meta Platforms (the parent company of Facebook), Google and Microsoft that were not reportable under the Hart-Scott-Rodino Act (the HSR Act).[5] Chair Khan commented that the findings 'capture[] the extent to which these firms have devoted tremendous resources to acquiring start-ups, patent portfolios, and entire teams of technologists—and how they were able to do so largely outside of our purview'.[6]

However, the report explicitly avoids making recommendations or reaching conclusions about HSR thresholds.[7] Additionally, rather than focusing on whether the transactions resulted in competitive harm, the study 'quantifies and

4 Letter from Representative Ken Buck and Senator Mike Lee, to Lina M Khan, Chair, Federal Trade Commission (FTC) (12 August 2021): www.scribd.com/document/520074846/Letter-to-FTC-from-U-S-senators-on-real-estate-and-antitrust#download&from_embed.

5 Press Release, FTC, 'FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies' (15 September 2021): www.ftc.gov/news-events/press-releases/2021/09/ftc-report-on-unreported-acquisitions-by-biggest-tech-companies.

6 id.

7 FTC, 'Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study', p. 3 (15 September 2021): www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

categorizes the pace, the size distribution of transactions in dollar terms, the types of transactions, and the number of non-HSR reportable transactions collectively by the five respondents'.[8]

The study found that 36 per cent of the transactions would have been reportable under the HSR Act had the debt and liabilities that the acquirer had taken on been included in the calculation of the purchase price.[9] This finding perhaps explains why the FTC announced just a few weeks prior, on 26 August 2021, that debt must now be included as part of the consideration paid for a target company when determining whether a transaction is reportable.[10]

The focus on tech mergers is part of a broader push for more antitrust scrutiny of mergers and acquisitions across all industries. There are legislative proposals to change the statutory burdens of proof to challenge mergers and acquisitions, and the US agencies have recently changed policies and procedures governing their merger investigations.

Given this changing landscape and increased scrutiny, understanding the US antitrust approach to tech mergers is more important than ever. This Chapter discusses a number of pertinent policy and process changes made by US agencies, as well as several recent US agency and court decisions involving tech mergers, to provide practitioners and in-house counsel insights into the current treatment of transactions in technology sectors under US antitrust law.

Increased scrutiny of all mergers

In response to a sentiment that various segments of the economy have become too concentrated, US legislators and agencies have signalled plans to increase antitrust scrutiny of mergers and acquisitions. This has led to legislative proposals and regulatory policy and process changes that affect all transactions, including those in technology industries.

In February 2021, Democratic Senator Amy Klobuchar introduced the 'Competition and Antitrust Law Enforcement Reform' bill. The bill includes provisions that would change the standard for mergers prohibited by Section 7

8 id. at 2–3.

9 id. at 8.

10 See Holly Vedova, 'Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt', FTC Competition Matters Blog (26 August 2021, 2:06pm): www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering.

of the Clayton Act from those that 'substantially lessen competition' to those that 'create an appreciable risk of materially lessening competition', where 'materially' is defined as 'more than a de minimis amount.'[11]

The bill also adopts presumptions for when certain acquisitions create such an appreciable risk or tends towards monopoly:

- either the acquiring or acquired party has more than 50 per cent market power in the relevant market and the other has a 'reasonable probability' of competing against them;
- the acquiring entity would hold voting securities and assets of the acquired entity amounting to more than US$5 billion; and
- the acquiring entity is worth more than US$100 billion and would own voting securities and assets of the acquired person in excess of US$50 million.

This bill, if adopted, would apply to mergers in any industry, not just tech.[12]

At the FTC, Khan joined with the two other Democratic FTC commissioners at the time, Rebecca Slaughter and Rohit Chopra,[13] in seeking to overhaul competition policy and reconsider underlying economic principles. On 15 September 2021, the FTC withdrew from the 2020 Vertical Merger Guidelines and associated commentary that the FTC and the Department of Justice (DOJ) had issued in June 2020 under the Trump administration. In its announcement, the FTC suggested that the 2020 Guidelines were too lenient and stated that they 'include

11 Press Release, 'Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement' (4 February 2021): www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

12 Other proposals also targeted mergers based on their size. The proposed Trust-Busting for the Twenty-First Century Act, sponsored by Missouri Republican Josh Hawley, would have prohibited companies with a market capitalisation of US$100 billion from acquisitions that could reduce competition 'in any way'. Taking aim at dominant digital firms (defined as providing a website or service through the internet and possessing market power, to be determined by the FTC), the bill would presume any US$100 million acquisition by such firms to be an unfair and deceptive practice.

13 Commissioner Chopra has since left the FTC and now serves as Director of the Consumer Financial Protection Bureau.

unsound economic theories that are unsupported by the law or market realities'.[14,15] In particular, the FTC majority's statement argued that the Guidelines' focus on the pro-competitive benefits of the elimination of double marginalisation is not consistent with the text of the Clayton Act or market realities.[16] Although the Vertical Merger Guidelines still remain in effect from DOJ's perspective, then-Acting Assistant Attorney General Richard A Powers stated that '[t]he Department of Justice is conducting a careful review of the Horizontal Merger Guidelines and the Vertical Merger Guidelines to ensure they are appropriately skeptical of harmful mergers' and suggested that DOJ 'will work closely with the FTC to update them as appropriate'.[17]

More recently, the FTC and DOJ announced plans to publish new Merger Guidelines to replace those that have been in place since 2010 and widely accepted by courts and practitioners. In January 2022, the agencies requested public comments on a long list of topics and questions, including 'how to account for key areas of the modern economy like digital markets in the guidelines, which often have characteristics like zero-price products, multi-sided markets, and data

14 Press Release, FTC, 'Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary' (15 September 2021): www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines; see also Press Release, FTC, 'Statement of FTC Chair Lina M. Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines' (9 July 2021): www.ftc.gov/news-events/news/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting-assistant-attorney-general-richard-powers (responding to President Biden's executive order calling for reconsideration of the Guidelines).

15 In their dissenting statement, Commissioners Phillips and Wilson heavily criticised the decision to withdraw from the Vertical Merger Guidelines, writing, 'Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware.' 'Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement' (15 September 2021): www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf.

16 Statement of Chair Lina M Khan, 'Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines' Commission File No. P810034, at pp. 2–5 (15 September 2021): www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

17 Press Release, US Department of Justice (DOJ), Antitrust Division, 'Justice Department Issues Statement on the Vertical Merger Guidelines' (15 September 2021): www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

aggregation that the current guidelines do not address in detail.'[18] Other topics included the Guidelines' discussion of potential and nascent competition, how they could better account for non-price competition, the validity of distinctions between horizontal and vertical transactions, the necessity of market definition in cases where there is direct evidence of competitive effects, and whether the threshold for presumptions of illegality should be lowered. The public comment period closed on 21 March 2022.

Under Khan, the FTC has made a practice of warning merging parties that even if the statutory waiting period set by Congress expires, allowing them to close, they may still be sued at any point for the transaction.[19] That is a significant departure from prior practice.

The FTC has always had the statutory power to challenge mergers even if they are not HSR reportable or after the HSR waiting period has expired. Until the policy change in 2021, however, the FTC typically would signal that the parties should pull and refile their HSR form to restart the initial 30-day clock or issue a Second Request if it had concerns about a transaction. Alternatively, the FTC would let the HSR waiting period expire (or grant early termination of the HSR waiting period) if their investigation in the first 30 days did not surface grounds for material concerns. That approach provided merging parties more certainty.

The FTC explained this departure from prior practice as being because of the increase in HSR filings, suggesting that it is harder for the FTC to finish investigations within the first 30-day HSR waiting period.[20] The change in policy has attracted significant controversy and criticism for diminishing deal certainty and disregarding the HSR reporting regime established by Congress, which contemplates that the FTC will either close its investigation at the end of the waiting period or issue a Second Request to prevent a merger from closing while it investigates.

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18 Request for Information on Merger Enforcement, FTC-2022-0003-0001 (17 January 2022): www.regulations.gov/document/FTC-2022-0003-0001; see also Press Release, FTC, 'Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers' (18 January 2022): www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

19 See Holly Vedova, 'Adjusting merger review to deal with the surge in merger filings', FTC: Competition Matters Blog (3 August 2021, 12:28pm): www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

20 id.

Republican FTC Commissioner Christine S Wilson said that she was concerned that this, along with other recent changes, amounts to a 'death by a thousand cuts' for the merger review framework, which collectively 'raise the costs of doing mergers and threaten to chill harmful and beneficial deals alike'.[21] Since the FTC introduced its warning letter policy in 2021, the volume of HSR filings has gone down, removing the justification the FTC originally asserted for this policy. It will be interesting to see if it will accordingly abandon the policy or continue it.

Another major change at the FTC came with its October 2021 announcement that it would start requiring 'prior approval' commitments in consent orders, a practice that had been discontinued in 1995.[22] To settle FTC merger concerns by consent decree under this new policy, parties will have to agree to obtain the FTC's advance approval of all future acquisitions in the relevant market or related markets for 10 years, regardless of the size of the target company or transaction value.

The FTC's prior approval provision lacks the timing and due process protections as the HSR Act. In its press release, the FTC cited a desire to encourage anticompetitive deals to 'die[] in the boardroom,' rather than forcing the FTC to expend time and resources analysing those deals.[23] Companies contemplating transactions that might require divestitures or other remedies implemented via consent decree will now need to weigh the risk that reaching a settlement with the FTC would require submitting all future transactions in that market, and potentially related markets, for FTC review on an unspecified timetable.

In Spring 2022, the agencies hosted a series of 'listening forums' about past mergers in specific industries, including one focused on the technology sector.[24] Chair Khan and Assistant Attorney General Jonathan Kanter introduced a series of prearranged speakers who had been affected by consolidation in the industry. The speakers focused on a range of merger effects that have historically been

21 Statement of Commissioner Christine S Wilson Regarding the Announcement of Pre-Consummation Warning Letters (9 August 2021): www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

22 Press Release, FTC, 'FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers' (25 October 2021): www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.

23 id.

24 FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Technology, FTC (12 May 2022), https://www.ftc.gov/news-events/events/2022/05/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-technology.

outside the scope of antitrust law, including the impact of delivery apps and ghost kitchens on the restaurant business,[25] how media consolidation allegedly reduces diversity of ideas and voices,[26] the impact of e-commerce on local brick-and-mortar businesses such as bookstores,[27] and employers sending more work overseas and purportedly not offering sufficient pay to certain employees.[28]

Chair Khan summarised the featured speakers' comments as describing 'how dominant platforms and apps can increasingly serve as key gatekeepers in gateways for finding products' and 'determine whether a business sinks or survives in the digital economy,' giving them 'significant if not complete control over the terms of access to those pathways' that can 'enable the platform to dictate the terms of commerce and eat up a lion's share of the profits from the small businesses sales'.[29]

Market definition

Two-sided markets

In its decision in *Ohio v. American Express* (*Amex*),[30] the Supreme Court held that 'courts must include both sides of the platform' in the analysis of market definition and competitive effects in two-sided markets characterised by strong indirect network effects[31] because in such markets, a platform 'cannot raise prices on one side without risking a feedback loop of declining demand'.[32]

In 2020, this concept was applied in a merger case for the first time in *United States v. Sabre Corp*.[33] In that case, the district court rejected DOJ's challenge to the acquisition by Sabre, a global distribution system (GDS) connecting travel agencies and airlines for bookings and other purposes, of Farelogix Inc., whose technology allegedly threatened to disintermediate Sabre. The *Sabre* court interpreted *Amex* to mean that '[o]nly other two-sided platforms can compete with a

25 'FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions- Technology', FTC, at 3–4 (12 May 2022): www.ftc.gov/system/files/ftc_gov/pdf/FTC%20and%20Justice%20Department%20Listening%20Forum%20on%20Firsthand%20Effects%20of%20Mergers%20and%20Acquisitions-%20Technology%20-%20May%2012%2C%202022_0.pdf (Transcript).

26 Transcript at 8–9, 16.

27 Transcript at 9–10.

28 Transcript at 12.

29 Transcript at 13–14.

30 138 S.Ct. 2274, 2287 (2018).

31 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018).

32 id. (internal citations omitted).

33 452 F.Supp.3d 97 (D. Del. 2020), vacated, 2020 WL 4915824 (3rd Cir. 20 July 2020).

two-sided platform for transactions' as a matter of law. The fact that Sabre was a two-sided platform and Farelogix was not was, in the court's view, a 'dispositive flaw' in DOJ's challenge.[34] The court found that even if Farelogix could, as a matter of law, be considered a competitor to Sabre in the relevant market on one side of the platform (the airline side), it would need to show that the anticompetitive effects in that side of the market were so substantial as to 'reverberate throughout the Sabre GDS' and affect both sides of the market.[35] The court found that DOJ did not make this showing.

DOJ appealed the decision. Despite the victory at the district court, the parties ultimately abandoned their deal because the UK's Competition and Markets Authority (CMA) prohibited the transaction.[36] Afterwards, DOJ asked the Third Circuit Court of Appeals to vacate the lower court's decision. The court granted the motion, although it noted that its decision was not to be construed as commentary on the merits:

> *We also express no opinion on the merits of the parties' dispute before the District Court . . . As such, this Order should not be construed as detracting from the persuasive force of the District Court's decision, should courts and litigants find its reasoning persuasive.*[37]

DOJ's November 2020 complaint challenging the *Visa/Plaid* acquisition took care to discuss harms on both sides of the relevant two-sided market. In *Visa/Plaid*, Visa, Inc. sought to acquire Plaid Inc., a company that provides financial data aggregation technology used by financial technology companies like Venmo to plug into consumers' financial accounts to perform functions like looking up account balances. Although the parties didn't compete directly, Plaid was planning to enter the market for online debit transactions, whereby consumers purchase goods with money debited from their bank accounts.[38]

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34 id. at 136–138.

35 id. at 72–73.

36 Press Release, Sabre Corp., 'Sabre Corporation Issues Statement on its Merger Agreement with Farelogix' (1 May 2020): https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix.

37 *United States v. Sabre Corp.*, 2020 WL 4915824, at *1.

38 Complaint, *US v. Visa, Inc. and Plaid Inc.*, No. 4:20-cv-07810, at 3 (N.D. Cal. 5 November 2020).

DOJ alleged that Visa controlled 70 per cent of the existing online debit transactions market, with the only other material competitor being Mastercard with a 25 per cent share.[39] DOJ's complaint stated that Visa was acquiring a potential competitor, and the agency was particularly concerned about Plaid's plan to begin offering pay-by-bank services.[40] Pay-by-bank is a type of online debit 'that uses a consumer's online bank account credentials . . . rather than debit card credentials . . . to . . . facilitate payments to merchants directly from the consumer's bank account'.[41]

The online debit transaction platforms at issue in the merger are two-sided transaction platforms that serve as intermediaries between merchants on one side and consumers on the other.[42] DOJ alleged that the merger of Visa and Plaid would hurt both merchants and consumers. For example, the complaint alleges that the pay-by-bank services that Plaid planned to offer would have much lower merchant fees than Visa's traditional debit service and, therefore, that the merger would eliminate this lower cost option for merchants.[43]

On the other side of the market, DOJ alleged that consumers would be harmed because Plaid's entry would mean that merchant savings would likely be passed on to consumers, and merchants might even offer rewards or other incentives to induce them to use Plaid's pay-by-bank debit service.[44] The parties ultimately abandoned the deal in January 2021.[45]

The pitfalls of pleading narrow digital markets

Defining the product market in tech mergers has also presented other types of challenges, especially where services to consumers are free of charge and the services offered are delineated in a way that makes them difficult to distinguish from other online services. A key case to watch in this regard is the FTC's suit against Meta Platforms in relation to its acquisitions of Instagram and WhatsApp.

39 id. at 3.
40 id. at 10, 12–13.
41 id. at 10.
42 id. at 15–16.
43 id. at 17.
44 id. at 18.
45 Press Release, DOJ, 'Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block' (12 January 2021): www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

In June 2021, the district court dismissed the FTC's original December 2020 complaint for failure 'to plead enough facts to plausibly establish' monopoly power, a necessary element of the agency's claims under Section 2 theories[46] that typically requires a dominant share of a properly defined relevant product market.[47]

The FTC had alleged a relevant product market for 'personal social networking (PSN) services', defined as 'online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space'.[48] The agency alleged that PSN services have three distinguishing characteristics – a social graph of personal connections, features to interact and share personal experiences with personal connections, and features for finding and connecting with other users – and argued, in turn, that mobile messaging services (e.g., WhatsApp), specialised social networking services (e.g., LinkedIn and dating apps) and 'online services that focus on the broadcast or discovery of content based on users' interests rather than personal connections' (e.g., Twitter, Reddit, and Pinterest), and 'online services focused on video or audio consumption' (e.g., YouTube and TikTok) were not reasonably interchangeable.

While the district court found the PSN market's contours 'plausible', it also suggested that the dearth of factual allegations supporting the market definition meant that the agency's market share allegations would need to carry more weight. The primary failing of the complaint was that the FTC had alleged only that 'Facebook has "maintained a dominant share of the U.S. personal social networking market (in excess of 60%)" since 2011 . . . and that "no other social network of comparable scale exists in the United States"'.[49] The court found this insufficient and suggested that the FTC's burden on market share allegations was

46 The FTC brings its enforcement actions under the FTC Act, but the Supreme Court has interpreted that statute's ban on unfair methods of competition as prohibiting all conduct that would violate the Sherman Act. The FTC has typically pleaded its cases based on the prevailing standards under the Sherman Act, the Clayton Act and other antitrust laws, and courts typically apply precedent concerning these laws in presiding over FTC competition cases. See FTC Guide to Antitrust Laws: www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

47 Memorandum Opinion, *FTC v. Facebook, Inc.*, Civil Action No. 20-3590, at 2, 19 (D.D.C. 28 June 2021).

48 Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590, at ¶ 52 (D.D.C. 9 December 2020).

49 *FTC v. Facebook*, Memorandum Op., at 27.

'more robust' because its product market was 'somewhat "idiosyncratically drawn" to begin with' and the complaint was 'undoubtedly light on specific factual allegations regarding consumer-switching preferences'.[50]

At several points in the opinion, the court implied that the nature of Meta Platforms' products and the fact that this was 'no ordinary or intuitive market' heightened the FTC's pleading burden. For example, the court indicated that the FTC's 'naked' assertions 'might (barely) suffice' for a 'more traditional good market, in which the Court could reasonably infer that market share was measured by revenue, units sold, or some other typical metric'.[51] But PSN services are 'free to use, and the exact metes and bounds of what even constitutes a PSN service – i.e., which features of a company's mobile app or website are included in that definition and which are excluded – are hardly crystal clear.' This 'unusual context' made its vague market share assertions 'too speculative and conclusory to go forward'.

Elsewhere in the opinion, the court again contrasted PSN services with 'familiar consumer goods like tobacco or office supplies', noting that 'there is no obvious or universally agreed-upon definition of just what a personal social networking service is.'[52]

The FTC subsequently filed an amended complaint, and Meta Platforms' motion to dismiss that complaint was denied. This time, the district court said the 'FTC [had] done its homework,' including by citing market share data from the media analytics firm ComScore. That data indicated at least a 60 per cent market share using measurements of daily average users, monthly average users and time users spent online, and the court concluded that these were 'common sense' indicators of social media competitiveness. The court further noted the FTC allegation that Meta Platforms and its competitors use precisely those metrics when analysing their own performance.

The *Meta Platforms* case, which will now proceed towards trial, illustrates the challenges of defining a relevant product market in the digital age. Market definition can become more complicated when there are many providers competing for consumer attention with differentiated, free-of-charge online services monetised through advertising, especially when consumers use a broad array of such online services at any given time. But the opinion gives a sense of the different tools courts (and agencies) might use to analyse market power in the 'attention economy'.

50 id.

51 id. at 2.

52 id. at 21.

The *Meta Platforms* case is not the only time the FTC has recently alleged narrow markets for tech products. In July 2022, the FTC sued to prevent Meta Platforms from acquiring Within Unlimited, Inc., a virtual reality (VR) studio.[53] Meta has previously acquired the leading VR headset, formerly known as Oculus and rebranded as the Meta Quest, and operates a leading VR app platform. The FTC proposed a narrow product market for 'VR dedicated fitness apps' whose primary purpose is physical fitness and a broader market for 'VR fitness apps' also including apps with incidental fitness or exercise benefits, such as sports apps and Meta's Beat Saber dance app. Meta competes only in the latter market, but the FTC alleged that the threat of Meta entering the narrower dedicated fitness market spurred innovation and competition by current market participants.

Horizontal theories of harm

Unilateral effects theories

Antitrust analysis of tech mergers is a dynamic area with some investigations involving novel or less common theories of harm; however, many tech merger investigations have involved traditional horizontal theories, such as unilateral effects theories.

Taboola's planned 2019 merger with Outbrain received regulatory attention in both the US, in the form of a Second Request,[54] and the UK.[55] Taboola and Outbrain both provided advertisement-based content recommendations. In announcing the merger, Taboola's CEO claimed that it would allow for the creation of a more robust competitor to Meta Platforms and Google for advertising.[56]

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53 Complaint, *Meta Platforms, Inc. et al.*, FTC Docket No. 1 (27 July 2022): www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf.

54 Press Release, Davis Polk & Wardwell LLP, T' Taboola secures DOJ approval of merger with Outbrain' (1 September 2020): www.davispolk.com/experience/taboola-secures-doj-approval-merger-outbrain.

55 The Israel Competition Authority also investigated the merger. The Authority even launched a criminal investigation against Taboola for failure to submit complete information during the course of the investigation. Taboola ultimately agreed to pay a fine of 5 million shekels. See Press Release, Israel Competition Authority, 'The Competition Authority reaches an agreed consent decree with Ynet' (22 August 2021): www.gov.il/en/Departments/news/consentdecree-ynet.

56 'Taboola and Outbrain to Merge to Create Meaningful Advertising Competitor to Facebook and Google', *Business Wire* (19 October 2019): www.businesswire.com/news/home/20191003005479/en/Taboola-and-Outbrain-to-Merge-to-Create-Meaningful-Advertising-Competitor-to-Facebook-and-Google ; see also Ingrid Lunden, 'Taboola and Outbrain call off their $850M merger', *Tech Crunch* (8 September 2020), https://techcrunch.com/2020/09/08/taboola-and-outbrain-call-off-their-850m-merger.

In the US, DOJ ultimately approved the deal,[57] and in the UK, the CMA continued to investigate to see if the merger would create a substantial loss of competition in the market for the 'supply of content recommendation platform services to publishers in the UK'.[58] In particular the CMA was interested in whether the merger would reduce competition through unilateral effects.[59] The parties ultimately abandoned the deal in September 2020. There were a few reasons given for why the deal was abandoned, including changing conditions from the covid-19 pandemic;[60] however, the ongoing antitrust investigations in the UK and Israel could have played a part as well.

In 2017, the FTC sued to block the merger of DraftKings and FanDuel, the two leading online platforms for daily fantasy sports, on the basis that the merger would have resulted in a 'near monopoly'.[61] According to the complaint, the parties competed on commission rates, discounts, contest prizes and non-price factors, such as contest size, product features and contest offerings.[62] While the industry was unique and relatively new, the FTC pursued a familiar unilateral effects case based on closeness of competition.[63] The parties abandoned the deal a month after the FTC's complaint.[64]

In 2015, after an extensive investigation, the FTC unconditionally cleared Zillow's US$3.5 billion acquisition of Trulia. The parties were the first and second largest consumer-facing online portals for home buying.[65] Internal documents suggested that they competed head-to-head to offer users home sales

57 'DOJ Won't Challenge Taboola & Outbrain Merger', Competition Policy International (22 July 2020): www.competitionpolicyinternational.com/doj-wont-challenge-taboola-outbrain-merger.

58 Issues Statement, 'Anticipated Acquisition by Taboola.com td of Outbrain inc.', Competition and Markets Authority (4 August 2020), https://assets.publishing.service.gov.uk/media/5f27e1d7e90e0732d865d713/Issues_Statement_-_Taboola_Outbrain.pdf.

59 id. at 6.

60 Lunden, see footnote 56.

61 Complaint, *DraftKings, Inc and FanDuel Limited*, FTC Docket No. 161-0174, at ¶ 1 (19 June 2017).

62 id. at ¶¶ 17, 60–75.

63 id. at ¶¶ 49–57.

64 Chris Kirkham and Ezequiel Minaya, 'DraftKings, FanDuel Call Off Merger', *The Wall Street Journal* (13 July 2017): www.wsj.com/articles/draftkings-fanduel-call-off-merger-1499976072.

65 'Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia, Inc.', FTC File No. 141-0214 (19 February 2015): www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

information and sell advertising to real estate agents.[66] The FTC nevertheless cleared the transaction without remedies based on data showing that the platforms represented 'only a small portion of agents' overall spend on advertising' and that their portals did not generate a higher return on investment for agents than other forms of advertising used by the agents.[67] This finding meant that the parties could not realistically increase advertising prices post-merger without losing too much agent spend to other forms of advertising. The FTC also found that the companies competed with a number of other portals to offer home buyers relevant information.

The *Zillow/Trulia* acquisition is a good reminder to always look closely at the parties' data, because it may prove to be an important reality check on documents that paint an unhelpful but inaccurate or incomplete picture. *Zillow/Trulia* also illustrates an important point to remember in mergers between online advertising businesses: even if the merging parties attract consumers with similar online content, they often compete with a much broader array of (online) companies in selling advertising, given that the same consumers can typically be targeted through many different advertising media.

This point is reinforced by DOJ's 2018 clearance of WeddingWire's acquisition of XO Group. Both WeddingWire and XO Group connected engaged couples to wedding service vendors, who paid a fee to advertise on the platform.[68] Despite the apparent close competition between the companies, the deal never received a Second Request.[69]

DOJ's successful 2014 challenge of Bazaarvoice's consummated acquisition of PowerReviews shows that a merger defence that online markets are dynamic only goes so far and that unhelpful documents still can kill deals.[70] Bazaarvoice's documents showed that its intent behind the acquisition was to eliminate its closest and only competitor in the sale of 'product ratings and reviews platforms'.[71] Following trial, the district court ruled for DOJ, pointing to 'the overwhelming

66 id. at 2.

67 id.

68 Scott Sher, Michelle Yost Hale and Robin Crauthers, 'United States: Digital Platforms', *Americas Antitrust Review 2020* (30 September 2019), https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2020/article/united-states-digital-platforms.

69 id.

70 Memorandum Opinion at 140–41, *United States v. Bazaarvoice, Inc.*, No. 13-cv-133, Doc. No. 244 (N.D. Cal. 18 January 2014).

71 Complaint at ¶¶ 1–9, 18, *United States v. Bazaarvoice, Inc.*, No. 13-cv-133 (N.D. Cal. 10 January 2013).

market share Bazaarvoice acquired when it purchased PowerReviews, the stark premerger evidence of anticompetitive intent and the merger's likely effects, [and] the actual lack of impact competitors have made since the merger', which had closed in June 2012.[72] Bazaarvoice was ordered to divest the PowerReviews business in a way that would re-establish PowerReviews as an independent competitor as strong as if it had never been acquired (taking into account how it would have developed on its own but for the acquisition).[73]

Nascent competition and maverick theories

The antitrust agencies have recently shown an increased interest in pursuing theories of harm in tech mergers around the concept of nascent competition, at times in conjunction with 'maverick' theories, to investigate or challenge acquisitions of recent entrants or small players by incumbent firms with large alleged market shares. There likewise has been an increased focus on nascent competition in Congress.[74]

The 2020 House Judiciary Antitrust Subcommittee report on Competition in Digital Markets included references to alleged threats that 'dominant' digital platforms posed to nascent competitors. For example, the report alleges that Meta Platforms 'used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms'.[75] The report also recommended that Section 7 of the Clayton Act be tightened to include greater protections for nascent competitors.[76]

Some have noted that protecting nascent competition is not always easy in practice. For example, in 2018, then-FTC Chair Joe Simons stated that acquisitions of nascent competitors in the high-tech space are 'particularly difficult for

72 *United States v. Bazaarvoice, Inc.*, Memorandum Op. at 10.

73 Third Amended Final Judgment, *United States v. Bazaarvoice, Inc.*, 13-cv-133, Doc. No. 286, § IV.A (N.D. Cal. 2 December 2014).

74 Concerns regarding nascent competition are likely a focus of the Executive Branch as well. Tim Wu, current member of President Biden's National Economic Council, along with C Scott Hemphill, penned the article 'Nascent Competitors' in the *University of Pennsylvania Law Review* in 2020. In the article, Wu argues that antitrust has an important role to play in protecting nascent competition, even when the competitive significance of a given company is uncertain. See C Scott Hemphill and Tim Wu, 'Nascent Competitors', *University of Pennsylvania Law Review*, Vol. 168, p. 1879 (2020).

75 Staff of H. Subcomm. on Antitrust, Commercial and Admin. Law of the Comm. on the Judiciary, 116th Cong., Investigation of Competition in Dig. Mkts., at 14 (2020).

76 id. at 20.

antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor' and 'the likely level of competition with the acquiring firm is frequently, maybe more than frequently, not apparent.'[77]

A prominent example of a nascent competitor case is the FTC's challenge of Meta Platforms' acquisition of WhatsApp and Instagram. The FTC had initially declined to challenge these mergers back in 2012 for Instagram and 2014 for WhatsApp.[78] In its 9 December 2020 complaint against Meta Platforms, however, the FTC alleged that Meta Platforms violated Section 2 of the Sherman Act, and claimed that these acquisitions were designed to eliminate nascent competitors that could grow to challenge Meta Platforms, especially if they were acquired by someone else.[79] For example, the FTC alleged that CEO Mark Zuckerberg 'recognized that by acquiring and controlling Instagram, Meta Platforms would not only squelch the direct threat Instagram posed, but also significantly hinder another firm from using photo-sharing on mobile phones to gain popularity as a provider of personal social networking'.[80] The complaint further alleged that employees internally celebrated the acquisition of WhatsApp, which they viewed as 'probably the only company which could have grown into the next FB purely on mobile'.[81] The FTC complaint also quoted an analyst report wherein the analyst wrote that 'WhatsApp and Facebook were likely to more closely resemble each other over time, potentially creating noteworthy competition, which can now be avoided'.[82]

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77 Leah Nylen, 'FTC to focus on "non-partisan", "aggressive" enforcement, Simons says', *MLex* (25 September 2018): www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1025909&siteid=191&rdir=1; see also 'Prepared Remarks of Chairman Joseph Simons', Georgetown Law Global Antitrust Enforcement Symposium, 5 (25 September 2018): www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

78 See Press Release, FTC, 'FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program' (22 August 2012): www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition; Alexei Oreskovic, 'Facebook says WhatsApp deal cleared by FTC', *Reuters* (10 April 2014): www.reuters.com/article/us-facebook-whatsapp/facebook-says-whatsapp-deal-cleared-by-ftc-idUSBREA391VA20140410.

79 *FTC v. Facebook*, Compl. at *5.

80 id.

81 id. at 7.

82 id.

The FTC's challenge relies on a course-of-conduct theory: the idea that a series of individually lawful acts, transactions or practices can combine to form an antitrust violation in the aggregate.[83] This approach has been questioned by some commentators. For example, Judge Douglas Ginsburg and Koren Wong-Ervin have suggested that this theory is akin to other 'monopoly broth' theories[84] because this sort of approach could act as an end run around established conduct-specific tests.[85] Judge Ginsburg and Wong-Ervin also point out that the agencies should not need to have to rely on a Section 2 course of conduct theory to challenge serial acquisitions, because they could just seek to block or undo 'the last merger in the series that tipped the market into undue monopoly power'.[86]

The FTC's initial complaint was dismissed for failure to adequately allege market power, but their amended complaint survived the motion to dismiss. In seeking to dismiss the amended complaint, Meta Platforms argued that it was too speculative to assert that Instagram and WhatsApp would have generated improved product quality had they remained independent from Meta Platforms.

In rejecting the second motion to dismiss, the district court acknowledged that the FTC would eventually need to prove that the acquisitions harmed competition in the relevant market and that 'expert testimony or statistical analysis' would likely be necessary to meet that burden, but that the FTC's allegations – including that Meta Platforms historically saw Instagram and WhatsApp as threats, that Meta Platforms has been able to provide lesser data privacy and security than in a competitive market and that Meta Platforms shut down projects after acquiring Instagram and WhatsApp – was sufficient for the court to conclude that the complaint was not too speculative to proceed to discovery.

Continuing its crusade against acquisitions by large tech companies, in July 2022 the FTC sued to prevent Meta Platforms from acquiring Within Unlimited, as described earlier in this Chapter. The FTC alleged that the merger would give Meta additional control over the VR 'ecosystem', reduce competition between Within's dedicated fitness app and Meta's Beat Saber dance app and reduce

83 Amended Complaint at 26, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590 (D.D.C. 19 August 2021).

84 Douglas H Ginsburg and Koren Wong-Ervin, 'Challenging Consummated Mergers Under Section 2', *Competition Policy International*, 8–9 (21 May 2020) (Challenging Consummated Mergers): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590703; see also Timothy Snyder and James Moore, 'Another Way to Skin the Cat? Perspectives on Using Section 2 to Challenge the Acquisition of Nascent Competitors', *The Threshold*, Vol. XXI, No. 1 (Fall 2020): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668026&download=yes.

85 id.

86 Ginsburg and Wong-Ervin at 9, see footnote 84.

Meta's incentive to enter and compete in dedicated fitness apps. The third and most novel theory hinges on the idea that the threat of entry by Meta contributes to competition and innovation in dedicated fitness apps. The trial for this case has been set for December 2022.

Another recent example of an FTC merger case based on nascent competition theories was its challenge of Illumina's planned 2019 acquisition of Pacific Biosciences of California, Inc. (PacBio).[87] Illumina was described by the FTC as the dominant provider of short-read DNA sequencers, and PacBio as the dominant provider of a nascent technology: long-read gene sequencers.[88] Long-read DNA sequencers can read longer individual DNA sequences, but have lower throughput overall and are more expensive.[89]

The FTC was concerned that, because advances in long-read gene sequencers could put pricing pressure on Illumina's short-read product, the two markets could converge, making PacBio a nascent competitor. In addition, there was already significant overlap in the two companies' customer base.[90] The FTC initiated administrative proceedings before the Commission to block the merger in December 2019. A few weeks later, the companies abandoned the transaction.[91]

Prior to that, in 2018, the FTC challenged CDK's acquisition of Auto/Mate, based on a maverick theory that the target company, while small, put disruptive competitive pressure on the acquirer and other incumbent players in the market.[92] CDK was the largest provider of dealer management systems (DMS).[93] DMSs are software platforms that are used to run various aspects of auto dealerships'

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87 Illumina's recent acquisition of GRAIL also involves an acquisition of a nascent competitor. GRAIL did not earn any revenue at the time that the FTC issued an administrative complaint, but instead had just raised private funding. This acquisition is discussed along with other vertical mergers later in this Chapter. See Complaint at 8, *Ilumina, Inc. and GRAIL, Inc.*, FTC Docket No. 9401 (30 March 2021): www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf.

88 Administrative Complaint, *Illumina, Inc. and Pacific Biosciences of California, Inc.*, FTC Docket No. 9387 (17 December 2019): www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

89 id.

90 id.

91 Joint Motion to Dismiss Complaint, *Illumina, Inc. and Pacific Biosciences of California, Inc.*, FTC Docket No. 9387 (3 January 2020): www.ftc.gov/system/files/documents/cases/d09387_jt_mtn_to_dismisspublic.pdf.

92 Administrative Complaint, *CDK Global and Auto/Mate*, FTC Matter No. 171 0156, Docket No. 9382 (20 March 2018): www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter.

93 Sher et al., see footnote 68.

businesses, including accounting, payroll and vehicle inventory.[94] CDK, along with the second largest provider Reynolds and Reynolds, had about 70 per cent of the market. Auto/Mate, by contrast, was the fifth largest provider, with less than one-third of 30 per cent of the market.[95]

Despite Auto/Mate's small share, the FTC filed a complaint, citing the fact that the combination resulted in a presumption of illegality under the Herfindahl-Hirschman Index thresholds laid out in the Merger Guidelines and because Auto/Mate appeared to be a maverick, disrupting the DMS market with its improved DMS functionality and low prices.[96] Ultimately, the parties abandoned the deal.[97]

Several recent DOJ actions follow a similar trend of challenges to acquisitions of nascent competitors. In its complaint challenging the proposed *Visa/Plaid* merger, DOJ alleged that the transaction would result in the elimination of a nascent competitor that was uniquely positioned to disrupt the market and erode Visa's 70 per cent market share.[98] Quoting *United States v. Microsoft Corp.*,[99] the complaint alleges the following: 'Monopolists cannot have "free reign to squash nascent, albeit unproven competitors at will." Acquiring Plaid would eliminate the nascent but significant competitive threat Plaid poses, further entrenching Visa's monopoly in online debit.'[100]

DOJ's challenge of the *Sabre/Farelogix* merger was also based on a nascent competition theory. Sabre is a GDS that assists airlines in marketing and distributing their fares to travel agents, including online travel agencies that market to consumers. There were three legacy GDSs, including Sabre.[101] Farelogix was not a GDS but had developed a 'direct connect' API solution that enabled airlines to sell tickets directly to travel agents and travellers, removing GDSs as intermediaries for many bookings.[102] DOJ alleged that the merger would eliminate a competitor

94 id.
95 id.
96 id.
97 See Commission Order Dismissing Complaint, *CDK Global and Auto/Mate*, FTC Matter No. 171 0156, Docket No. 9382 (26 March 2018).
98 Complaint at 5, *US v. Visa Inc. and Plaid Inc.*, No. 4:20-cv-07810 (N.D. Cal. 5 November 2020).
99 253 F.3d 34, 79 (D.C. Cir. 2001).
100 id.
101 Complaint at 6, *US v. Sabre Corp.*, No. 1:19-cv-01548-UNA (20 August 2019).
102 id. at 9.

whose presence airlines used as a bargaining chip to negotiate for lower prices with the GDSs.[103] DOJ argued that Farelogix was 'poised to grow significantly' as the industry shifted towards a newer standard that it had pioneered.[104]

Finally, in its 2020 challenge of Credit Karma's acquisition of Intuit, DOJ seems to have combined a theory of nascent competition with a maverick theory of disruption (as well as a unilateral effects theory). This acquisition raised concerns in the same product market – digital-do-it-yourself (DDIY) tax preparation – defined in *United States v. H&R Block*. In that 2011 case, DOJ blocked a merger between the No. 2 and No. 3 DDIY competitors, H&R Block and TaxAct, based on a loss of direct competition and increased potential for coordination with Intuit, which owns the leading DDIY product, TurboTax. That successful challenge by DOJ involved a more traditional maverick theory of harm.

In 2017, Credit Karma launched its own DDIY tax preparation product.[105] Credit Karma's offering had a very small share compared to Intuit, with only around 3 per cent of the market compared with Intuit's 66 per cent;[106] however, Credit Karma was unique in the market because its offerings are completely free, even for more complex filings, whereas Intuit and all other DDIY tax preparation providers charge fees for anything beyond the most basic filings.[107]

In a complaint accompanying a consent decree, DOJ alleged that 'Credit Karma has constrained Intuit's pricing, and has also limited Intuit's ability to degrade the quality and reduce the scope of the free version of TurboTax . . . If the proposed transaction proceeds . . . consumers are likely to pay higher prices, receive lower quality products and services, and have less choice'. [108] The consent decree required the parties to divest Credit Karma's tax business to Square, Inc., including all the relevant software and intellectual property.[109]

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103 id. at 10 ('For over a decade, Farelogix's airline customers have successfully used the threat of switching to Farelogix's booking services solutions to negotiate better rates and terms with Sabre and the other GDSs for bookings through both traditional and online travel agencies.').

104 id. at 13.

105 Complaint at 2, *US v. Intuit Inc. and Credit Karma, Inc.*, No. 1:20-cv-03441 (D.D.C. 25 November 2020).

106 id. at 2–3.

107 id. at 3.

108 id. at 3–4.

109 Press Release, DOJ, 'Justice Department Requires Divestiture of Credit Karma Tax for Intuit to Proceed with Acquisition of Credit Karma' (25 November 2020): www.justice.gov/opa/pr/justice-department-requires-divestiture-credit-karma-tax-intuit-proceed-acquisition-credit.

Non-price theories: privacy

US agency officials have acknowledged that privacy conceptually could be one quality parameter on which companies compete.[110] Traditionally, however, the agencies seemed disinclined to use antitrust merger review to protect user privacy, instead dealing with user privacy protections as part of the FTC's consumer protection enforcement efforts.[111] FTC Chair Khan's recent announcements and the FTC's suit against Meta Platforms suggest that this could be changing, however, as the FTC framed data privacy as an element of consumer choice that could be harmed by loss of competition.

When the FTC first investigated and then declined to challenge Meta Platform's acquisition of WhatsApp, for example, the FTC's Bureau of Consumer Protection (separate from the Bureau of Competition) sent Meta Platforms a letter reminding them to abide by WhatsApp's privacy commitments to users.[112] In contrast, in its 2021 amended antitrust complaint against Meta Platforms, the FTC alleged that the harm to competition, in part from the acquisition of WhatsApp and Instagram, results in loss of consumer choice, which includes 'enabling users to select a personal social networking provider that more closely suits their preferences, including, but not limited to, preferences regarding the amount and nature of advertising, as well as the availability, quality, and variety of data protection privacy options for users, including but not limited to, options regarding data gathering and data usage practices'.[113]

Non-horizontal theories of harm

Vertical foreclosure

With the FTC's withdrawal from the Vertical Merger Guidelines, and both agencies' plan to modernise their merger guidelines, increased challenges to vertical mergers are likely. This continues a trend of increased vertical enforcement that

110 DOJ, 'Assistant Attorney General Makan Delrahim Delivers Keynote Address at the University of Chicago's Antitrust and Competition Conference' (19 April 2018): www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos.

111 'Statement of FEDERAL TRADE COMMISSION Concerning Google/DoubleClick', FTC File No. 071-0170, at 2 (stating the Commission 'lack[s] legal authority to require conditions to this merger that do not relate to antitrust,' like privacy concerns): www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

112 Press Release, FTC, 'FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition' (10 April 2014): www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed.

113 Amended Complaint at 73, *FTC v. Facebook*.

began before the Guidelines were published in 2020. For example, in 2013, DOJ investigated ASML's acquisition of Cymer. ASML makes lithography machines, which are used to make semiconductors, and Cymer produces the light sources used in those lithography machines. The parties stated that the acquisition was intended to help accelerate the development of 'Extreme Ultraviolet semiconductor lithography technology', which will help to create new and improved microchips.[114] Despite the purely vertical relationship between the two parties, the deal received a Second Request.[115] DOJ ultimately declined to challenge and cleared the merger in April 2013.[116] In 2011, DOJ sought behavioural commitments to clear Google's acquisition of airfare pricing and shopping software developer ITA Software. The remedies were designed to ensure that Google would continue to provide rival online travel websites such as Bing and Kayak access to ITA Software's airfare pricing and shopping engine to power their flight search.[117]

During the Trump administration, DOJ challenged AT&T's acquisition of Time Warner, which was also based on vertical foreclosure concerns. While that acquisition was not entirely in the digital markets sphere, the rationale for the transaction and states' bases for challenging it involved online video and digital advertising. AT&T claimed it pursued the transaction to gain a stream of data and content that would enable it to compete better for advertising dollars against online companies such as Google and Meta Platforms. DOJ alleged that once part of AT&T, Time Warner would have the incentive and ability to extract higher rents for its marquee programming (e.g., CNN and Turner Sports programming such as March Madness, NBA, and MLB games) from rivals of AT&T's DirecTV video distribution business, weakening their ability to compete effectively with

114 Press Release, ASML, 'ASML to acquire Cymer to accelerate development of EUV technology' (17 October 2012): www.asml.com/en/news/press-releases/2012/asml-to-acquire-cymer-to-accelerate-development-of-euv-technology.

115 Press Release, Cymer, Inc., 'ASML and Cymer provide transaction status update' (14 December 2012): www.prnewswire.com/news-releases/asml-and-cymer-provide-transaction-status-update-183464381.html.

116 'U.S. Department of Justice clears ASML acquisition of Cymer', *Business Wire* (5 April 2013): www.businesswire.com/news/home/20130405005784/en/U.S.-Department-of-Justice-clears-ASML-acquisition-of-Cymer.

117 Complaint, *United States v. Google, Inc.*, 1:11-cv-688 (D.D.C. 8 April 2011).

AT&T. DOJ lost its challenge both at the district court and appellate court levels, allowing the merger to proceed,[118] but in April 2022, AT&T spun off most of the Time Warner assets in a transaction with Discovery Inc.

On 1 September 2022, the FTC lost its vertical challenge to Illumina's acquisition of GRAIL before an administrative law judge. Illumina is the largest provider of next generation sequencing (NGS) in the US and globally. NGS platforms allow for DNA sequences to be read and analysed.[119] GRAIL is a pre-commercial diagnostics company that makes NGS cancer tests. This includes multi-cancer early detection (MCED) tests, which use NGS to broadly screen for multiple types of cancer before patients even exhibit systems.[120]

The FTC's concern about this transaction is fundamentally vertical in nature: it is concerned that Illumina could reduce competition in the US MCED market by raising the costs for GRAIL competitors and by otherwise hindering their ability to sell competing tests.[121] For example, the FTC is concerned that Illumina could raise the price of its NGS systems or of necessary chemical reagents that it provides to competitors of GRAIL.[122] This case is also noteworthy because at the time of the complaint, GRAIL was pre-commercial and had not yet earned any revenue, making this another example of the FTC seeking to protect nascent competition.[123]

Despite the ongoing FTC investigation, the parties closed the deal on 18 August 2021, and the administrative trial began on 24 August 2021.[124] Illumina had made an open offer to sign 12-year contracts with anyone interested in securing their supply of its DNA sequencing products, but the FTC

118 See Memorandum Opinion, *United States v. AT&T Inc.*, 1:17-cv-2511, Doc. No. 18-5214 (D.C. Cir. 26 February 2019): www.lit-antitrust.shearman.com/siteFiles/27063/USCA%20DCA%20 18-5214%20-%20USA%20v%20AT&T%20-%20Opinion.pdf.

119 Complaint at 2-3, *Ilumina, Inc. and GRAIL, Inc.*

120 id. at 2, 8.

121 id. at 16–24.

122 id.

123 id. at 8.

124 Mike Scarcella, 'Illumina-Grail deal heads to FTC trial, as EU weighs penalty', *Reuters* (23 August 2021): www.reuters.com/legal/litigation/illumina-grail-deal-heads-ftc-trial-eu-weighs-penalty-2021-08-23; Jonathan Wosen, 'FTC trial kicks off, with fate of Illumina's acquisition of Grail hanging in the balance', *The San Diego Union-Tribune* (27 August 2021): www.sandiegouniontribune.com/business/story/2021-08-27/ftc-trial-kicks-off-with-fate-of-illuminas-acquisition-of-grail-hanging-in-the-balance.

contested the adequacy of this offer as a remedy to competitive harm.[125] The administrative trial ended in June 2022, with the FTC arguing that Illumina should have to divest itself of GRAIL until it retained just the 12 per cent it owned prior to the challenged acquisition. Illumina, on the other hand, stood by its offer to sign long-term supply contracts and argued that sequencing is its most profitable business, making allegations it would limit the sale of its sequencing products untenable. In July 2022, Illumina and GRAIL successfully reopened the administrative record to introduce evidence that Ultima Genomics will soon offer next-generation sequencing in the US. Illumina and GRAIL pointed to the entry as showing that the sequencing market remains competitive.[126]

In December 2021, the FTC brought a complaint to enjoin NVIDIA, a manufacturer of microprocessors, from acquiring Arm, which develops and licenses microprocessor designs and architectures. The FTC alleged that NVIDIA would have an incentive to restrict licensing of Arm designs to competing manufacturers because the benefits to its processor business would outweigh any losses stemming from curtailing Arm's licensing.

According to the FTC, competitors would also be wary to share proprietary information with Arm, as was necessary and routine in Arm's pre-merger business model, because of the risk it could be used against them by NVIDIA. The complaint further alleged that those competitors' inability to work with Arm to incorporate Arm designs into their processors would limit competition even if NVIDIA didn't formally limit design licensing. In February 2022, NVIDIA and Arm abandoned the transaction because of the 'significant regulatory challenges' the transaction faced, including investigations from the UK's CMA and the European Commission.[127]

In February 2022, DOJ brought suit to prevent UnitedHealth from acquiring Change Healthcare, which controls an electronic data interchange (EDI) transaction platform used by insurers, pharmacies and healthcare providers to transmit sensitive claims data to one another. In addition to a typical foreclosure theory and alleged horizontal overlap in the first-pass claims market, DOJ has focused on how UnitedHealth could allegedly use its access to sensitive insurance data flowing

125 Bryan Koenig, 'Illumina "Wasting Court Time" With Deal Overtures, FTC Says', *Law360* (21 July 2021): www.law360.com/articles/1405296/illumina-wasting-court-time-with-deal-overtures-ftc-says.

126 Order at 2–3, *Ilumina, Inc. and Grail, Inc.*

127 NVIDIA, 'NVIDIA and SoftBank Group Announce Termination of NVIDIA's Acquisition of Arm Limited' (7 February 2022): https://nvidianews.nvidia.com/news/nvidia-and-softbank-group-announce-termination-of-nvidias-acquisition-of-arm-limited.

across Change's platform to benefit its own products and reduce competition among health insurers, calling Change's data the real 'prize in the merger', allowing UnitedHealth to peer into rivals' strategies and prices.[128] The trial concluded in August 2022, and the judge ruled against the DOJ in September 2022.

Conglomerate effects

Merger conglomerate effects have been defined as:

> *a distinct category of competitive effects arising from transactions in which the parties' products are not in the same antitrust product market and the products are not inputs or outputs of one another, but in which the products are complementary or in closely related markets.*[129]

The United States noted in its June 2020 submission to the Organisation for Economic Co-operation and Development regarding conglomerate effects, that the agencies 'typically do not view such mergers through a distinct lens, finding that our standard theories of horizontal and vertical harm capture most modern, economically-sound theories of . . . "conglomerate" effects'.[130]

This approach appears to be changing under Khan and other current Democratic commissioners, however. In July 2021, the FTC reportedly opened an investigation into Amazon's planned acquisition of Metro-Goldwyn-Mayer (MGM). According to an article in the publication *The Information*, 'the FTC [was] wary of whether the deal [would] illegally boost Amazon's ability to offer a wide array of goods and services, and [was] not just limited to content production

128 Leah Nylen and John Tozzi, 'UnitedHealth and DOJ trial begins: handling sensitive data', Benefits Pro (3 August 2022): www.benefitspro.com/2022/08/03/unitedhealth-and-doj-trial-begins-handling-sensitive-data.

129 See 'Conglomerate effects of mergers – Note by the United States', Organisation for Economic Co-operation and Development, Directorate for Financial and enterprise Affairs Competition Committee, 2 (4 June 2020): www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

130 id.

and distribution.'[131] Senator Elizabeth Warren also sent a letter to FTC Chair Khan calling for a broad investigation into the transaction, including beyond just the effects in the video streaming market.[132]

The transaction closed in March 2022 without a vote or challenge by the FTC, which was split 2–2 between Democrats and Republicans from October 2021 to May 2022, while the third Democratic Commissioner, Alvaro Bedoya, awaited Senate confirmation. This meant that Chair Khan could not file a complaint without the support of at least one Republican Commissioner. Chair Khan warned that the investigation would continue, and after the deal closed, the FTC released a statement reminding parties that the agency may challenge a deal 'at any' time if determined to be in violation of law.[133]

The FTC has been investigating Amazon on a variety of issues since 2019, and after Bedoya's confirmation, the FTC pursued additional questions about the MGM acquisition.[134] The European Commission approved the transaction, finding limited overlap between the companies and that Amazon faced strong competition in the video streaming market.[135]

The FTC's apparent contemplation of conglomerate effects in the *Amazon/MGM* acquisition represents a divergence from the investigation into Amazon's acquisition of Whole Foods in 2017. There, the FTC rejected a host of non-horizontal theories of harm put forth by opponents of the transaction. Critics expressed concern, for example, that Amazon's acquisition of Whole Foods would allow it to leverage its scale, logistics and buyer power in other retail areas to

131 Josh Sisco, 'FTC Opens Probe of Amazon's MGM Purchase, Signaling a Lengthy Inquiry, *The Information* (9 July 2021): www.theinformation.com/articles/ftc-opens-probe-of-amazons-mgm-purchase-signaling-a-lengthy-inquiry.

132 Letter from Senator Elizabeth Warren to Lina M Khan, Chair, FTC (29 June 2021): www.warren.senate.gov/imo/media/doc/Letter%20to%20FTC%20re%20Amazon-MGM%20Deal.pdf.

133 Todd Spangler, 'Following Amazon's MGM Acquisition Close, FTC Warns It May "Challenge a Deal at Any Time"', *Variety* (17 March 2022): https://variety.com/2022/biz/news/ftc-may-challenge-amazon-mgm-deal-1235208241.

134 Leah Nylen, 'FTC's Antitrust Probe of Amazon Picks Up Speed Under New Boss', *Bloomberg* (31 May 2022, 4:01pm): www.bloomberg.com/news/articles/2022-05-31/ftc-s-antitrust-probe-of-amazon-picks-up-speed-under-new-boss.

135 Press Release, European Commission, 'Mergers: Commission approves acquisition of MGM by Amazon' (15 March 2022): https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1762.

quickly dominate the grocery business (as they claim it did with book retailing).[136] They also raised the concern that Amazon would be able to squeeze certain food suppliers.[137]

The FTC let the acquisition proceed without a Second Request,[138] rejecting these conglomerate monopoly leveraging theories for lack of cognisable antitrust harms.[139] Both Amazon and Whole Foods had modest footprints in the online and offline grocery retail business.[140] The transaction has since offered consumers many benefits, including reduced prices at Whole Foods, the ability to return Amazon orders at Whole Foods and low-cost delivery of Whole Foods groceries via Amazon, among other things.

Another deal that may have involved a conglomerate effects analysis was Salesforce's US$27.7 billion acquisition of Slack in 2021. Salesforce is the world's largest provider of customer relationship management products,[141] and Slack offers a channel-based messaging system that is used for communication and collaboration. Investors reportedly expected early clearance of the deal because of the fact that it was positioned as helping create a stronger competitor to Microsoft Teams.[142]

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136 Diane Bartz, 'Critics say Whole Foods deal would give Amazon an unfair advantage', *Reuters* (22 June 2017): www.reuters.com/article/us-whole-foods-m-a-amazon-com-antitrust/critics-say-whole-foods-deal-would-give-amazon-an-unfair-advantage-idUSKBN19D2Q8.

137 id.

138 Press Release, FTC, 'Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc.' (23 August 2017): www.ftc.gov/news-events/news/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau-competition-agencys-review-amazoncom-incs.

139 Interview of Bruce Hoffman, Director, Bureau of Competition, FTC, *The Threshold*, Vol. XVIII, No. 3, at 15–16 (25 July 2018).

140 Bartz, see footnote 135.

141 Press Release, Salesforce, 'Salesforce Signs Definitive Agreement to Acquire Slack' (1 December 2020): https://investor.salesforce.com/press-releases/press-release-details/2020/Salesforce-Signs-Definitive-Agreement-to-Acquire-Slack/default.aspx.

142 Flavia Fortes, Salesforce, 'Slack Refiled Transaction in US to Give Regulators Extra Time', *MLex* (28 January 2021): https://content.mlex.com/#/content/1260577.

Despite the seemingly complementary nature of the two companies' offerings, however, Salesforce announced that it had received a Second Request from DOJ on 16 February 2021;[143] however, DOJ concluded the investigation on 19 July 2021, allowing the parties to complete the merger without remedies.[144]

Remedies

Divestitures

Divestitures continue to be the primary and preferred merger remedy of the US agencies, and several of the transactions discussed above resolved competitive concerns with simple structural remedies. For example, the consent decree entered into by the parties to the Intuit-Credit Karma merger required the parties to divest Credit Karma's DDIY tax business to Square, Inc.[145]

In divestiture remedies, the US agencies historically have strongly preferred divestiture of a stand-alone business, or assets that already comprised a single business. Mixing and matching of different assets to create a new divestiture business, typically, is disfavoured by US agencies.

DOJ's approach to the *Sprint/T-Mobile* merger is a notable deviation from that policy. T-Mobile's US$26 billion acquisition of Sprint, announced in 2018, involved a more complicated remedy package comprising both structural and behavioural terms.[146] To prevent competitive effects in the market for retail mobile wireless services, DOJ negotiated a consent decree designed to enable Dish Network, a satellite TV distributor that had been accumulating wireless spectrum, to build an internet-of-things 5G network to replace Sprint as a fourth national wireless competitor.[147] T-Mobile agreed to divest Sprint's prepaid brands,

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143 Jordan Novet, 'Justice Department seeks more information on Salesforce's $27 billion deal for Slack', *CNBC* (16 February 2021): www.cnbc.com/2021/02/16/salesforce-slack-deal-doj-requests-more-info.html.

144 'DOJ Drops Probe Into $27.7B Salesforce/Slack Merger', Competition Policy International (19 July 2021): www.competitionpolicyinternational.com/doj-drops-probe-into-27-7b-salesforce-slack-merger; Press Release, Slack, 'Salesforce Completes Acquisition of Slack' (July 21 2021): https://slack.com/blog/news/salesforce-completes-acquisition-of-slack.

145 Press Release, DOJ, 'Justice Department Requires Divestiture of Credit Karma Tax for Intuit to Proceed with Acquisition of Credit Karma' (25 November 2020): www.justice.gov/opa/pr/justice-department-requires-divestiture-credit-karma-tax-intuit-proceed-acquisition-credit.

146 Kori Hale, 'T-Mobile Closes $26 Billion Sprint Deal, Budget Conscious Consumers Beware' (6 April 2020): www.forbes.com/sites/korihale/2020/04/06/t-mobile-closes-26-billion-sprint-deal-budget-conscious-consumers-beware/?sh=7e59ab366785.

147 Competitive Impact Statement at 6, *US v. Deutsche Telekom AG, et. al.*, No. 1:19-cv-02232-TJK (D.D.C. 30 July 2019).

Boost Mobile and Virgin Mobile, to Dish Network, as well as an array of spectrum assets, and provide an opportunity to acquire any redundant retail stores and wireless cell sites.[148]

To help Dish compete while it built out its own national 5G network over the span of several years, the consent decree also required T-Mobile to provide Dish wholesale access to its network for seven years without discrimination against Dish subscribers or preferential treatment of its own subscribers.[149] The remedy was, therefore, unusual in:

- creating a new competitor out of a mix of different assets that did not comprise a stand-alone business, as well as
- being a hybrid between structural and long-term behavioural relief: certain assets were divested, but Dish will also rely on the T-Mobile network and service agreements for years to come.

Another noteworthy aspect of the *Sprint/T-Mobile* merger was that a number of state attorneys general sued to block the merger, despite DOJ indicating its approval for the deal subject to a consent decree and other states joining with DOJ as part of the settlement. They claimed that DOJ had only done a 'cursory investigation' and that the acquisition still violated the Clayton Act, even subject to the settlement with DOJ.[150] The court ultimately ruled in favour of the merging parties, however, giving 'some deference' to DOJ and the Federal Communications Commission and finding that the federal remedy package resolved any likelihood of harm from the merger.[151]

Behavioural remedies

In the early to mid-2010s, behavioural remedies were more common and accepted, particularly for vertical mergers. For example, in 2011, DOJ required Google to agree to certain commitments to provide rivals access to ITA Software's airfare pricing and shopping engine to clear the deal.[152] It also required behavioural

148 Final Judgment at 3-4, 13-18, *US v. Deutsche Telekom AG, et. al.*, No. 1:19-cv-02232-TJK (D.D.C. 20 August 2020).

149 id. at 19–20.

150 Marguerite Reardon, 'DOJ's backing of T-Mobile, Sprint merger challenged by state attorneys general', *CNET* (9 January 2020): www.cnet.com/tech/mobile/states-urge-court-to-disregard-doj-backing-of-t-mobile-sprint-merger.

151 Makena Kelly, 'T-Mobile and Sprint win lawsuit and will be allowed to merge', *The Verge* (11 February 2020): www.theverge.com/2020/2/11/21132924/tmobile-sprint-merger-approved-federal-court-antitrust-lawsuit.

152 *United States v. Google, Inc.*, see footnote 117.

commitments that year from Comcast in its acquisition of video programming provider NBCUniversal. Additionally, DOJ accepted behavioural remedies to resolve concerns with the 2010 merger of Live Nation and Ticketmaster, although issues with this decree and ongoing violations led DOJ to pursue modification and extension of the decree in 2019.[153]

Under the Trump administration, DOJ suggested it was less likely to rely on ongoing behavioural remedies, as there was a strong preference for structural remedies, even in vertical mergers. Makan Delrahim, in a keynote address at the American Bar Association's 2017 Antitrust Fall Forum, stated that he would 'cut back on the number of long-term consent decrees' in place and favour structural remedies over behavioural relief.[154]

A week later, DOJ demonstrated its commitment to Delrahim's position by challenging AT&T's acquisition of Time Warner, rejecting a remedy similar to what was accepted in the 2011 *Comcast/NBCUniversal* merger. DOJ further memorialised this position in its 2020 Merger Remedies Manual, which states that 'remedies should not create ongoing government regulation of the market', and that conduct remedies are typically 'difficult to craft and enforce', making them 'inappropriate except in very narrow circumstances'.[155]

While some expected that the AT&T/Time Warner loss would deter future challenges to vertical mergers and make agencies more open to behavioural remedies in such cases, that is not necessarily the case. In fact, Khan and the Democratic wing of the FTC have taken a similarly strong stance against behavioural remedies while also expressing scepticism towards the widely accepted approach to analysing vertical mergers. In a letter to Senator Elizabeth Warren dated 6 August 2021, FTC Chair Lina Khan wrote that she shared Senator Warren's concerns about behavioural remedies, writing that 'both research and experience suggest that behavioral remedies pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive

153 Press Release, DOJ, 'Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster' (19 December 2019): www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live.

154 Makan Delrahim, Assistant Attorney General, US Department of Justice Antitrust Division, Keynote Address at American Bar Association's Antitrust Fall Forum (16 November 2017).

155 DOJ, Antitrust Division, Merger Remedies Manual, 4 (September 2020). The 2020 Manual replaced the Antitrust Division Policy Guide to Merger Remedies (June 2011), which was enacted under Obama appointee Christine Varney and expressed more openness to behavioural remedies: www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

tactics enabled by the transaction.'[156] The Khan FTC is expected to be more open to vertical and conglomerate theories of harm while also eschewing behavioural remedies, but the ability to succeed in the courts, where case law and economics will challenge this agenda, remains to be seen.

Momentum against vertical mergers and behavioural remedies has grown over the past year with challenges to numerous vertical mergers and with the agencies arguing in each case that the remedies offered were inadequate to prevent competitive effects. In *NVIDIA/Arm*, discussed above, the defendants offered a 'comprehensive set of commitments' to address concerns that NVIDIA would disadvantage or harm its rivals through control of Arm's licensing operation or chill innovation through its access to sensitive competitor information shared with Arm.[157] Defendants offered to:

- create a separate entity dedicated to licensing Arm's intellectual property;
- erect firewalls between that entity and NVIDIA to protect competitors' sensitive information;
- license Arm intellectual property on non-discriminatory term;
- maintain pre-merger levels of technical support at Arm;
- provide access to Arm intellectual property at the same time it is given to NVIDIA design teams;
- continue offering licensees the opportunity to participate in the Arm technical advisory board;
- publish all Arm instruction set architecture modifications and instructions shared with NVIDIA's design teams; and
- enable interoperability between Arm-based products and any other product requested by licensees, without discrimination in favour of NVIDIA.[158]

The transaction was abandoned before the FTC had to litigate the fix and identify the perceived flaws in this package. The CMA found five-year commitments insufficient given the long development cycles in the industry.[159]

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156 Letter from Lina M Khan, Chair, FTC, to Senator Elizabeth Warren (6 August 2021): www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

157 Answer and Defences, *NVIDIA Corp. et. al*, FTC Docket No. 9404 (21 December 2021).

158 id.

159 Andrea Coscelli, 'A report to the Secretary of State for Digital, Culture, Media & Sport on the anticipated acquisition by NVIDIA Corporation of Arm Limited', Competition & Mkts. Auth., § 12 (20 July 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033732/GOV.UK_-_NVIDIA_Arm_-_CMA_Report_to_DCMS__Web_Accessible_.pdf.

DOJ also rejected behavioural remedies in *UnitedHealth/Change Healthcare*, discussed above, which went to trial in August 2022. The parties sought to resolve DOJ's vertical concerns with commitments to Change customers that UnitedHealth would:

- maintain firewalls that UnitedHealth's Optum Insight subsidiary already has in place for handling data from UHG competitors;
- continue to process EDI transactions according to industry standards; and
- make available in the market any innovations developed using Change's EDI data.[160]

The parties argued that it would be 'economic suicide' for Optum to deviate from its long-standing firewall preventing it from sharing external claims data with UnitedHealth, as it would risk losing a sophisticated consumer base that is highly attuned to issues of data protection. At trial, the defence economic expert testified that any benefit from using Change's sensitive data would be outweighed by the resulting loss of customers.[161] DOJ's rebuttal expert argued that Optum does not have enough external business to make losing customers a sufficient disincentive to UnitedHealth using the Change data gained in the acquisition.[162] DOJ emphasised that the preferred remedy for an anticompetitive merger is a 'full stop injunction'[163] and that the parties' proposed remedies carry risks that could be avoided by blocking the merger outright.[164]

Along the lines of blocking a merger being better than alternative remedies, DOJ rejected UnitedHealth and Change's proposal to divest ClaimsXTen, Change's first-pass claims editing software, to a private equity firm. DOJ argued that a private equity firm would not be able to market first-pass claims editing with the same 'competitive intensity' Change can when integrated into its suite of payment accuracy products, and that a private equity firm would lack the incentive to innovate.[165]

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160 ECF 74, Defendants' Pretrial Statement, at 2–3 (13 July 2022).

161 Bryan Koenig, 'UnitedHealth Can't Afford To Misuse Rivals' Data, Judge Told', *Law360* (15 August 2022): www.law360.com/articles/1521150/unitedhealth-can-t-afford-to-misuse-rivals-data-judge-told.

162 id.

163 ECF 70, Plaintiffs' Pretrial Statement, at 4 (13 July 2022).

164 Nylen & Tozzi, see footnote 128.

165 ECF 101, Plaintiff's Pretrial Brief at 64–67 (22 July 2022)

CHAPTER 10

United States: Platforms and Mergers

Maria Garibotti and Brian S Gorin[1]

Introduction

In 2021, the United States saw continued regulatory and legislative scrutiny of merger activity by large firms whose businesses can be analysed as two-sided or multi-sided platforms.[2] Scrutiny of these businesses, and particularly of digital platforms, has been intensifying since President Biden issued an executive order on competition in July 2021. The executive order was intended to promote greater competition in several industries, including technology, and called for closer scrutiny of large companies' acquisitions of nascent or potential competitors.[3]

Following the executive order, legislators and regulators have taken steps to re-examine the statutes and regulatory framework that govern antitrust enforcement in ways that directly impact digital platforms:

Several bills were introduced in both houses of Congress addressing digital platforms, including the American Innovation and Choice Online Act, which seeks to regulate the largest 'online platforms';[4] the Open App Markets Act, which is focused narrowly on payments in app marketplaces;[5] and the Platform Competition and Opportunity Act of 2021, which would establish 'certain acquisitions by dominant online platforms' to be unlawful.[6]

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1 Maria Garibotti is vice president and Brian Gorin is managing principal at Analysis Group.

2 In what follows, we limit the discussion to two-sided platforms to simplify language. The analysis of multi-sided platforms is similar to that of two-sided platforms.

3 Executive Order No. 14036, 86 Fed. Reg. 132 (July 14, 2021)

4 American Innovation and Choice Online Act, S.2992, 117th Cong. (2021–2022).

5 Open App Markets Act, S.2710, 117th Cong. (2021–2022).

6 Platform Competition and Opportunity Act of 2021, H.R.3826, 117th Cong. (2021–2022).

In September 2021, and because of strenuous objections from two of its five commissioners, the Federal Trade Commission (FTC) rescinded its support of the revised Vertical Merger Guidelines, which the FTC and the Antitrust Division of the Department of Justice (DOJ) had jointly issued in 2020. The three commissioners voting for the rescission – FTC Chair Lina Khan, Rebecca Kelly Slaughter and Rohit Chopra[7] – noted that network effects and other aspects of digital markets result in a 'broader set of tactics that firms may use to raise rivals' costs'.[8] While it did not officially withdraw its support, the DOJ stated at the time that it was conducting a review of both the Horizontal Merger Guidelines and the Vertical Merger Guidelines 'to ensure they are appropriately skeptical of harmful mergers'.[9]

Also in September 2021, the FTC published a retrospective analysis of acquisitions by selected technological platforms of small companies (i.e., transactions that were not required to be reported because they were below the statutory threshold).[10] In discussing the report, Chair Khan remarked that it 'captures the extent to which these firms have devoted tremendous resources to acquiring start-ups, patent portfolios, and entire teams of technologists—and how they were able to do so largely outside of our purview.'[11]

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7 Commissioner Chopra subsequently left the Federal Trade Commission (FTC) to become director of the Consumer Financial Protection Bureau.

8 FTC, 'Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly S', Commission File No. P810034 (15 September 2021): www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

9 Department of Justice (DOJ), 'Justice Department Issues Statement on the Vertical Merger Guidelines' (15 September 2021): www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

10 FTC. 'Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study'. (September 20221): www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf. The statutory reporting thresholds were originally established by the Hart-Scott-Rodino Antitrust Improvement Act of 1976 and are updated annually.

11 FTC. 'Remarks of Chair Lina M. Khan Regarding Non-HSR Reported Acquisitions by Select Technology Platforms', Commission File No. P201201 (15 September 2021): www.ftc.gov/system/files/documents/public_statements/1596332/remarks_of_chair_lina_m_khan_regarding_non-hsr_reported_acquisitions_by_select_technology_platforms.pdf.

In January 2022, the FTC and the DOJ (the Agencies) jointly issued their Request for Information on Merger Enforcement (RFI), soliciting public comments in 15 areas that the agencies were re-examining to better understand 'how the agencies can modernize enforcement of the antitrust laws regarding mergers.'[12]

In addition to the RFI, the Agencies hosted 'listening forums' on the 'first-hand effects of mergers and acquisitions', including a session on technology mergers that was held on 12 May 2022.[13] In this session, both Assistant Attorney General Jonathan Kanter of the DOJ and FTC Chair Khan expressed a concern with incumbent platforms acquiring nascent competitors, among other concerns that led them to suggest the need to revise the guidelines 'to better fit a modern economy'.[14]

This focus on digital platform competition is rooted in the economics of two-sided platforms, which can present features that need to be incorporated into antitrust analysis. In this Chapter, we first provide a brief background on the economics of platforms. We then use the themes outlined in the FTC and DOJ RFI to explore implications for digital markets when analysed as two-sided platforms, including summarising some of the commentary received to date by the agencies.

Brief overview of the economics of two-sided platforms

Two-sided platforms are businesses that enable and encourage two groups of users to connect to and interact with each other.[15] These businesses may follow a variety of models, but they share two key features:

- They act as matchmakers between user groups,[16] making it easier for users on both sides to find each other (described by economists as reducing 'search costs') and lowering the costs of any associated interaction (described by

12 DOJ and FTC. Request for Information on Merger Enforcement. (18 January 2022): www.regulations.gov/document/FTC-2022-0003-0001 (RFI).

13 FTC. 'FTC and Justice Department Launch Listening Forums on Firsthand Effects of Mergers and Acquisitions'. (17 March 2021): www.ftc.gov/news-events/news/press-releases/2022/03/ftc-justice-department-launch-listening-forums-firsthand-effects-mergers-acquisitions; a link to the transcript of the technology session is available at https://www.ftc.gov/news-events/events/2022/05/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-technology.

14 Transcript, 'FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Technology', available at: https://www.ftc.gov/news-events/events/2022/05/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-technology (the Technology Listening Forum Transcript).

15 M. Rysman, 'The Economics of Two-Sided Markets'. *Journal of Economic Perspectives*, Vol. 23, No. 3, 2009, p. 125–143.

16 See, for example, D. S. Evans and R. Schmalensee, *Matchmakers: The New Economics of Multisided Platforms*. Harvard Business Review Press, 2016.

economists as reducing 'transaction costs').[17] For example, the operator of a ride-sharing platform first matches a rider seeking travel from point A to point B with a driver willing to make that trip and subsequently facilitates the payment of the associated fare.

- They experience indirect network effects,[18] meaning that the value of the platform to one group of users is connected to the presence of users on the other side of the platform. This means that platform operators must nurture both sides of the platform simultaneously.

Two-sided platforms can be observed throughout the economy. For example, payment cards and newspapers are classic examples of two-sided platforms. Still, as the economy has become more and more digital in the past 20 years, it has led to an increasing prevalence of (digital) platform businesses,[19] driven by the abundance of data and increased processing power that enable improved matching.[20] Commonly cited examples of two-sided digital platforms include online marketplaces and sites related to the sharing economy, from ride-sharing apps to vacation rentals.

The origins of economic research into two-sided platforms can be traced back to early work on network effects or network externalities, which focused on 'system competition' between alternative combinations of components, such as hardware and software.[21] Starting in the early 2000s, and alongside the rise of the internet, economists' growing understanding of network effects led them to the recognition that '[m]any if not most markets with network externalities are two-sided' and 'must "get both sides of the market on board,"'[22] giving rise to the field we now know as platform economics.

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17 A. Hagiu (2009). 'Strategic Decisions for Multisided Platforms', *MIT Sloan Management Review*, Vol. 55, No. 2, Winter 2014.

18 See, for example, B. Jullien, A. and M. Rysman, 'Two-sided Markets, Pricing, and Network Effects', *Handbook of Industrial Organization*, Vol. 4, No. 1, 2021, pp. 485–592.

19 A. Goldfarb and C. Tucker, 'Digital economics', *Journal of Economic Literature*, Vol. 57, No. 1, 2019, pp. 3–43.

20 B. Jullien and W. Sand-Zantman, 'The economics of platforms: A theory guide for competition policy', *Information Economics and Policy*, Vol. 54, 2021, Article 100880.

21 See, for example, M. L. Katz and C. Shapiro, 'Systems Competition and Network Effects'. *Journal of Economic Perspectives*, Vol. 8, No. 2, 1994, pp. 93–115.

22 J. C. Rochet and J. Tirole, 'Platform competition in two-sided markets', *Journal of the European Economic Association*, Vol. 1, No. 4, 2003, pp. 990–1029.

Platform economics initially focused on pricing strategies,[23] and specifically on how the characteristics of demand on each side of the platform, and the structure of indirect network effects, create different pricing incentives on each side of a platform. Because demand on one side of the platform affects demand on the other side, prices cannot be set in isolation; instead, different prices may be charged to different groups of consumers. As an example, a credit card issuer may charge merchants for each transaction completed with the card, while offering rewards to, rather than charging, consumers using the card.

The study of pricing within a single platform naturally led to the study of pricing when there is competition among platforms, including when customers on one or both sides of the platform use multiple platforms, known as multi-homing.[24] For example, consider drivers that simultaneously accept rides from both Uber and Lyft, or riders that maintain both Uber and Lyft accounts and switch between them regularly.[25]

Another question analysed by platform economists is whether the prevalence of network effects leads platform competition to a 'winner-takes-all' situation, or alternatively results in ongoing competition among multiple platforms.[26] Intuitively, the presence of network effects may give an advantage to platforms that enjoy early success and, therefore, acquire an even larger number of users, but many factors have been found to reduce this early advantage, including the possibility of multi-homing, the structure of the network and the possibility that the network effects are fragile.[27] Furthermore, the success of social media platform start-ups such as Snapchat and TikTok demonstrate that, at least in some instances, even competitors with large, established platforms face significant competition from new entrants.

Finally, research in economics and strategy has focused on the ways in which platforms can compete over time or dynamically. Topics have included incentives to innovate and improve quality.[28] Inquiries into innovation and quality focus

23 See, for example, Rochet and Tirole; Rysman.

24 Rysman.

25 Y. Bakos and H. Halaburda, 'Platform competition with multihoming on both sides: Subsidize or not?'. *Management Science*, Vol. 66, No. 12, 2020, pp. 5599–5607.

26 See, for example, Rysman, and Jullien and Sand-Zantman.

27 See, for example, C. Tucker, 'Network Effects and Market Power: What Have We Learned in the Last Decade?', *Antitrust*, 2018, pp. 72–79; F. Zhu and M. Iansiti, 'Why Some Platforms Thrive and Others Don't', *Harvard Business Review*, Vol. 97, No. 1, 2019, pp. 118–125; and J. Crémer, Y. A. de Montjoye and H. Schweitzer, 'Competition policy for the digital era', Report for the European Commission (2019).

28 Jullien and Sand-Zantman.

not just on how a platform competes through innovation of its own services, but also on how the platform can affect its own participants' incentives to innovate and compete. For example, platforms that operate online marketplaces can create ratings systems that encourage sellers to improve their offerings,[29] and innovations in operating system features can induce video game developers to improve graphics and play experience.[30]

As we discuss in the next section, while the Agencies' RFI raises broad topics that affect mergers in businesses of all types, it also addresses whether the unique characteristics of two-sided platforms, and of digital businesses specifically, warrant special treatment or whether they can be addressed in the broader context of traditional merger review.

Platform-related themes in the RFI

The RFI is part of a broader effort in which the Agencies seek to 'modernize enforcement of the antitrust laws regarding mergers'[31] and update both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. The RFI appears to be driven by a belief that merger enforcement has been too lax: the Agencies describe themselves as being 'particularly interested' in any aspects of competition that current guidance may 'underemphasize or neglect' and seek 'specific examples of mergers that have harmed competition'.

The RFI is structured as a series of questions on 15 topics, spanning the purpose and goal of the merger review process, the types and sources of evidence that Agencies should use in their analysis of merger outcomes and the types of analysis that can identify those outcomes, and themes arising in specific areas of merger review: potential and nascent competition, monopsony power and labour markets, innovation and intellectual property, and digital markets. These topics are not separated into horizontal or vertical mergers, and one question is whether this distinction should be revisited.

29 See, for example, P. Belleflamme and M. Peitz, *The Economics of Platforms*, Cambridge University Press, 2021, Chapter 6.

30 See, for example, Rysman.

31 RFI, p. 1.

As at the time of writing, the RFI has received more than 1,900 comments,[32] which are expected to inform updated guidelines by the end of 2022.[33] It drew comments from a broad range of stakeholders, including academics, practitioners, industry groups and think tanks, as well as individuals.

The questions on digital markets highlight themes that are common to the antitrust analysis of two-sided platforms, from the possibility of 'tipping' to the treatment of multiple sides in market definition. In this section, we focus on these digital market questions, zooming in on those that are most closely related to two-sided platforms. Most of these questions tap into existing debates about the appropriate treatment of two-sided platforms in general and digital platforms in particular. For each set of questions, we first present the questions as stated in the RFI, and then we discuss the relevant economics and present some of the commentary from academics, practitioners and other commentators.

Should there be dedicated guidelines for digital markets?

From the RFI:

> *How, if at all, should the guidelines' analysis of mergers in digital markets differ from mergers in other markets? How should markets be defined in the case of mergers in the digital sector where products and services undergo rapid change? How should the guidelines address prospective competitive harms in rapidly evolving markets?*[34]

This first set of questions in the RFI relates to whether digital markets are sufficiently different from other markets to merit special guidelines, focusing on the possible challenges associated with market definition when products change rapidly through innovation, and allowing for the possibility that harm may be prospective in digital markets. During the listening forum on technology, AAG Kanter mentioned the 'unique economics of the internet', and Chair Khan referred to 'dynamic and novel issues' in digital markets.[35]

The comments received reflect disagreement among commentators over the need for special treatment of digital businesses.

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32 www.regulations.gov/docket/FTC-2022-0003.

33 FTC. 'An Update on FTC Merger Enforcement: Remarks at International Bar Association's 19th Annual International Mergers and Acquisitions Conference' (15 June 2022): www.ftc.gov/system/files/ftc_gov/pdf/CWilsonUpdateMergerEnforcement.pdf.

34 RFI, p. 7.

35 Technology Listening Forum Transcript.

Those in favour of a different approach appeared to worry that digital businesses have certain unique features that make traditional merger analysis harder to implement or that may require novel theories of harm. For example, they suggest that traditional approaches to market definition may result in overly narrow markets that lead to 'overlooking' potential anticompetitive effects,[36] or that the prevalence of products with no monetary price in digital platforms renders the Guidelines' primary focus on the analysis of price effects ineffective.[37] Others, however, suggest that in digital markets in particular, it is necessary to consider the impact of an acquisition across multiple markets.[38]

Those against such distinction point to the imprecision of defining a digital market when digital businesses are highly diverse and many industries offer products that may have digital components, or when digital offerings may compete with physical offerings,[39] questioning the need to single out digital markets. They also argue that Guidelines should be organised around analytical concepts, and that the analytical concepts that apply to digital businesses are not unique to the digital world and may apply more broadly.[40]

Even commentators who favour a special focus on digital markets acknowledge that the factors that arise in digital markets are not necessarily new, but instead that the 'degree to which they exist in digital markets'[41] may require special attention. A middle-of-the-road approach may be to update the Guidelines to reflect the type of competitive dynamics that arise in digital markets, while stopping short of creating separate guidelines.

Whether through specific guidelines for digital markets or through the analysis of platform economics more generally, the remaining questions raise relevant economic issues, which we address next.

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36 See, for example, 'Comments of the Electronic Frontier Foundation and the Public Interest Patent Law Institute on the Department of Justice / Federal Trade Commission Request for Information on Merger Enforcement', 21 April 2022, p.2: www.regulations.gov/comment/FTC-2022-0003-0438.

37 'Public Comments of the Colorado and Nebraska Attorneys General in Response to the Request for Information on Merger Enforcement', 21 April 2022: www.regulations.gov/comment/FTC-2022-0003-0767 (Colorado and Nebraska AGs), p. 28.

38 'US Merger Guidelines Review: Comment by Reset', 21 April 2022: www.regulations.gov/comment/FTC-2022-0003-1066 (US Merger Guidelines Review), p. 3.

39 'Comments of the Computer & Communications Industry Association (CCIA)', p. 7: www.regulations.gov/comment/FTC-2022-0003-1780

40 'Gregory J. Werden in Response to Request for Information on Merger Enforcement': www.regulations.gov/comment/FTC-2022-0003-0087 (Werden), p. 36.

41 'Center for American Progress RFI Submission on Merger Guidelines', 21 April 2022, p. 15.

Network effects and potential tipping

From the RFI:

> *How should the guidelines analyze mergers in markets subject to tipping toward oligopoly or monopoly, such as may result from significant network effects? How should the nature and timing of enforcement strategy differ in markets subject to tipping?*[42]

This set of questions focuses on the possibility that an industry might 'tip' into a concentrated structure because the magnitude of network effects for businesses operating in the industry, and that merger enforcement in such industries might need to be modified to take such risks into account, including by having different 'timing', where timing appears to refer to the idea that protecting nascent competition may require deployment of antitrust enforcement before there is evidence or likelihood of actual harm.

The concept of tipping reflects the winner-takes-all hypothesis discussed in the section on platform economics. Under this hypothesis, indirect network effects within a platform could grow sufficiently large such that the leading platform will 'pull away from its rivals in popularity once it has gained an initial edge'.[43]

Theoretical research in platform economics has pointed to the possibility of tipping in markets that exhibit indirect network effects.[44] A commonly cited theoretical conclusion is that competition under such circumstances can be 'for the market' rather than competition for share within the market.[45] This does not necessarily lead to a sustained absence of competitive constraints for incumbents, as entrants may seek to challenge the existing incumbents by offering a differentiated or improved product.

More recently, the theoretical inevitability of tipping has been challenged. In the context of digital platforms, scholars have pointed to factors such as the fragility of incumbent network effects when they are not tethered to a hardware platform,[46] as well as to the importance of how the network is structured and

42 RFI, p.7

43 Katz and Shapiro.

44 Rysman.

45 See, for example, J. Farrell and P. Klemperer, 'Coordination and Lock-in: Competition with Switching Costs and Network Effects', *Handbook of Industrial Organization*, Vol. 3, 2007, pp. 1967–2072.

46 Tucker.

whether the network effects are local,[47] challenging the idea that markets with two-sided platforms are inevitably prone to tipping and highlighting the possibility that there could be ongoing competition within the market.

Recent research has also pointed to the limits in the power of network effects, which do not always grow with the total size of the network, but may instead depend on whether the 'right' participants join the network (a phenomenon that is sometimes referred to as local network effects).[48] It is also possible that, at some point, positive indirect network effects from increased size are outweighed by negative externalities from 'congestion', which limits a platform's optimal size.[49]

How does theoretical economic research relate to the RFI? The RFI appears to start from the premise that two-sided digital platforms are competing for the market rather than within the market, in the sense that a traditional antitrust analysis may not correctly identify as being in the same product or geographic market the full set of competitive forces faced by two merging parties. If this were the case, it is possible that the established approach to merger analysis, which focuses on product and geographic markets in which the merging parties currently overlap, would fail to flag certain mergers of current competitors.

In a similar vein, the focus on the nature and timing of enforcement strategy appears to originate from the concern that firms that are benefitting from having achieved this tipping point would want to acquire potential competitors before they enter the same market.

This view was espoused by AAG Kanter during the listening forum:

> *If given room to grow, the unique economics of the internet and digital autonomy mean that new and innovative company [sic] can rapidly disrupt existing markets, challenging incumbents, and enhancing consumer choice. But if we allow dominant firms to buy up or block these nascent competitors before they get to scale, we will lose out twice.*[50]

47 F. Zhu and M. Iansiti, 'Why Some Platforms Thrive and Others Don't', *Harvard Business Review*, Vol. 97, No. 1, 2019, pp. 118–125.

48 C. Tucker, *Network Stability, Network Externalities, and Technology Adoption. In Entrepreneurship, Innovation, and Platforms*. Emerald Publishing Limited, 2017.

49 See, for example, D. S. Evans and M. Noel, 'Defining antitrust markets when firms operate two-sided platforms', *Columbia Business Law Review*, Vol. 3, 2005, p. 667.

50 Technology Listening Forum Transcript.

Similar concerns are raised in other regulatory efforts. The three bills discussed in the first section of this Chapter note a 50 million user threshold for the platforms they seek to regulate, which can be interpreted as a reference to network effects and a de facto definition of a tipping point. In this same vein, the Platform Competition and Opportunity Act explicitly forbids acquisitions if the asset or stock issuer is a 'nascent or potential competit[or] to the covered platform.'[51]

Responses to the RFI revealed mixed views on the need for special attention to nascent competitors and on the need to establish special mechanisms for the analysis of businesses with strong indirect network effects. Commentators presented both sides of the economic debate on the strength and durability of network effects.

Commentators in favour of creating a special analytical framework for mergers of businesses with strong network effects, particularly digital platforms, argued that dominant incumbent platforms enjoy durable market power and prevent entry by new firms.[52] Consistent with Chair Khan and the FTC's retrospective study of acquisitions, these commentators also argued that digital platforms have adopted a 'serial acquisition strategy' of smaller competitors.[53] A common message was that the risk of tipping may call for increased enforcement.[54] These positions were summarised succinctly by one commentator:

> *[E]nforcers and courts need to pay particular attention to potential and nascent competition in digital platform markets. They create markets prone to tipping, where a small, new, or potential competitor may play an outsized role. To protect competition in these markets, it's especially important to recognize the harms of acquisitions of potential or nascent competitors and block mergers that might be allowed in other types of markets.*[55]

Other commentators noted that more recent research has pointed to the fragility of network effects in many digital platform settings and point to TikTok's rivalry with Facebook as an example of an 'upstart' effectively challenging an incumbent

51 See footnote 6.

52 'Request for Information on Merger Enforcement Public: Comments of 23 State Attorneys General', 21 April 2022 (Comments 23 State AG), p. 36: www.regulations.gov/comment/FTC-2022-0003-0807.

53 'Comments of the American Antitrust Institute', 21 April 2022: www.regulations.gov/comment/FTC-2022-0003-1155 (American Antitrust Institute), p. 4; and ibid.

54 US Merger Guidelines Review, p. 9.

55 'Re: Request for Information on Merger Enforcement, FTC-2022-0003-0001', 21 April 2022: www.regulations.gov/comment/FTC-2022-0003-0730 (Re: RFI Merger Enforcement), p. 3.

platform,[56] arguing that there is no particularly significant risk and that transactions should be evaluated on a case-by-case basis. One commentator on this side of the debate offered the following summary:

> *The propensity of network effects to tip markets and the resulting harm are both exaggerated. Networks effects are just one of the many forces shaping market evolution. Dominance can be unstable and short-lived with digital platforms, and several other forces can counter the positive reinforcement of network effects. . . . The strategy and timing of merger enforcement should not depend on the possibility of tipping.*[57]

It is interesting to note that in addition to the questions discussed in this section, the RFI has a section entirely dedicated to whether the guidelines should change standards or propose new approaches to address 'potential and nascent competition' more generally, across all industries. These are not focused on digital markets or platforms, so we will not discuss them here, and instead turn to the next topic: transaction platforms.

Are transactions platforms different?

From the RFI:

> *How should the guidelines evaluate mergers in two-sided simultaneous transaction platform markets? What are the competitively-relevant differences between two-sided simultaneous transaction platforms and other kinds of multi-sided platforms?*[58]

These questions address a potentially significant distinction between different kinds of two-sided platforms, calling out platforms that enable simultaneous transactions as potentially meriting differential antitrust analysis.

56 NetChoice RFI Submission, 21 April 2022 (NetChoice RFI Submission), pp. 42–43: www.regulations.gov/comment/FTC-2022-0003-0415.

57 Werden, p. 37.

58 RFI, p. 8.

The notion of a special two-sided platform called a 'simultaneous transaction' platform was put forth by the US Supreme Court in its *Ohio v. American Express* (*Amex*) decision on anti-steering provisions in credit cards.[59] *Amex* analysed credit cards as two-sided platforms connecting buyers and merchants and highlighted the simultaneous nature of interactions between the platform and each side:

> *Because the interaction between the two groups is a transaction, credit-card networks are a special type of two-sided platform known as a "transaction" platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other.*[60]

While the Supreme Court focused on simultaneity, the economic literature that originated the term transaction platform focused on the presence of an observable interaction (or transaction) between both sides of the platform.[61] Importantly, the definition of transaction platforms does not require that this interaction be a monetary transaction, but that the different sides of the platform interact directly with each other, through the platform. A transaction platform differs from a newspaper, which could be seen as bringing together readers and advertisers (therefore operating as a two-sided platform) who never interact directly with each other through the platform.

Amex and the underlying economic literature upon which the decision relies suggest that this distinction directly informs the approach to market definition in the antitrust analysis of two-sided platforms. The main question is whether an antitrust analysis should define a single market that combines the services provided to both sides of the platform, or to define two related markets, and whether the answer depends on the platform being a transaction platform.

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59 *Ohio et al. v. American Express Co.*, 138 S. Ct. 2274 (2018).

60 ibid., p. 1.

61 L. Filistrucchi, D. Geradin, E. van Damme and P. Affeldt, 'Market Definition in Two-Sided Markets: Theory and Practice'. *Journal of Competition Law & Economics*, Vol. 10, No. 2, 2014, pp. 293–339.

Amex and proponents of defining a single market for transaction platforms view the platform as providing the service of facilitating interactions between both sides:

> *[D]efining a single market implies defining the market for services to a transaction. The product that is offered is the possibility to transact through the platform. . . . Candidate substitute products are not only other platforms which offer, to both sides, the possibility to transact but also non-intermediated transactions.*[62]

In *Amex*, the Supreme Court ruled that both sides of the platform should be included in a single market for credit card transactions.[63] The Supreme Court also found that finding a price increase on one side of the platform was not sufficient to show anticompetitive effects in the relevant market, which should consider joint price and joint output.[64]

The *Amex* decision has proven to be controversial, with certain antitrust scholars and practitioners embracing the approach taken by the Supreme Court,[65] and others questioning whether the definition of a single market may miss relevant competitive dynamics on either side of the platform.[66]

The controversy surrounding *Amex* is echoed in the commentary on the RFI, with certain commentators arguing for limiting the application of a single market definition in platform settings, without addressing the question of whether a platform is a transaction platform, and others arguing that such a single-market approach is often necessary and appropriate for transaction platforms.

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62 ibid.

63 'Indeed, credit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole.' *Amex*, p. 2.

64 'Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the two-sided credit-card market.' *Amex*, pp. 2–3.

65 See, for example, J. D. Wright and J. M. Yun, 'Burdens and balancing in multisided markets: The first principles approach of Ohio v. American Express', *Review of Industrial Organization*, Vol. 54, No. 4, 2019, pp. 717–740.

66 See, for example, M. L. Katz and A. D. Melamed, 'Competition Law as Common Law: American Express and the Evolution of Antitrust', *University of Pennsylvania Law Review*, Vol. 168, 2019, pp. 2061–2106.

Commentators arguing in favour of limiting the *Amex* approach argue that there should be no special consideration given to transaction platforms, and that antitrust authorities should always separately consider competitive pressures on each side of the platform rather than defining a combined market.[67] Many commentators directly acknowledged their view that following the approach delineated in *Amex* may be 'problematic',[68] and that new guidelines may need to depart from the approach or limit its application to narrow circumstances related to competition being uniform across both sides of the platform, rather than whether the platform is a transaction platform.[69]

On the other side of the debate, certain commentators supported the need to understand transaction platforms as providing a single service that connects consumers on both sides of the platform, and therefore analyse market definition and competitive effects by defining a single market,[70] with some commentators emphasising the need to follow *Amex* in vertical mergers.[71]

The question of whether all or some two-sided platforms are seen as transaction platforms, and therefore as providing the service of intermediating interactions, can have wide-ranging consequences on the antitrust analysis of a proposed transaction, and it is likely that any updated guidelines will provide additional guidance on the Agencies' interpretation of the law and description of their current practice. The next set of RFI questions digs deeper into the specifics of merger analysis for two-sided platforms.

Choosing the right analytical framework

From the RFI:

> *What are the appropriate indicia of market power in complex and multi-sided markets? Are traditional market definition approaches reliable frameworks for assessing the existence and magnitude of market power in these markets? Are other tools as effective or more effective than market definition in those contexts?*[72]

67 US Merger Guidelines Review, p. 71.

68 Werden, p. 38.

69 US Merger Guidelines Review, p. 46; and American Antitrust Institute, p. 20.

70 'Comments of ITIF', 21 March 2022, p. 17: www.regulations.gov/comment/FTC-2022-0003-0189.

71 NetChoice RFI Submission, pp. 43–44.

72 RFI, p. 8.

This group of RFI questions suggests that the characteristics of industries with two- or multi-sided platforms may require a re-examination of the antitrust toolkit available to regulators when assessing market power. The questions suggest two separate concerns: one is whether existing approaches that originate in the analysis of one-sided markets must be adapted to apply to settings with two-sided platforms; the other is whether there are new tools or approaches that would be 'more effective' in these settings.

Research in platform economics acknowledges challenges with applying existing tools to two-sided platforms. For example, researchers have highlighted the difficulties with the application of the hypothetical monopolist test based on a small but significant increase in price (SSNIP)[73] because of the need to account for indirect network effects that create feedback loops. Researchers have also emphasised the point that 'the standard quantitative tools of merger analysis can't be used mechanically when multi-sidedness is important',[74]giving as examples the need to adapt critical loss analysis to contexts with zero prices on one side of the platform, and the need to include indirect network effects in merger simulations. More recently, researchers have proposed adaptations of analysis of upward pricing pressure (UPP) to settings with two-sided platforms, finding that not doing so may overstate UPP.[75]

Responses to these questions were broad, consistent with the broad scope of the inquiry. Most commentators seemed to agree with the need to adjust antitrust analysis to the realities of any industry, but while some commentators noted that '[c]omplex and multi-sided markets are not so special',[76] others proposed specific ways in which traditional analyses may need to be adjusted. For example, certain state enforcers commented on the need to adapt structural presumptions to settings with network effects, suggesting that firms in such settings may be able to exercise market power at lower shares,[77] and to create analogues of the SSNIP test as alternatives for markets in which prices on one side of the platform may be non-monetary, such as by considering potential increases in attention or data

73 D. S. Evans and R. Schmalensee, 'The Antitrust Analysis of Multi-sided Platform Businesses'. National Bureau of Economic Research, Working Paper 18783, 2013.

74 R. Schmalensee, 'An Instant Classic: Rochet and Tirole, pp. 173–175.

75 A. Cosnita-Langlais, B. O. Johansen and L. Sørgard, 'Upward pricing pressure in two-sided markets: Incorporating rebalancing effects', *International Journal of Industrial Organization*, Vol. 74, 2021, Article 102692.

76 Werden, p. 39.

77 Comments 23 State AGs, pp. 24, 29.

requirements from customers, rather than increases in price.[78] Other suggestions are to de-emphasise the need for a SSNIP test and to focus instead on a holistic approach, focusing on qualitative evidence of substitutability that identifies products or services that are 'reasonably interchangeable'.[79]

Overall, commentators did not seem to embrace a wholesale change away from traditional antitrust analysis, but instead supported the careful application of existing principles to two-sided platforms specifically.

One factor unique to two-sided platform settings is the concept of multi-homing. The RFI included a set of questions specifically related to multi-homing, which we address next.

The role of multi-homing

From the RFI:

> *How should the guidelines account for multihoming or interoperability? To what degree does multihoming or interoperability offset competitive concerns in actual practice?*[80]

The final set of RFI questions that we analyse in this chapter is related to multi-homing and interoperability, which is an important factor in the analysis of competition between platforms.

As presented in the RFI and some of its responses, the discussion of tipping and competition for the market suggests that users choose a single platform on which to interact. The concept of multi-homing presents an alternative to this assumption.

Multi-homing is present when users can easily access multiple platforms within a given industry. Theoretical economics literature shows that the nature of competition among two-sided platforms depends on the extent to which one or more of the sides are able to multi-home, although there is no single answer, and the consequences of multi-homing depend on how each model is set up and what kind of multi-homing it can accommodate.[81]

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78 Colorado and Nebraska AGs, pp. 26–27.

79 Colorado and Nebraska AGs, p. 28.

80 RFI, p. 8.

81 See, for example, Rochet and Tirole; M. Armstrong, 'Competition in two-sided markets', *RAND Journal of Economics*, Vol. 37, No. 3, 2006, pp. 668–691.

The ability to multi-home is related to the ease of switching among competing platforms, and academics have argued that increased ease of multi-homing increases competition.[82] Interoperability between platforms has a similar effect to multi-homing, in that it makes switching easier and increases competition.[83]

Commentators have differed regarding the weight to put on considerations of multi-homing when analysing mergers in industries with two-sided platforms. They have pointed to the potential mitigation of anticompetitive effects driven by the availability of multi-homing,[84] with some putting forth the idea that a platform may acquire a company in a different market to reduce competition by making multi-homing more difficult or preventing interoperability.[85] This would be the case, for example, if this target company was in the business of facilitating multi-homing, for example, by facilitating sellers' maintenance of storefronts in competing online marketplaces. Supporters of this view note a need for the merger guidelines to be 'especially wary of potential mergers to make multi-homing more difficult'.[86]

While acknowledging the relevance of multi-homing and interoperability, commentators suggested that it is 'too specialized for inclusion in the Guidelines' and too subjective and unlikely 'to provide meaningful insights into a merger's effect on competition'.[87] These commentators pointed to the need to understand the magnitude of the importance of multi-homing and interoperability in any given setting, which requires understanding consumer behaviour. In this view, the possibility of multi-homing or interoperability is just one additional factor in antitrust analysis and does not rise to the level of requiring inclusion in the guidelines.[88]

The debate on multi-homing captured in comments to the RFI echoes that of other questions: whether the guidelines need to include specific mention of phenomena that may be particularly relevant in two-sided platforms or instead provide a general conceptual framework that can be adapted to the specifics of the transaction under analysis.

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82 Tucker.

83 See, for example, Crémer, de Montjoye and Schweitzer.

84 'Comments of the Free State Foundation', 21 April 2002, p. 3: www.regulations.gov/comment/FTC-2022-0003-1510.

85 S. Athey and F. M. Scott Morton, 'Platform annexation', 2021, available at SSRN 3786434.

86 Re: RFI Merger Enforcement, p. 8.TC-2022-0003-0730.

87 NetChoice RFI Submission, p. 45.

88 Werden, p. 40.

Conclusion

The increased focus on antitrust enforcement in technology has extended to the arena of mergers and, in particular, to the merger guidelines, as evidenced by the RFI and listening forum. The two main dimensions of debate seem to be the degree to which merger enforcement should look beyond established practices (e.g., scrutinising mergers when products overlap) and the degree to which the economics of two-sided markets, and of two-sided digital platforms in particular, need to be addressed specifically within the guidelines, or whether they can be addressed by a general conceptual framework that can be applied across industries and market structures. Whatever the outcome, the upcoming year is likely to bring renewed scrutiny of acquisitions in the digital space.

CHAPTER 11

Argentina

Miguel del Pino[1]

Introduction: antitrust law and the fourth industrial revolution

Antitrust law has always worked within an economic structure. After several industrial revolutions, we have reached a turning point where technology presents itself not only as a tool but as a social force that affects our political, social and economic environment. Consequently, for some years now, we have been witnessing a new phase of capitalism, which authors have called the fourth industrial revolution.[2]

This revolution is linked to the technological innovations that have been produced in recent decades. Among these are those relating to information and communication technologies, the development of computers, tablets, smartphones and the like, and their programs and apps, and the emergence of the internet at the end of the 20th century.[3] Moreover, one of the main factors that has influenced the connection between physical and digital applications is known as the internet of things (IoT).

The IoT can be described as the relationship between things (products, services, places, etc.) and people through a series of connected technologies and various platforms.[4] This technology accomplished its full potential through sensors and numerous other means of connecting things in the physical world

1 Miguel del Pino is a partner at Marval, O'Farrell & Mairal. The author would like to thank Franco Nigro and Pilar Moreyra for their assistance with this chapter. This chapter was accurate as at November 2021.

2 Klaus Schwab, founder and executive chairman, World Economic Forum, *The Fourth Industrial Revolution* (Crown Business, New York, 2016).

3 Luis Antonio Velasco San Pedro, 'El papel del derecho de la competencia en la era digital', Revista de Estudios Europeos, No. 78 (July–December 2021), pp. 93–110, http://www.ree-uva.es/, p.102.

4 Klaus Schwab, op. cit. (footnote 2, above).

to virtual networks. Billions of devices around the globe, such as smartphones, tablets and computers, are connected to the internet. In addition, future projects such as 'smart cities' rely on a digitalised structure that is not far from reach, as big-tech companies aim to pursue an algorithmic way of living.[5]

Today, the world is all about connectivity and data flows, as producers and consumers exchange information and make decisions freely and independently.[6] This flow of data operates within the society of information in which digital platforms build up digital markets under the scope of e-commerce, substituting and complementing traditional markets based on physical interpersonal relationships.[7] Therefore, it is undeniable that the internet has transformed our economy and has affected different markets, both existing and forthcoming.

By January 2019, 56 per cent of the global population were internet users.[8] Companies such as Google and Facebook already operate in a data economy or digital economy,[9] marked by the development of a double process that implies, on the one hand, the exponential generation of data and, on the other, its continuing dissemination favoured by all kinds of sensors and artificial intelligences.[10]

In addition, in the digital economy there are market structures characterised by the presence of online platforms from two or more sides. For example, search engines are platforms that connect users, content providers and advertisers. Unlike one-sided markets, they do not offer a direct interaction between the final

5 Carlo Ratti, 'We need more urban innovation projects like the "Google City". This is why', World Economic Forum, https://www.weforum.org/agenda/2020/09/google-smart-cities-urban-innovation-technology/ (last accessed 7 September 2021).

6 Yuval NoahHarari, *Homo Deus: A Brief History of Tomorrow* (Penguin Random House UK, 2017), p. 430.

7 Luis Antonio San Pedro Velasco, op. cit., (footnote 3, above), p. 102.

8 Tim Berners-Lee on reshaping the web, *Financial Times*, Tech Tonic podcast (3 December 2019).

9 The Organisation for Economic Co-operation and Development [OECD] has defined the term 'digital economy' as the economy made up of markets based on digital technologies that facilitate the trade of goods and services through electronic commerce (e-commerce) that operates layer-based, with separate segments for transporting data and applications. 'The Digital Economy' (2012), Directorate for Financial and Enterprise Affairs, Competition Committee, https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf.

10 Éric Sadin, 'La silicolonización del mundo: La irresistible expansión del liberalismo digital' (Caja Negra, CABA, 2018), p. 26.

consumer and the supplier of the good but are characterised by their intermediaries who make connections between users through indirect networks. WhatsApp would be an example of a direct network economy or platform.[11]

However, just as the Internet Age has been established, blockchain technology brings great changes and proposals. Therefore, it would not be wrong to speak of a Blockchain Era. As such, it is based on consensus mechanisms built on decentralised databases capable of eliminating the need for third parties to act as intermediaries.[12] In fact, Sir Tim Berners-Lee – founder of the world wide web – has argued that 'the future is moving towards decentralized platforms as opposed to the current centralized versions'.[13]

Therefore, it is within this new economic structure that antitrust law finds itself at the centre of change as we – actors in the process – reflect on whether antitrust policies in Argentina are firm enough to confront this new digital era.

Defining key concepts: digital economy and platform economy

A new economic model has arisen from the fourth industrial revolution under the notion of a digital economy. Nonetheless, a clarification of what is meant by 'digital economy' has become increasingly difficult and intertwined with traditional economy. Therefore, before any analysis can be made, a definition, conceptualisation and measurement of this phenomenon is necessary.

Some do not rely on a specific definition and identify the digital economy as a 'complex structure'[14] or 'less as a concept and more as a way of doing things'.[15] Moreover, definitions may fail to conceive the essence of the phenomenon it seeks to define and loses itself in the times and trends from which they emerge. For

11 Available at https://www.argentina.gob.ar/sites/default/files/cautelar_whatsapp_facebook.pdf.

12 Giovanna Massarotto, 'Antitrust in the Blockchain Era', *Notre Dame J. Emerging Tech.* (forthcoming) (2020), p. 2.

13 See Klint Finley, 'Tim Berners-Lee, Inventor of the Web, Plots a Radical Overhaul of His Creation', *WIRED* (4 April 2017), https://www.wired.com/2017/04/tim-berners-lee-inventor-web-plots-radical-overhaul-creation/.

14 European Parliament, 'Challenges for Competition Policy in a Digitalised Economy' (July 2015), Brussels. http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU(2015)542235_EN.pdf.

15 Enrico Benni, Elmasry Tarek, Jigar Patel and Jan Peter aus dem Moore, 'Digital Middle East: Transforming the Region into a Leading Digital Economy, (October 2016), New York. NY. http://www.mckinsey.com/global-themes/middle-east-and-africa/digital-middle-east-transforming-the-region-into-a-leading-digital-economy.

example, early definitions focus especially on the internet, reflecting its emergence during the 1990s, whereas later definitions add new inventions such as mobile phones, sensor networks, cloud computing or big data.[16]

Despite this, all definitions share three key elements.[17] First, they all recognise technology as the foundation for the digital economy. Second, no definition tends to restrict itself only to the digital sector but amplifies its borders. As a result, 'digital economy' covers all digitally enabled economic activity. This last aspect tends to be a problem since the more activities have developed with technology, the more the digital economy is just economy. Therefore, it is complex to distinguish between what may fall under the scope of digital economy and what is just traditional economy branched with technology.[18] Authors[19] argue that, instead of referring to a digital economy, one should speak of a digitalised economy. The distinction arises from the differentiation between 'digitisation' (conversion of data from analogue to digital form) and 'digitalisation' (application of digitisation to organisational and social processes, including economic activity).[20] If this last approach is applied, a narrower scope of digital economy would serve those activities and technologies that are emergent and did not pre-exist the digital technology such as the platform economy, the gig economy and the sharing economy. This brings up our third key element, which that is all definitions of 'digital economy' extend not only to the applications but the productions of those digital technologies. Therefore, platform-based companies would be included, such as Facebook or Google, which are solely digital, as well as platforms that trade tangible goods, such as Amazon, eBay, or Alibaba, plus Airbnb and Uber in a closer blurred edge.[21]

Now that platform-based companies have been mentioned, we should analyse a definition of platform economy. Platform economy falls under the scope of the digital economy as an economic environment that brings together two or more groups who value each other in some way.[22] These platforms have already been questioned under antitrust principles. On the one hand, each platform has

16 Rumana Bukht and Richard Heeks, 'Defining, Conceptualising and Measuring the Digital Economy', Centre for Development Informatics (University of Manchester, UK, 2017), p. 4.

17 id., pp. 11–12.

18 id., p. 11.

19 Namely, Rumana Bukht and Richard Heeks.

20 Rumana Bukht and Richard Heeks, op. cit. (footnote 14, above), p. 12.

21 id., p. 13.

22 Mark Jamison, 'Applying Antitrust in Digital Markets: Foundations and Approaches', Boston College Intellectual Property & Technology Forum, 2020, p. 11, http://bciptf.org/wp-content/uploads/2020/04/Jamison_Applying-Antitrust-in-Digital-Markets.pdf.

an access guardian (gatekeeper) on a key distribution channel (key channel). Facebook is a social network; Google is an ad-supported search engine; Amazon is a commercial distribution network; and Apple is an operating system with an app store.[23] The access guardian of each platform uses its position to maintain its market power. From that position, it controls other businesses, which allows it to identify potential rivals to copy or replicate or buy;[24] for example, Facebook buying Instagram and WhatsApp.[25] Moreover, most of these companies have exerted an abusive dominant position in the market, excluding competitors and exploiting consumers who have developed high levels of dependency as technology has become part of our daily living.[26]

As a result, the one question underlying these issues is whether the Argentine Antitrust Law No. 27,442 (the Antitrust Law) is sufficient to address competition problems within the digital market.

Merger control cases with a digital aspect

The Prisma case

On 25 November 2019, a Resolution was signed that approved a transaction carried out in January 2019, which consisted of a group of 14 banks from Argentina and Visa International selling 51 per cent of shares of the company Prisma Medios de Pago SA and transferring control of the company to the Advent investment fund.[27] This resulted in a process that began in May 2016 when the National Antitrust Commission opened an investigation into the credit, debit and electronic payment card market.[28] The case developed in a context of technological change and significant digital disruptions in the sector. One of the greatest merits of the investigation was the study of the sector from an antitrust perspective in Argentina, which in the long run facilitates the entry and development of new players and business models based on platforms and provides certain predictability regarding the Antitrust Commission's opinion on these matters.

23 Luis Antonio San Pedro Velasco, op. cit. (footnote 3, above), p. 102.

24 id.

25 https://www.titlemax.com/discovery-center/lifestyle/everything-facebook-owns-mergers-and-acquisitions-from-the-past-15-years/.

26 This is further analysed on an investigation issued by the National Antitrust Commission in Argentina over the Facebook Economic Group.

27 See https://www.argentina.gob.ar/sites/default/files/dictamen_prisma.pdf.

28 id.

Professor Xavier Vives identifies three types of actors involved in the sector: incumbents and two types of new entrants – fintech companies and big-tech companies.[29] Among the incumbents are banks and credit card brands such as Visa and MasterCard. Big-techs are large technology companies that are expanding their product horizons to provide electronic and financial payment services and are typically organised around platform models such as Amazon, Google or Apple. In Argentina, the main exponent of this group is Mercado Libre, an electronic commerce platform that ventured into electronic payment services with its Mercado Pago app. Finally, fintech (financial technology) is meant by companies that use innovative technology in financial services.[30] In Argentina, a numerous group of these are present.

The origin of the Antitrust Commission's market investigation was the existence of a closed market structure made up of a group of incumbents that could be preventing the development of big-tech and fintech players in these markets, thus causing damage to the general economic interest. In this case, Prisma, as the main incumbent, exerted a dominant position and was the only company commercialising the Visa brand in Argentina. Also, the company was present in all the links of the chain of electronic payment services and its shareholders were 14 Argentine banks, leaving a restricted space for big-tech and fintech.[31]

The Antitrust Commission evaluated two theories: (1) a potential unilateral conduct based on an abusive exclusive dominant position by Prisma; and (2) a potential coordinated conduct facilitated by the society of banks in Prisma that would affect consumer financing conditions.[32]

Potential unilateral conduct based on abusive dominant position[33]

First, the Antitrust Commission understood that there were entry barriers that made it difficult for new players to enter the market and for the expansion of existing players that competed with Prisma in the provision of various services. This was evident, given that only Prisma had an operating licence to market

29 Xavier Vives, 'Digital disruption in financial markets', OECD hearing (June 2019), https://one.oecd.org/document/DAF/COMP(2019)1/en/pdf.

30 id.

31 Available at: https://www.argentina.gob.ar/sites/default/files/dictamen_prisma.pdf, pp. 2–3.

32 Esteban Greco and María Fernanda Viecens, 'Innovación y disrupción digital en los mercados de medios de pago: El caso de defensa de la competencia en Argentina' (University of San Andrés, December 2019), pp. 4–5, https://repositorio.udesa.edu.ar/jspui/bitstream/10908/16692/1/%5bP%5d%5bW%5d%20-%20Greco%20y%20Viecens.pdf.

33 id.

VISA. Moreover, the integration of Prisma made the company the only option for some players within the value chain. For example, entrants who wanted to offer payment options and include the VISA brand in their portfolio had to turn to Prisma. Consequently, the company had built an infrastructure under which any actor who wanted to commercialise with VISA (whether online or physically) had to work with Prisma.

Potential coordinated conduct facilitated by society of banks[34]

The shareholding composition of Prisma, in which 14 of the main banks in the country converged, constituted a potential vehicle for the coordination of commercial strategies, since the financing system through the payment of instalments with VISA credit cards implemented by Prisma established financing conditions that had to compete with those offered by its shareholder banks.

Relevant market definition: an analysis of platform markets

The credit card and electronic payment markets belong to the category of platforms that connect different types of customers and are known as bilateral or multilateral platforms. One definition applicable to this type of market is provided in a study by the Organisation for Economic Co-operation and Development (OECD): 'a market in which a firm acts as a platform and sells different products to different groups of clients, recognising that the demand of a group depends on the demand of another group'.[35]

One of the distinctive characteristics of these markets is the relationship between the demand of the different groups of users of the platform (the different sides of the platform) that allow indirect network effects. These effects constitute externalities, since a greater number of users on one side of the platform make it more attractive to users on the other side. When these effects are significant, the prices that the platform charges users on one side affects demand on the other side, which in turn leads to reactions in demand from the first group.[36]

Further, the Antitrust Commission identified four relevant markets: (1) electronic payment issuance; (2) adhesion or acquisition; (3) electronic payment processing; and (4) provision of terminals or interfaces for electronic payments.[37] Prisma operates in all these markets.

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34 id.

35 Lapo Filistrucchi, 'Market Definition in Multi-Sided Markets', OECD hearing (June 2017), https://one.oecd.org/document/DAF/COMP/WD(2017)27/FINAL/en/pdf.

36 Esteban Greco and María Fernanda Viecens, op.cit. (footnote 30, above), p. 6.

37 See https://www.argentina.gob.ar/sites/default/files/dictamen_prisma.pdf, pp. 2–3.

The case was finally solved through the offer of a structural commitment consisting of the divestment of Prisma and a commitment to conduct linked to the conditions for the provision of the payment processing service, whose validity conditions were subject to compliance.[38]

The *Prisma* case stands as an important precedent within the digital economy since the subject held to discussion is not purely digital but a reflection of an ongoing process (as explained above) regarding the digitisation of the traditional economy. As a result, the Antitrust Commission first entered the world of economic platforms and prepared to face even greater challenges.

Investigations and decided cases

WhatsApp and Facebook

On 13 May 2021, the Secretariat of Trade in Argentina, based on the opinion of the Antitrust Commission, ordered the opening of an *ex officio* investigation against WhatsApp Inc and its controllers for a potential violation of competition, under the terms of Sections 1 and 3 of the Antitrust Law.[39] As in other jurisdictions mentioned in its opinion (Turkey, India, Italy, Germany and Brazil), the Antitrust Commission considered that updating the terms of service and conditions of WhatsApp privacy (mandatory for its users) that would take place on 15 May 2021 could generate anticompetitive consequences by virtue of its interaction with its parent company, Facebook.

As a result of this opinion, a preventive measure was imposed in the terms of Section 44 of the Antitrust Law[40] that, in short, establishes that (1) the Argentine subsidiaries of Facebook and WhatsApp refrain from implementing or suspending the update of the conditions of service and privacy policy of the WhatsApp application in Argentina for 180 days or until the end of the investigation, whichever happens first, and (2) the companies refrain from exchanging data in the sense established in the update even in cases where WhatsApp users have accepted the update.

The Antitrust Commission understood in its opinion that, given the high penetration of users in Argentina, Facebook holds a dominant position in the digital platforms market through its social networks (Facebook and Instagram), as well as the WhatsApp messaging platform. Taking this dominant position into account, the Antitrust Commission identified a series of potential problems that

38 id., p. 7.

39 See https://www.argentina.gob.ar/sites/default/files/cautelar_whatsapp_facebook.pdf.

40 http://servicios.infoleg.gob.ar/infolegInternet/anexos/310000-314999/310241/norma.htm.

would arise as a result of the new terms and conditions, among which would be a possible exploitative conduct (referring to the compilation of user information on the platforms and the absence of options for the users of these platforms to limit the processing of their information outside the platform on which it was required or obtained) and exclusions (corresponding to possible exclusions of competitors in online advertising as a result of the treatment, cross-linking and consolidation of the information obtained about the users of all its platforms).[41]

In addition, the Antitrust Commission analysed the relevant market within the economic structure of digital technologies.[42] Citing the OECD, the Antitrust Commission argued that the digital economy is an economy made up of markets based on digital technologies that facilitate the trade of goods and services through electronic commerce (e-commerce) that operates on a layer basis, with separate segments for the transport of data and applications.

Within the digital economy, there are market structures that are characterised by the presence of online platforms with two or more sides; that is, of platforms that coordinate the interdependent demand of two or more groups of users. These structures are generally financed through advertising and include, for example, search engines, social networks, commerce portals, audiovisual content services, among other platforms.

As a result, platforms with two or more sides include two or more user groups. For example, search engines are platforms that connect users, content providers and advertisers. Unlike one-sided markets, they do not offer a direct interaction between the final consumer and the supplier of the good but are characterised by intermediaries who make connections between users through indirect networks. WhatsApp would be an example of a direct network economy or platform.

The characteristics of a platform with two or more sides are that:

- there are two or more user groups that use the platform;
- there are indirect network externalities that occur when the usefulness of the platform for the user on one side of the market increases when the number of users, the quantities traded or the quality of the users on the other side of the market increases. For example, the greater the number of users or market share of a social network, the more value it will have for any advertiser; and
- there is an intermediary or platform necessary to internalise the externalities created by the market consumer group.

41 See https://www.argentina.gob.ar/sites/default/files/cautelar_whatsapp_facebook.pdf, pp. 11–12.

42 id., pp. 8–10.

The market with two or more sides in which Facebook and its subsidiaries participate, particularly those that provide the social media service, is part of what is known as a non-transactional two-sided market (or advertising platform). Unlike commercial platforms, there is no direct transaction between the groups of users of the platform, because the business model consists of attracting users to the platform and generating incentives for advertisers to pay for advertising space on the platform.

The analysed case demonstrates that an investigation into possible anticompetitive practices in digital markets initiated in one jurisdiction may be replicated in others, producing a snowball effect. In this way, the global presence of digital markets not only serves as regulatory inspiration but also allows us to anticipate cases that could arise before the authorities in Latin America. Therefore, the *WhatsApp/Facebook* case has proved to be a modern precedent in which Argentine antitrust law has been tested under the competition problems that may arise in digital platforms.

Competition policy and advocacy initiatives

As regards the initiatives carried out by the Antitrust Commission, the opening of the *WhatsApp/Facebook* investigation followed a trend started by foreign competition authorities that inquired into WhatsApp's privacy policy, which signals the Commission's commitment to the international antitrust agenda in terms of digital platforms and user privacy. In this sense, and considering the Commission's often insufficient funding, it is to be expected that, in the near future, more cases and investigations regarding digital platforms will be 'imported' from foreign competition authorities.

In relation to these cases and investigations, the multinational nature of the markets involved not only encourages the Antitrust Commission to evaluate the regulations adopted in other countries but also to examine their case law on the matter. This can be seen in Argentina through the *WhatsApp/Facebook* case, in which the opening of the investigation followed international precedents from countries such as Turkey, India, Brazil, Germany, Italy and the United States.

In this sense, in June 2021, the European Commission opened two new investigations. The first targets Google for an alleged restriction on competition by limiting third parties' access to data needed to operate in the digital advertising market. The second involves an investigation of Facebook's new 'Facebook Marketplace' to evaluate the organisation's potential competitive advantage in the digital advertising market thanks to the information it gathers from its social

media platforms. Although these investigations have not been picked up by the Antitrust Commission yet, it should come as no surprise if it decides to take a look at these markets in the near future.

The foregoing shows that an investigation into potential anticompetitive conduct in digital markets opened in a particular jurisdiction may be replicated in others (such as Argentina) in a snowball effect. Thus, the global presence of digital markets not only provides regulatory inspiration but also signals the future cases to be discussed by Latin American competition authorities.

In relation to the antitrust policy in Argentina, however, there are no specific regulations regarding digital platforms. Hence, new digital issues have to be faced on the basis of generic anticompetitive conduct and merger control regulations.

Moreover, on 30 November 2020, a Draft Bill for the amendment of certain sections of the Antitrust Law was included within a set of bills to be addressed by the Argentine National Congress in its extraordinary sessions. The Draft Bill includes several relevant changes to the structure of the National Competition Authority (which is intended to replace the Antitrust Commission some time in the future, as explained below) as regards both the merger control and anti-competitive conduct regimes. This Draft Bill was approved by the Senate on 4 February 2021, which has included certain amendments to the original draft. Since the Draft Bill was not discussed during extraordinary sessions, it is now expected to be discussed by the House of Representatives during its ordinary sessions of 2021. However, at the time of writing, it has not yet been discussed and there is no indication as to when it will be. It should be noted that this Draft Bill does not address digital markets specifically nor does it propose any specific procedures or regulations that would aid the Antitrust Commission or the parties in proceedings or investigations regarding these types of markets.

Institutional issues

The Antitrust Commission has been striving for the digitalisation of dockets for some years. Before the covid-19 pandemic struck, filings before the Commission had to be performed both physically and digitally (i.e., in CD format) with the aim of eventually transitioning into a fully digital system.

This process had to be abruptly sped up once the government placed restrictions to circulation and attendance in the workplace. To maintain the Antitrust Commission's functionality during the pandemic, a remote procedures platform (Trámites a Distancia (TAD)) was implemented. Through this website, the parties in a merger control proceeding can notify a transaction before the Antitrust Commission as well as provide answers to subsequent requests for information.

However, it should be noted that TAD is not a proprietary system of the Antitrust Commission. Instead, it is a platform used to manage a wide variety of government permits and procedures before different agencies and authorities. As such, TAD is not tailored to fit the needs either of the Commission or of the companies that appear before it. In addition, TAD users are often met with technical difficulties that may interfere with the proper filing of merger control notifications or responses to requests for information.

Furthermore, some issues regarding antitrust proceedings in Argentina have not been addressed in this digitalisation process. For example, anticompetitive conduct cases that began before the implementation of TAD (bearing in mind that anticompetitive conduct proceedings can last upwards of five years) have not yet been digitalised. As a consequence, since they are not accessible online, cases have to be accessed manually by attorneys in the Antitrust Commission's offices.

As regards the possibility of creating a digital unit within the Antitrust Commission, the Antitrust Law created a new decentralised and autarchic antitrust authority within the Executive Branch: the National Competition Authority. However, until the appointment of the members of the new antitrust authority, the existing double-tier system comprising the Antitrust Commission and the Secretary of Domestic Trade will remain in force. The National Competition Authority will include three divisions: the Antitrust Tribunal, the Anticompetitive Conduct Secretariat and the Merger Control Secretariat. At the time of writing, the National Competition Authority had not been created. Moreover, the aforementioned Bill for the amendment of the Antitrust Law has addressed the issue of the creation of this authority but made no mention of the creation of a digital unit or any other branch of the sort. As such, and considering the substantial delay in the implementation of changes to the antitrust authority, we believe the creation of a digital unit is unlikely, at least in the foreseeable future.

Finally, as regards the Antitrust Commission's budget, it should be noted that, although Section 33 of the Antitrust Law sets out filing fees that would contribute to make up the Commission's budget, these filing fees have not been brought into effect yet. As such, at the time of writing, the parties in a merger control proceeding need to pay no fees to file for a transaction's review. This is a hindrance to the Antitrust Commission's budget, which currently depends fully on funds granted by the Ministry of Productive Development. This budget limitation could also make it difficult to create a digital unit, at least for the time being.

Given the relevance that companies in the digital markets currently have, it is critical that the Antitrust Commission faces the challenges posed by these dynamic and modern markets. From a purely practical perspective, it remains to be seen whether the Commission is ready to continue incorporating sophisticated concepts and analysis tools in accordance with this need.

Conclusion: is Argentina's Antitrust Law up to the challenge?

At a time when innovation symbolises process, it is important that antitrust regulations refrain from disrupting the development of the digital markets. Nonetheless, certain limits must be constructed so that new players may participate in the game, allowing for a broad portfolio of choice for consumers and users. The law is about regulating reality and as such we are responsible for keeping up with the process. Our standards must remain firm during times of change. Still, the question remains whether substantial reforms are needed or if adaptation will be sufficient. A proper equilibrium should be chosen since maintaining principles is what assures formal validation when implementing our legislation in any case, but without any strong interventionism that may generate limitations to innovation, which is ultimately the engine of an Argentine economy that urgently needs to take off.

CHAPTER 12

Brazil

Barbara Rosenberg, Marcos Exposto and Julia Krein[1]

Brazil's antitrust authority, the Administrative Council for Economic Defence (CADE) has been paying increasing attention to matters involving digital markets. In the past couple of years, CADE has released two work documents summarising both national and international discussions on the matter, with the goal of making foreign and domestic practice more accessible to its staff and to the public. According to its recently appointed chair Alexandre Cordeiro, CADE is vigilant of the issues that a digital economy has brought to the antitrust authority, but also careful not to deter innovation in fast-paced markets, while keeping the consumer welfare standard as its guiding principle.[2]

It is important to highlight that there is no consensus on what qualifies as a 'digital market' from the perspective of Brazilian competition law enforcement. CADE's latest work document discussing digital issues addressed decisions in all markets in which there is some type of 'platform' connecting two or more groups of clients over the internet, even if the cases did not specifically involve a discussion about a digital aspect of the business. As the global economy evolves

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1 Barbara Rosenberg and Marcos Antônio Tadeu Exposto Júnior are partners, and Julia Krein is a junior associate at Barbosa Müssnich Aragão Advogados - BMA. This chapter was accurate as at November 2021.

2 Since his nomination was confirmed by the Brazilian Senate on 7 July 2021, Mr Cordeiro has given many interviews to the press stating his views on the goals of Brazilian antitrust policy, including those involving digital markets. See, e.g., his interview to *Reuters*, as published by Istoé Dinheiro on 19 July 2021, at: https://www.istoedinheiro.com.br/entrevista-conglomerados-formados-por-big/ and his 19 July 2021 interview to CNN at https://www.cnnbrasil.com.br/business/cade-deve-intervir-o-minimo-possivel-no-mercado-diz-novo-chefe-da-autarquia/. See also his 14 July 2021 interview with *Brazil Journal*, available at: https://braziljournal.com/no-cade-um-novo-xerife-cauteloso-com-os-remedios-que-aplica.

towards an increasingly more digital world, however, an ever-growing number of business transactions is carried out through the internet, which means that nearly all markets already have or will at some point have a digital aspect to them, broadening the scope of what could potentially qualify as 'digital'.

Discussions about digital markets in Brazil to this point have therefore tended to aggregate many different business models, such as internet searches, advertising, ridesharing, hardware, software, retail, etc. For the purposes of this Chapter, the selection of cases mentioned focuses on relevant competition assessments centered on a predominantly digital company or business (that is, one which relies mainly on the internet to operate, e.g., Uber's ride-sharing, Google's search and advertising services). Our analysis extends to cases in which final decisions had been issued by 31 August 2021.

Merger cases with a digital aspect

Brazil requires mandatory notification to CADE of a broader range of transactions in addition to full-blown mergers, also including certain minority share acquisitions, creation of joint ventures and consortia, and certain strategic partnerships or collaborations among competitors creating a common enterprise between competing companies (associative agreements), which are jointly referred to as 'concentration acts'.[3] In this section, we use 'merger case' broadly to refer to all types of transactions that are reportable under the Brazilian merger control regime, even if they are not acquisitions per se.

Out of the 143 merger cases analysed by CADE involving digital platforms described in CADE's work document, since 2000, 86 per cent were subject to a fast-track analysis, with only 14 per cent of these cases undergoing the non-fast track (ordinary) procedure (comparable to the European Union's long form review); out of these cases, only two were subject to remedies.

In these two cases, the remedies applied in one of them were not related to any digital aspect of the business,[4] and therefore will not be considered for the purposes of this Chapter. In the next item, we provide an overview of the other case, which concerned debates over the disruptive potential of a digital company.

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3 Per Articles 88 and 90 of Law No. 12,529/11; Articles 9 and 10 of CADE's Resolution No. 2/2012, CADE's Resolution No. 17/2016.

4 The case concerned the acquisition of Nike's Brazilian branch by sports retailer Centauro, including a distribution arrangement with Nike's headquarters by means of which Centauro would become Nike's exclusive distributor in Brazil. CADE applied remedies to separate Nike's business from that of Centauro to prevent vertical restraints against other competing retailers, a remedy that applied equally to digital and brick-and-mortar operations, without

Itaú/XP case: minority investment in a disruptive company

XP Investimentos S.A. (XP) is a NASDAQ-listed company that pioneered the investment platform model in Brazil, inspired by the US's Charles Schwab Corporation. It gained traction in particular after 2015, and, in 2017, Brazilian retail banking group Itaú Unibanco S.A. (Itaú) notified CADE of its intention to acquire 49.9 per cent of the total shares of XP Group's holding company (an initial acquisition of 30.1 per cent of its voting stock, with a possibility of increasing this stake to up 49.9 per cent of voting stock in the future, in any case without gaining control over XP).

In its analysis of the proposed minority acquisition, CADE expressed concerns that the acquisition could hinder competition between investment platforms, particularly because, by offering investment options from multiple distributors, XP had disrupted the traditional investment model in which consumers invested only in proprietary products offered by their retail banks.

Although the shareholders' agreement to be executed between Itaú and XP's shareholders limited some of the powers Itaú would hold over XP after its investment, CADE still deemed it necessary to apply remedies to preserve competition among investment platforms by limiting certain practices that it understood could raise barriers to entry in the segment.

CADE thus decided to apply remedies despite the transaction's lack of horizontal overlap or significant market shares; the majority decision issued by Commissioner Paulo Burnier emphasised that XP's position as a disruptive player in a two-sided market required an analysis beyond traditional concentration indices to preserve the competitiveness of the investment platform model.

The remedies adopted, however, did not directly relate to Itaú's rights over XP, as CADE was satisfied at the time that the proposed shareholders' agreement limited Itaú's ability to shield itself from the competitive pressure XP originally posed over traditional banking services.

In the agreement on behavioural remedies ultimately signed with CADE, Itaú agreed to treat competing investment platforms fairly, without discrimination, and to refrain from directing its banking clients towards XP. XP, on the other hand, undertook certain obligations against the use of exclusivity clauses with its distribution network (a practice that predated the transaction) and other

any particular digital concern. See Merger Case No. 08700.000627/2020-37 (*Grupo SBF S.A/ Nike do Brasil Comércio e Participações Ltda*).

measures aimed at reducing barriers to entry for competing investment services, even if some of them had no direct causal link with the minority shareholding acquisition by Itaú.

Despite its initial intention to increase its shareholding in XP, in late 2020, Itaú announced its intention to sell its stake in XP, and in early 2021 both companies defined how this sale would take place after the appropriate regulatory approvals, so that Itaú will no longer hold any interest in XP.

In any case, to date, this was the most prominent merger case in which CADE expressly stated its concerns about potential competition posed by a digital service, particularly as a justification to extend its analysis beyond market shares and impose remedies that related to competitive conditions in the market.

Other merger decisions

As mentioned above, CADE analyses most of the 'digital' merger cases under a fast-track procedure, which makes most of its decisions on these matters simpler, namely without an in-depth review, as such cases often can be cleared on a first-look basis.

CADE's decisions on internet search tools

CADE's two merger cases concerning search services date back to the 2000s: the *Google/DoubleClick* case, and the *Microsoft/Yahoo* case.[5] Both cases analysed both aspects of a internet search service, that is, its search functionalities to the final user and its advertising offerings.

In the 2007 *Google/DoubleClick* case, CADE defined the affected relevant market as the national market for 'ad serving', which would be vertically related to digital search services. CADE understood that there could be concerns related to the search services obtaining unfair competition advantages owing to their vertical integration with the ad-serving activities, but ultimately concluded that there were no grounds for intervention in that case. This conclusion was due to the fast pace of innovation in the market, the existence of strong rivals such as Microsoft offering its own search services, and that a search engine manipulating its results would likely lead its users to start conducting queries in higher quality services.

While the analysis of the *Google/DoubleClick* case was eminently vertical, in the 2009 *Microsoft/Yahoo* case, CADE analysed the horizontal overlap between Bing and Yahoo's search tool. At that time, CADE already found that there are

5 Merger Cases No. 08012.005304/2007-11 and 08012.006419/2009-94.

significant returns to scale in the search market, as the more queries are conducted in each service, the more these queries can be used to improve future ones. In that case, CADE concluded that the merger between Bing and Yahoo could result in gains to improve the resulting company's ability to compete with Google's search tool and approved the case without restrictions.

Since then, CADE has not assessed any other mergers in the digital search segment, but it came back to review the market for digital searches again in the 2018–2019 decisions in the Google anticompetitive conduct investigations, detailed below.

CADE's decisions on social networking services

CADE has analysed cases involving social networks on few occasions: Microsoft's 2011 acquisition of Skype and its 2016 acquisition of LinkedIn.[6] In the first case, CADE defined a relevant product market as the market for instant messaging services, with a worldwide global dimension. In the second one, CADE left the relevant market dimensions open, indicating that the fact that LinkedIn was focused on professional contacts mitigated concerns resulting from the transaction..

CADE's decisions on video-on-demand services

CADE first reviewed the video-on-demand segment during the 2017 *AT&T/ Time Warner* merger, an analysis that was further detailed in the context of Disney's 2018 acquisition of Fox.[7] In both cases, although CADE acknowledged that video on-demand services may represent some form of competitive pressure over traditional paid television (pay TV) channels and operators, it ultimately decided in the *Disney/Fox* case to not include video-on-demand services in the same relevant market as pay TV, thereby limiting its analysis of the case to pay TV only.

In 2020, CADE upheld the segmentation between video-on-demand and pay TV in its fast-track analysis of a case involving Warner's HBO;[8] on the other hand, in a 2021 case, it also assessed a scenario comprised of both video on demand and pay TV services.[9] In the *Amazon/MGM* case, CADE's General Superintendence upheld the previous practice of segmenting video on demand services.[10] This was,

6 Merger cases No. 08012.006188/2011-33 and 08700.006084/2016-85.
7 Merger cases No. 08700.001390/2017-14 and 08700.004494/2018-53.
8 Merger case No. 08700.001726/2020-36.
9 Merger case No. 08700.000129/2021-75.
10 Merger case No. 08700.004073/2021-28.

however, an analysis under the fast-track procedure, so it is possible that in future cases that require a more in-depth analysis, CADE acknowledges different or evolving market conditions as this sector undergoes fast-paced changes.

Investigations and decided cases

Initially, we highlight that there are no cartel, coordination or collusion investigations currently being carried out by CADE with a digital aspect. This section, therefore, focuses on vertical and unilateral conduct investigations.

Brazil applies an effects test (which is like other jurisdictions' 'rule of reason') to vertical and unilateral conduct cases, requiring a case-by-case analysis of the economic conditions in which a given conduct takes place. Given the differences between the context and business models analysed in each case, CADE's conclusion in a specific setting should, therefore, not be understood as binding for future investigations. Even though CADE usually observes its past decisions when assessing a new case, it may deviate from its previous conclusions should it find that the new facts or economic conditions differ from previous ones.

Google cases

Between late 2018 and 2019, CADE closed three cases against Google without any penalties. These cases had been opened between 2011 and 2013 following complaints by Microsoft and Buscapé (a Brazilian price comparison site). There are still two open investigations against Google under way. In this section, we describe each of them.

Google AdWords API case

The first closed case, which was based on a complaint by Microsoft,[11] concerned the terms and conditions of the API related to Google's AdWords (now Google Ads, Google's text search advertising tool). The API was key in allowing automatic management of campaigns by developers, and Microsoft claimed that certain clauses of its terms and conditions restricted their ability to multihome across different search advertising services. CADE ultimately closed the case because it found no indication of said restrictions to multi-homing, particularly

11 The complaint was later withdrawn, but CADE decided to continue with the investigation against Google based on Microsoft's original claims. See Administrative Proceeding No. 08700.005694/2013-19.

considering that all ad agencies and advertisers that responded to its requests for information reported having no issues in multi-homing due to these terms and conditions.

Google Shopping cases

The second closed case, which followed similar complaints by other price comparison sites in other jurisdictions, concerned Google Shopping, particularly the rich product results Google displays in its general search results whenever it identifies that a user is searching for products.[12] These results feature a particular product offer in a third-party website with a picture and their price and are usually displayed in the top of the search results page above text results. Price comparison site Buscapé filed a complaint to CADE arguing that this format unfairly gave preference to Google's own price comparison tool, Google Shopping, and excluded rivals from accessing a similar format.

After an eight-year proceeding that included a detailed economic study by CADE's Department of Economic Studies (DEE), CADE ultimately decided to close the case after a tie among the six commissioners and CADE's chair exercising his casting vote in favour of closing the case without penalties.

The majority decision was grounded in DEE's economic study, which did not find evidence of a causal link between Google's conduct and actual harm to price comparison sites, a fact highlighted by the decision as a key difference between the case in Brazil and the similar complaint in Europe. Additionally, the majority decision also found that there were reasonable justifications for Google's rich shopping results based on evidence that they benefited consumers. Additionally, CADE's chair emphasised that there was no clear remedy to be applied to the case other than having CADE design Google's product, and that antitrust intervention should be carefully weighed, especially in fast-paced developing markets, to avoid overdeterrence. Given the lack of clear evidence of harm to competition caused by Google's conduct and a clear-cut remedy to the case, it was closed without any penalties or remedies.

Still regarding Google's rich results, in 2016, local results website Yelp brought a similar complaint to that of the *Google Shopping* case, arguing that Google unfairly gave preference to its own local results by displaying them in a prominent position in the search results page including rich features such as a map. This case is still ongoing before CADE's General Superintendence.[13]

12 Administrative Proceeding No. 08012.010483/2011-94.

13 Administrative Inquiry No. 08700.003211/2016-94.

Use of third-party content cases

The last case CADE closed was a separate complaint brought by Buscapé during the *Google Shopping* case in which it claimed that Google was 'scraping' (i.e., unfairly automatically crawling and collecting) product reviews from the Buscapé website and displaying it in Google Shopping. CADE also closed the case because it found there was no evidence of such reiterated conduct on Google's part, and that the limited evidence Buscapé had produced of some of its product reviews being displayed in Google Shopping were owing to a technical error (which still attributed their source to Buscapé). Absent evidence of the conduct, CADE decided to close the case without penalties.

Nevertheless, over the course of this case concerning 'scraping' in product reviews, CADE received some complaints from press publishers claiming that Google would unfairly benefit from the display of their news content, thereby diverting traffic and ad revenue from their pages. CADE decided to open a separate investigation into this matter, which is currently ongoing before CADE's General Superintendence.[14]

Uber cases

Uber launched in Brazil in 2014, and, although at the time there were already some relevant apps intermediating the connection between taxi drivers and passengers, Uber was the first mobility app offering private ride-sharing instead of connecting the user to a taxi driver. This launch disrupted private passenger transportation in Brazil, as well as elsewhere, and this disruption resulted in four separate claims to CADE between 2015 and 2016 involving Uber's activities.

Cases against Uber

Out of the cases against Uber, there were two very similar ones offered by the Brazilian Chamber of Deputies' Consumer Defence Commission and by an association of taxi drivers claiming that Uber would be engaging in unfair competition by offering 'individual private passenger transportation services' without having to comply with national and municipal regulation applicable to taxi services.[15] This claim was grounded on the fact that existing regulation on private transportation services applied only to taxis, but not to private cars (likely because ridesharing had never been a widely adopted practice requiring regulation).

14 Administrative Inquiry No. 08700.003498/2019-03.

15 Administrative Inquiry No. 08700.004530/2015-36 and Preliminary Proceeding No. 08700.010960/2015-97.

CADE's General Superintendence closed both cases in 2015 and 2017 without any penalties; in both decisions, it found that Uber's market entrance had pro-competitive effects instead of causing harm to competition. It also emphasised that CADE did not have the mandate to regulate Uber's activities, as this was an attribution of the federal and municipal legislative powers. The mere fact that there was asymmetric regulation over different players, therefore, was not sufficient to find a competition violation.

In 2016, CADE also received two separate claims by one citizen and the state of São Paulo public prosecutors against Uber's pricing practices, claiming that Uber's algorithm would act by unlawfully coordinating prices among private drivers, promoting an artificial price control at a predatory pricing level, which led to a single investigation opened that year.[16]

CADE's General Superintendence also closed this case without any penalties. First, it did not find evidence of predatory pricing, since there was no evidence of sustained losses suffered by Uber drivers, and therefore there was no evidence of prices set below drivers' marginal costs. Regarding the coordination claims, CADE found that (1) there was no evidence of express or tacit cartelisation between Uber drivers; and (2) even if Uber's business model sets drivers' prices, there was clear evidence that this business model had benefitted consumers and promoted competition, and therefore could not be deemed anticompetitive. CADE's General Superintendence did, however, issue a non-binding recommendation for ridesharing apps to reconsider their pricing model to allow drivers to have greater pricing freedom.

Case moved by Uber

Uber, alongside a law school's student group, in 2017 filed a sham litigation complaint before CADE against taxi drivers' associations, targeting lawsuits moved by the latter against Uber's business in Brazil, as well as other intimidatory conduct that taxi drivers would have adopted against Uber drivers.[17]

CADE's Tribunal closed Uber's case against the taxi drivers' associations in 2017 because it found that the latter's claims to the judiciary power were a legitimate attempt at solving a regulatory void and did not meet the threshold to be considered 'sham' claims. CADE also found there was insufficient evidence of the intimidatory conduct to convict the drivers for an antitrust violation.

16 Preliminary Proceeding No. 08700.008318/2016-29.

17 Administrative Proceeding No. 08700.006964/2015-71.

Despite neither Uber nor Uber's sham litigation claim having resulted in penalties, in 2018 CADE's DEE issued a work document titled 'Competition effects of a shared economy: did Uber's market entry affect the market of taxi apps between 2014 and 2016?',[18] in which it conducted an economic study over transportation services in 590 Brazilian municipalities. In this document, CADE found that taxi drivers initially lost an average of 56.8 per cent of their rides in those cities in which Uber launched. It also found, however, that over a longer period of analysis (comprising at least two years), Uber and taxi prices became competitive against each other, ultimately leading taxi drivers to recover the lost rides by offering discounts and other price reductions. DEE's conclusion was that Uber's market entry solved some market failures of the traditional private transportation market, and that it could even be possible to assess deregulating taxi services to ensure their greater competitiveness.

Online Travel Agencies MFN case

In 2016, a group of hotels filed a complaint against online travel agencies Booking.com, Decolar.com and Expedia, claiming they were applying abusive most-favoured nation (MFN) clauses preventing hotels from offering better prices on any competing services. In 2017, all three travel agencies requested to negotiate cease-and-desist agreements with CADE, which were ultimately approved by CADE's Tribunal in 2018.

All three agreements foresaw similar conditions: the travel agencies committed to cease the requirement of the 'broad' MFNs, that is, those that apply to all third-party websites, but were allowed to continue applying 'narrow' MFNs, which prevent the hotel from offering lower prices in metasearch websites (such as Tripadvisor and Trivago, which are not travel agencies per se)[19] and in their own websites. CADE found there were legitimate justifications for allowing narrow MFNs, particularly related to the prevention of the freeriding effect (in which the user finds the hotel via a travel agency but ultimately books at the hotel's own website, so that the travel agency is not properly compensated for the matchmaking).

18 Available at: http://antigo.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/documento-de-trabalho-001-2018-uber.pdf. Freely translated.

19 According to CADE, they are not considered travel agencies because they do not allow users to book directly on their website, but rather redirect them to another website to complete the reservation.

There were no fines, and the travel agencies did not formally acknowledge or confess that their practices could have anticompetitive effects (as neither of these are required by Brazilian law in vertical cases), but the agreements resulted in a change in their contractual practices.

iFood and Gympass exclusivity cases

CADE is currently investigating exclusivity requirements imposed on business partners by two services that intermediate the matchmaking between their user and a business: iFood and Gympass.

iFood is the main food delivery app in Brazil, offering users a broad range of restaurants and supermarkets from which they can order food to be delivered to their door or to pick up in store. It was the first food delivery app to reach relevant scale in Brazil. In 2020, rival delivery app Rappi filed a complaint against iFood, claiming that it required exclusivity from many restaurants, preventing them from registering in competing apps and thus hampering rivals' ability to develop their businesses.

Gympass, on the other hand, is a membership service that offers users the possibility to access many local gyms and fitness classes by paying a single monthly subscription, being the first business of this kind to be launched in Brazil. In 2020, its rival Total Pass filed a complaint before CADE challenging Gympass' exclusivity requirements with gyms, which would prevent them from registering with competing services and thus hinder their development. Both cases are still ongoing, and both have in common the fact they target vertical restraints practiced by innovative digital players who were responsible for launching innovative business models related to digital markets in Brazil.

Digital acquisitions inquiry

Following other jurisdictions' concerns with acquisitions of innovative businesses not meeting the relevant thresholds for submissions (particularly in the case of start-ups, which are often nascent or small businesses), in July 2020, CADE asked 19 companies to provide a detailed list of mergers, acquisitions and other 'concentration acts' in which they took part over the 10 previous years.[20]

These requests were sent to the following Brazilian and global companies: Amazon, B2W Digital, Booking.com, Google, iFood, Mercado Livre, Magazine Luiza, Facebook, Netshoes, Twitter, Microsoft, Submarino Viagens, Apple, Uber, 99, Via Varejo, Walmart and Tencent.

20 Proceeding No. 08700.002785/2020-21.

Since these companies replied to the requests in August 2020, there have been no further public developments on the case; public statements to the press, nonetheless, indicated that CADE's goal was not to impose penalties on these acquisitions, but rather to analyse market trends to improve CADE's enforcement tools for future cases.[21] It is not clear which will be the public result of this inquiry, as it has not been detailed in CADE's recent work documents concerning digital matters, which will be detailed in the following section.

Competition policy and advocacy initiatives

In the last two years, CADE has published two specialised working papers associated with digital matters. The first was published in August 2020 and titled 'Competition in Digital Markets: a review of expert reports'.[22] Its goal was to summarise the key issues covered by reports published in other jurisdictions discussing competition in digital markets, including, but not limited to, the Final Report by the Stigler Committee on Digital Platforms,[23] the report on Competition Law and Data by the French and German antitrust authorities,[24] the Final Report of the Australian Consumer and Competition Commission's Digital Platforms Inquiry[25] and others, totalling 21 expert documents.

21 See Valor Econômico's report dated 3 July 2020, available at: https://valorinveste.globo.com/mercados/renda-variavel/empresas/noticia/2020/07/03/cade-consulta-gigantes-digitais-para-avaliar-aquisicoes-no-setor.ghtml.

22 A summarised English version of the report was published by its authors, Patricia Sakowski (deputy CADE general-superintendent) and Filippo Lancieri (CADE PNUD consultant) and is available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681322. The original Portuguese publication is available at CADE's website, at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n05-2020-concorrencia-em-mercados-digitais-uma-revisao-dos-relatorios-especializados.pdf.

23 Stigler Committee on Digital Platforms, 'Stigler Committee on Digital Platforms: Final Report' available at: https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report.

24 Autorité de la Concurrence; Bundeskartellamt, 'Competition Law and Data', available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=05A65D631328FDBDE9A8517A1246C99A.2_cid387?__blob=publicationFile&v=2.

25 Available at: https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

In this work document, which did not provide CADE's position on any of the issues, CADE aimed at 'summarizing to CADE and to Brazilian society the view of its international peers and grounding the improvement of CADE's internal policy-making and technical and scientific update'.[26]

A year later, in August 2021, CADE published its second work document on digital markets, this time summarising its own internal practice with 'digital platform' businesses over two decades. The title of this new work document, which is only available in Portuguese, can be translated as 'CADE Report – Digital Platform Markets', and describes over 100 merger and conduct cases decided by CADE since as early as 20 September 2000 until November 2020. It covers sectors ranging from sporting goods retail to ride-sharing, financial services and fitness apps. The common feature for CADE to select these cases was that the companies involved in each case offered some type of 'platform' (understood as a service which connects two or more different groups of users for a given purpose, transactional or not),[27] even if this service was not the focus of the competition analysis in the relevant case. Because it covers CADE's practice over the two decades in which internet access became widespread and new business models launched, it ends up providing a portrait of this innovation process as it describes analyses conducted under very different market conditions.

The goal of these studies was to organise the scientific production and CADE's decisions related to the digital economy so that they become easily accessible to the public and to other government bodies, so that this knowledge can lead to better informed decisions and policymaking.

Within the Brazilian competition defence system, however, CADE is not the only body responsible for competition advocacy. This legal mandate is also cast upon the Brazilian Ministry of Economy's Secretary of Competition and Competitiveness Advocacy (SEAE). In 2021, SEAE's main activities have been conducting public consultations to assess the competition conditions in infrastructure markets and to assess the existing regulatory burden over private entities. None of its public activities were directed at digital markets.

CADE's advocacy initiatives are therefore not the main focus of its legal mandate and are often grounded on discussions and matters under review in the context of a concrete case (such as in the Uber cases discussed above which resulted in an economic study providing policy recommendations for the legislative power

26 CADE, 'Concorrência em mercados digitais: uma revisão dos relatórios especializados', August 2020, p. 7, freely translated.

27 id., Section 2.1.

regarding the regulation of taxicabs). CADE sometimes forwards its decisions to other authorities with requests, recommendations or simply for their information, with the main goal of promoting competition, based on the strategic vision which will be further detailed below.

Institutional issues such as the strategic vision

In mid 2021, CADE's two main leadership positions, that of General Superintendent and that of Tribunal Chair, were set to become vacant: both the mandates of the previous Superintendent Alexandre Cordeiro and of the previous Chair Alexandre Barreto expired in July 2021. This indicated a possibility of a shift in CADE's command, and, therefore, of its institutional policy (particularly as Barreto and Cordeiro had been appointed in a previous administration within the federal government).

The Brazilian government, however, maintained both Cordeiro and Barreto in CADE's leadership positions by shifting their seats: Alexandre Cordeiro was nominated as CADE's new Chair, and Alexandre Barreto as CADE's new General Superintendent. While Cordeiro's nomination has already been confirmed by the Brazilian Senate and he has already taken office, Barreto's nomination is pending confirmation.

Since his nomination, Alexandre Cordeiro has given many interviews to the press in which he declares the institutional position he plans to maintain as the new Chair. In these interviews, he emphasises that antitrust analysis should be limited to its legal mandate of protecting competition, and that this should not be mixed with separate concerns such as the defence of privacy, labour or the environment. According to him, even though these are also valid concerns, they have been legally assigned to other authorities (e.g., the National Data Protection Agency (ANPD)) and not to CADE. Thus, CADE's role regarding these other issues is to cooperate with these authorities to ensure they can properly conduct their work, but not to directly intervene in these matters. He cites a recent example of CADE's cooperation with ANPD to assess changes in WhatsApp's privacy policy as an example of this successful interface between competition and data protection authorities.[28]

28 See Alexandre Cordeiro's 25 August 2021 interview with R7, available at: https://noticias.r7.com/jr-24h/conteudo-exclusivo/jr-entrevista/videos/jr-entrevista-alexandre-cordeiro-presidente-do-cade-fala-sobre-a-concorrencia-no-pos-pandemia-25082021.

Cordeiro has also stated that his view of 'competition defence' is to defend competition as a manner to protect consumer welfare by preventing abuses of market power ensuring fair prices and product quality, and that he does not subscribe to other jurisdictions' intention to 'return to a Pre-Chicago School moment'.[29] Further, he has expressed wariness of excessive intervention in innovative markets,[30] and that he does not believe that efficient companies should be penalised owing to their organic growth; although there is a global trend towards concentration, he suggests this is not in itself negative if there is, for instance, a high level of rivalry among the existing companies.[31]

Still, he emphasises in all interviews that CADE is keeping a close eye on digital discussion points, such as the use of algorithms and if it can facilitate collusion, impact consumer choice or generate unfair competitive advantages, and that it will intervene should it find any conditions that show that consumer welfare has been harmed.[32]

29 See Alexandre Cordeiro's 14 July 2021 interview with *Brazil Journal*, available at: https://braziljournal.com/no-cade-um-novo-xerife-cauteloso-com-os-remedios-que-aplica.

30 See Alexandre Cordeiro's 14 July 2021 interview with *Estadão*, available at: https://economia.estadao.com.br/noticias/geral,novo-presidente-do-cade-alexandre-cordeiro-diz-que-tendera-a-ser-menos-intervencionista,70003778696.

31 See Alexandre Cordeiro's 19 July 2021 interview to *Reuters*, as published by CNN and available at: https://www.cnnbrasil.com.br/business/conglomerados-de-gigantes-da-tecnologia-preocupam-diz-presidente-do-cade/.

32 See Alexandre Cordeiro's 14 July 2021 interview with *Brazil Journal*, available at: https://braziljournal.com/no-cade-um-novo-xerife-cauteloso-com-os-remedios-que-aplica.

CHAPTER 13

Canada

Elisa K Kearney, Alysha Manji-Knight and Joshua Hollenberg[1]

Introduction

While digital markets have been a focus of the enforcement and advocacy work of the Canadian Competition Bureau (the Bureau) for many years, they have gained specific prominence under Commissioner of Competition Matthew Boswell (the Commissioner), who was appointed for a five-year term on 5 March 2019. This increased focus aligns with broader government priorities to update the laws governing the internet and rebuild Canadians' trust in digital markets, including commitments to protect consumers' rights online and bring forward new regulations for large digital companies, as set out in the governing Liberal Party's 2019 and 2021 election platforms.[2]

The Bureau's Strategic Vision for 2020–2024, published on 11 February 2020, which set out Commissioner Boswell's vision for the Bureau to be 'at the forefront of the digital economy', emphasises this spotlight on digital markets.[3] The Commissioner committed to creating a Digital Enforcement Office in July 2019.

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1 Elisa K Kearney and Alysha Manji-Knight are partners and Joshua Hollenberg is an associate at Davies Ward Phillips & Vineberg LLP.

2 See Liberal Party of Canada, 'Forward: A Real Plan For The Middle Class', 2019, online: https://2019.liberal.ca/wp-content/uploads/sites/292/2019/09/Forward-A-real-plan-for-the-middle-class.pdf; and Liberal Party of Canada 'Forward. For Everyone', 2021, online: https://liberal.ca/wp-content/uploads/sites/292/2021/09/Platform-Forward-For-Everyone.pdf.

3 Competition Bureau Canada, 'The Competition Bureau's Strategic Vision for 2020–2024: Competition in the digital age', 11 February 2020, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html.

In April 2021, as part of its 2021 Budget, the government committed to providing the Bureau, which had been hamstrung with budgetary constraints for years, an additional C$96 million over five years[4] to enhance the Bureau's 'enforcement capacity and ensure it is equipped with the necessary digital tools for today's economy'.[5] Using these funds, the Bureau launched its Digital Enforcement and Intelligence Branch (CANARI), a team of competition specialists, intelligence experts, data scientists and data engineers that form a centre of expertise on digital business practices and technologies and that provide intelligence expertise for all directorates at the Bureau. CANARI stands for Competition through Analytics, Research and Intelligence, and it will be the Bureau's high-tech version of the 'canary in a coal mine'.

Mounting calls for reform

Shortly after Commissioner Boswell's appointment in early 2019, he received a letter from the Minister of Innovation, Science and Economic Development, noting the need for the Commissioner to ensure that Canada's competition infrastructure is fit for purpose and 'responsive to a modern and changing economy'.[6] The Bureau and others within government have been exploring this question of whether the Competition Act is fit for purpose over the past few years, and calls for reform of Canada's competition laws have only grown stronger.

In April 2021, the federal Standing Committee on Industry, Science and Technology (the INDU Committee) held a series of four meetings to study competitiveness in Canada, Competition Act reform and related matters, and a second series of four meetings to consider the proposed merger of Rogers Communications Inc. and Shaw Communications Inc., two of Canada's largest telecommunications companies. Certain sections of the Competition Act came

4 The re-election of the Liberal government in September 2021 means that the additional C$96 million funding commitment is very likely to continue to be realised over the coming years.

5 Government of Canada, 'Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience', 19 April 2021, online: www.budget.gc.ca/2021/home-accueil-en.html, at p. 141.

6 Minister of Innovation, Science and Economic Development Navdeep Bains, 'Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition', May 2019, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04464.html. The letter to Commissioner Boswell reflected a focus on digital markets in mandate letters from the Prime Minister to the Minister of Innovation, Science and Economic Development over the past several years, including calls for enhanced online data privacy rights, measures to ensure the revenues of 'web giants' are shared fairly with creators and media, and a clear set of rules that ensure fair competition in the online marketplace.

under heavy scrutiny during both series of the INDU Committee hearings, including the efficiencies defence in Section 96 and the one-year statute of limitations on merger reviews.[7] Providing the Bureau with the power to compel data from market participants for market studies was also discussed.[8]

In June 2021, the Bureau convened a Competition and Growth Summit where the need for a 'rigorous and comprehensive review of the Competition Act to ensure that it is fit for purpose' was again recognised.[9] The importance of addressing new issues arising out of digital transformation and the rise of large digital platforms acting as gatekeepers across a number of markets was identified as a notable challenge facing the Bureau and other competition authorities.[10]

While no specific solutions were discussed, there was general agreement that competition authorities need to adapt their tools to these markets and may require additional powers and resources to carry out their mandates in this new reality. At the same time, significant emphasis was placed during the Summit on the need to promote competition to strengthen post-pandemic growth, ensure Canada's competition law enforcement framework is robust and well-resourced, take advantage of opportunities for regulatory reform, and have the Bureau take advantage of all the tools it has available.[11] Although digital markets were a major topic of discussion, these takeaways were framed to apply to markets broadly and not exclusively to online issues.[12]

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7 See Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, Competitiveness in Canada, 43rd Parl, 2nd Sess, No. 33 (22 April 2021) (Chair: Sherry Romanado), online: www.ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-33/evidence (see testimony of Ms. Kaylie Tiessen at 1130); and Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, Competitiveness in Canada, 43rd Parl, 2nd Sess, No. 30 (22 April 2021) (Chair: Sherry Romanado), online: www.ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-30/evidence (see testimony of Mr David Vaillancourt at 1250).

8 Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, Competitiveness in Canada, 43rd Parl, 2nd Sess, No. 29 (7 April 2021) (Chair: Sherry Romanado), online: www.ourcommons.ca/DocumentViewer/en/43-2/INDU/meeting-29/evidence (see testimony of Commissioner Boswell at 1510).

9 Competition Bureau Canada, 'Canada Needs More Competition: takeaways from the Competition and Growth Summit', June 2021, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04595.html.

10 ibid. at p. 7.

11 ibid at p. 12.

12 The Summit built on the Bureau's August 2019 Data Forum, which addressed digital platforms, new approaches to regulation, data portability and privacy.

In October 2021, Senator Howard Wetston initiated a consultation 'to promote additional dialogue on paths forward for Canadian competition law'[13] and commissioned a report on the state of the Competition Act in a digital era.[14] Professor Edward Iacobucci found that 'the Act is generally well-suited to addressing economic harms in digital markets' because of its reliance on 'general, flexible standards for assessing conduct'.[15] Professor Iacobucci also identified opportunities for incremental substantive amendments to the Act, but cautioned that these 'amendments do not result necessarily from the emergence of digital markets, and would be appropriate in any event.'[16]

The Bureau filed a submission in response to the Wetston Consultation,[17] which contained a comprehensive set of amendments it sought, which would overhaul the Canadian competition regime if fully accepted. The Bureau states that 'the new, digital economy has grown a class of so-called 'digital giants' that 'have obtained a high degree of influence across a wide range of economic activity' through their actions 'to collect, broker, and benefit from this new wealth of data'.[18]

Proposed amendments include reducing standards to be met when analysing the anticompetitive effects of mergers, abuse of dominance and competitor collaborations; eliminating the efficiencies defence; and extending review periods to three years following a merger.

Specific to digital markets, the Bureau has proposed extending the time during which it can challenge a merger to three years, increasing monetary penalties to up to three percent of a company's global revenues and reducing the burden of proof it must meet to challenge the acquisition of small companies such as tech start-ups.

The federal government introduced its 2022 budget on 7 April 2022, launching a preliminary phase in modernising the competition regime[19] designed to address concerns in digital markets, including 'fixing loopholes; tackling practices harmful to workers and consumers; modernizing access to justice and

13 See Howard Wetston, 'Competition Consultation', online: https://sencanada.ca/media/368379/letter-pdf.pdf.

14 See Edward M Iacobucci, 'Examining the Canadian Competition Act in the Digital Era', 27 September 2021, online: https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf.

15 ibid. at p. 3.

16 ibid

17 See Competition Bureau, 'Examining the Canadian Competition Act in the Digital Era: Submission by the Competition Bureau', 8 February 2022, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html.

18 ibid.

19 ibid.

penalties; and adapting the law to today's digital reality'.[20] These changes were included in the budget implementation legislation, which was passed into law on 23 June 2022. Specifically, the amendments include:

- expanding the substantive scope of the Act's abuse of dominance provisions;
- adding wage fixing and no-poach agreements as criminal conspiracy offences and removing the cap on potential criminal fines for conspiracies;
- formally adding drip pricing to the list of prohibited misleading advertising practices;
- significantly increasing administrative monetary penalties; and
- adding a new anti-avoidance provision for the Act's merger notification regime.

Notably, a series of factors have been introduced, likely in response to sustained criticism by the Commissioner and other commentators of the Act's inability to address anticompetitive actions by big-tech companies in digital markets, for the Tribunal to consider when assessing the impact on competition of an act or practice in the context of abuse of dominance and non-criminal agreements between competitors and mergers. These are:

- the effect of the practice on barriers to entry in the market, including network effects;
- the effect of the practice on price or non-price competition, including quality, choice or consumer privacy;
- the nature and extent of change and innovation in a relevant market; and
- any other factor that is relevant to competition in the market that is or would be affected by the practice.

Consultations are expected to be held on whether further even more substantive changes to the Competition Act are required to address issues in digital markets. The consultations could address issues that have long been sources of criticism, such as the efficiencies defence for mergers, or more recent items identified by the Bureau, such as amending the abuse of dominance standard from the substantial lessening or prevention of competition to one that includes prevention to capture conduct targeting emerging competitors in the digital economy.

20 Government of Canada, 'Budget 2022: A Plan to Grow Our Economy and Make Life More Affordable', 7 April 2022, online: https://budget.gc.ca/2022/home-accueil-en.html, at p. 72.

Competition law is not the only tool in the government's toolkit for addressing consumer harms in the digital economy: to date, the approach being proposed in Canada is multi-pronged, with four different federal regulatory bodies (the Bureau, a sector-specific telecommunications and broadcasting regulator, a privacy regulator and a Data Commissioner[21]) enforcing laws that impact marketplace conduct in digital markets.

Before the 2021 federal election, legislation strengthening privacy protections and increasing the regulation of data and digital platforms had been introduced but died on the order paper. New legislation has since been introduced, including bills targeting the relationship between large digital companies and traditional news media companies, online streaming services, privacy and cybersecurity.

Enforcement in digital markets

In the Bureau's Strategic Vision for 2020–2024, the Commissioner identified timely and proactive enforcement action as essential given the rapid pace of change in a digital economy. The Bureau's record in this regard is mixed, however.

Mergers

Thoma Bravo Acquisition of Aucerna

The Bureau took the unusual step of unwinding a small acquisition of a digital software company in 2019. Thoma Bravo, an American private equity firm, acquired Canadian technology company Aucerna on 13 May 2019. Quorum Business Solutions, a portfolio company of Thoma Bravo, supplied specialised software to the Canadian oil and gas industry. This product, MOSAIC Reserves Software, was the closest competitor of Aucerna's Value Navigator software.

Thoma Bravo notified the Bureau of the transaction on 13 February 2019, although it is unclear whether the transaction met the minimum thresholds in the Competition Act. After a three-month investigation, the Bureau indicated that it had concerns with the transaction, but the transaction nevertheless closed after the statutory waiting period expired on 11 May 2019. The Bureau filed an application challenging the transaction on 14 June 2019, following which a hold-separate agreement was filed on 24 July 2019 in respect of Quorum's MOSAIC

21 The concept of a Data Commissioner was introduced in Prime Minister Justin Trudeau's 2019 mandate letter to then-Minister of Innovation, Science and Economic Development Navdeep Bains, which was included in the federal government's 2021 budget.

software, and a consent agreement on 20 August 2019. Pursuant to the consent agreement, Thoma Bravo agreed to spin off and sell the MOSAIC software to a Bureau-approved purchaser.

This case illustrates the Bureau's focus on pursuing mergers below the minimum thresholds that raise competitive issues, particularly those involving the digital economy, as well as the Bureau's power to unwind a transaction post-closing.

Rogers' acquisition of Shaw

Rogers Communications announced its plans to acquire Shaw Communications on 15 March 2021. That same day, the Bureau announced its intention to review the transaction.[22] The Bureau obtained court orders for information from industry competitors, including Xplornet Communications, BCE Inc., TELUS Corporation and Quebecor Inc., in July and August of that year.[23] The Bureau also took the step of issuing a public request for information, seeking information from the public on specific areas of interest in September 2021.[24]

In May 2022, the Bureau sought a court order to block the proposed transaction, alleging that 'removing Shaw as a competitor threatens to undo the significant progress it has made introducing more competition into an already concentrated wireless services market'.[25] The case remains before the Tribunal at the time of writing.

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22 See Competition Bureau Canada, 'Competition Bureau to review the proposed acquisition of Shaw by Rogers', 15 March 2021, online: www.canada.ca/en/competition-bureau/news/2021/03/competition-bureau-to-review-the-proposed-acquisition-of-shaw-by-rogers.html.

23 See Competition Bureau Canada, 'Competition Bureau obtains court orders to advance investigation of Rogers' proposed acquisition of Shaw', 5 August 2021, online: www.canada.ca/en/competition-bureau/news/2021/08/competition-bureau-obtains-court-orders-to-advance-investigation-of-rogers-proposed-acquisition-of-shaw.html.

24 See Competition Bureau Canada, 'Competition Bureau seeks information from market participants to advance investigation of Rogers' proposed acquisition of Shaw', 28 September 2021, online: www.canada.ca/en/competition-bureau/news/2021/09/competition-bureau-seeks-information-from-market-participants-to-advance-investigation-of-rogers-proposed-acquisition-of-shaw.html.

25 See Competition Bureau Canada, 'Competition Bureau seeks full block of Rogers' proposed acquisition of Shaw', 9 May 2022, online: www.canada.ca/en/competition-bureau/news/2022/05/competition-bureau-seeks-full-block-of-rogers-proposed-acquisition-of-shaw.html.

Abuse of dominance

Toronto Real Estate Board investigation

In a landmark dispute that began in 2011 and lasted more than seven years and touched on a number of issues common to digital market cases, the Bureau successfully challenged the conduct of the Toronto Real Estate Board (TREB) as it related to data. In particular, it was successful in setting a precedent on the control and use of data as well as the use of privacy and intellectual property as defences to abuse of dominance claims. The tension between privacy and competition was apparent in this case, where it was acknowledged that otherwise anticompetitive restrictions on access to and use of data could be valid if the restrictions were put in place to comply with privacy laws. The privacy justification was not accepted in this case.

TREB owns and operates a database containing current property listings and historical sales data, such as sold prices, for real estate transactions in the Greater Toronto Area, called Multiple Listing Service (MLS). The Bureau alleged that TREB was abusing its dominance by restricting access to, and the use of, MLS data by real estate agents. It further argued that TREB used its control of MLS data to protect its members from innovative products developed by current or potential competitors, including by restricting the use of virtual office websites.

The Competition Tribunal (the Tribunal) sided with the Bureau,[26] the Federal Court of Appeal (FCA) denied TREB's appeal,[27] and the Supreme Court of Canada declined to hear an appeal of the FCA's decision in 2018.[28]

The *TREB* case illustrates that control of significant amounts of data can be a source of market power, and restrictions on access can be a barrier to entry. Further, as confirmed by the Tribunal, an organisation or company that controls data does not need to compete with the parties allegedly harmed by the conduct for there to be a finding of an abuse of dominance.

TREB argued that the limitations put in place on the access to and use of its data were justified as necessary to protect individual privacy and as a valid exercise of its intellectual property. The court rejected both arguments. On privacy, the court found that TREB had introduced the policies restricting the use of its data

26 *The Commissioner of Competition v. The Toronto Real Estate Board* (27 May 2011), CT-2011-003, online: Competition Tribunal https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462552/index.do?q=CT-2011-003.

27 *The Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236, online: www.canlii.org/en/ca/fca/doc/2017/2017fca236/2017fca236.html [TREB].

28 *Toronto Real Estate Board v. Commissioner of Competition*, 2018 CanLII 78753 (SCC), online: www.canlii.org/en/ca/scc-l/doc/2018/2018canlii78753/2018canlii78753.html.

based on a desire to restrict competition and maintain control over the data, and that there was no evidence that the data restriction policies had been informed by TREB's privacy policies. The court acknowledged that privacy could be a valid justification for limits on the use of, or access to, data if the limits were enacted to meet some regulatory or statutory obligation.

Regarding TREB's argument that the restrictions were a valid exercise of its intellectual property in the MLS system, both the Tribunal and the FCA rejected this argument, finding that there was no copyright in the MLS database and that the Competition Act 'precludes reliance on copyright as a defence to an anti-competitive act'.[29]

Amazon investigation

On 14 August 2020, the Bureau announced its investigation into whether Amazon engaged and is continuing to engage in anticompetitive behaviour on Amazon.ca, its Canadian marketplace. The Bureau highlighted three specific areas of interest:

- any past or existing Amazon policies that may impact third-party sellers' willingness to offer their products for sale at a lower price on other retail channels, such as their own websites or other online marketplaces;
- the ability of third-party sellers to succeed on Amazon's marketplace without using its 'Fulfilment by Amazon' service or advertising on Amazon.ca; and
- any efforts or strategies by Amazon that may influence consumers to purchase products it offers for sale over those offered by competing sellers.

The abuse of dominance investigation is ongoing, and there has been no conclusion of wrongdoing thus far.[30]

The Bureau previously investigated Amazon's marketing practices, finding that representations made regarding the ordinary selling price of products on Amazon.ca were misleading. The investigation concluded with a consent agreement registered on 11 January 2017, and Amazon paying C$1.1 million in fines.[31]

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29 TREB, *supra* note 12 at Paragraph 176.

30 Competition Bureau Canada, 'Competition Bureau seeks input from market participants to inform an ongoing investigation of Amazon', 14 August 2020, online: www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html.

31 Competition Bureau Canada, 'Competition Bureau statement regarding its inquiry into Amazon's price advertising in Canada', 11 January 2017, online: www.canada.ca/en/competition-bureau/news/2017/01/amazon-changes-pricing-practices-pays-1-1-million-settle-price-advertising-case.html.

Deceptive marketing

Deceptive marketing has been a primary focus of the Bureau in recent years. Since Commissioner Boswell was appointed, the Bureau has been active in this area and concluded investigations into deceptive marketing practices in digital markets by way of registered consent agreements with FlightHub Group Inc.; StubHub Inc., Ticketmaster and LiveNation; and Facebook.

Facebook investigation

In a case highlighting the Bureau's use of the Competition Act's deceptive marketing provisions to address privacy concerns, the Bureau and Facebook ended an investigation into Facebook's representations about the disclosure of personal information with a settlement agreement registered on 19 May 2020.[32] Pursuant to the agreement, Facebook agreed to pay C$9 million in fines and an additional C$500,000 in costs.[33]

From its investigation, the Bureau concluded that Facebook had given users the impression that they had greater control over access to their personal information than was actually provided; instead, access to personal information of users and their friends was provided to third party developers in a manner that was inconsistent with its privacy claims.[34]

Facebook agreed not to make false or misleading representations about the disclosure of personal information, including about the extent to which users can control access to their personal information on Facebook and Messenger.

Facebook voluntarily cooperated with the Bureau in its investigation and entered into the settlement agreement noted above; however, an investigation by Canada's Office of the Privacy Commissioner (OPC) on the same issues and seeking similar remedies has taken a different turn, with Facebook challenging the OPC's application to federal court for a declaration that Facebook contravened Canada's privacy law, the Personal Information Protection and Electronic Documents Act (PIPEDA).[35]

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32 Facebook, Inc. (19 May 2020), CT-2020-004, online: Competition Tribunal https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/471812/index.do.

33 Competition Bureau Canada, 'Facebook to pay $9 million penalty to settle Competition Bureau concerns about misleading privacy claims', 19 May 2020, online: www.canada.ca/en/competition-bureau/news/2020/05/facebook-to-pay-9-million-penalty-to-settle-competition-bureau-concerns-about-misleading-privacy-claims.html.

34 ibid.

35 The Canadian Press, 'Facebook takes Canada's privacy commissioner to court over personal data probe', 20 April 2020, online: www.theglobeandmail.com/canada/article-facebook-takes-canadas-privacy-commissioner-to-court-over-personal.

FlightHub investigation

The Bureau concluded an investigation into online travel agency FlightHub by registering a settlement agreement on 24 February 2021, which included a C$5 million penalty against the company and a C$400,000 fine each for two of FlightHub's directors.[36] The agreement also prohibits FlightHub and its directors from making false or misleading statements or claims as well as requiring the removal of online reviews, which appear to be made by customers but were posted by the company and its employees.[37]

The Bureau concluded that FlightHub had been misleading customers regarding the price of flights as well as the cost and terms of cancellation, seat selection and rebooking policies. FlightHub also made millions from fees that it actively concealed from consumers.[38]

The FlightHub settlement agreement is notable for several reasons. First, the penalty is the largest levied for drip-pricing cases. Drip pricing is where a customer is shown a headline price, to which mandatory fees are then added. This form of deceptive marketing has been a significant priority for the Bureau. Second, this case represents the first time the Bureau successfully enforced rules against astroturfing – the practice of using fake reviews or engagement to create the impression of a large, supportive community of users or customers.[39]

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36 FlightHub Group Inc. (24 February 2021), CT-2019-003, online: Competition Tribunal https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/493395/index.do.

37 Competition Bureau Canada, 'Investigation of FlightHub ends with $5.8M in total penalties for company and directors', 24 February 2021, online: www.canada.ca/en/competition-bureau/news/2021/02/investigation-of-flighthub-ends-with-58m-in-total-penalties-for-company-and-directors.html.

38 ibid.

39 The Bureau reached a consent agreement with Bell Canada in October 2015 relating to the posting of post-positive reviews and high ratings of Bell apps by Bell employees without disclosing that they were employees of Bell Canada. Bell agreed to an enhanced corporate compliance programme and paid an administrative monetary penalty of C$1.25 million. Competition Bureau Canada, 'Bell Canada reaches agreement with Competition Bureau over online reviews', 14 October 2015, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03992.html.

Other recent drip-pricing investigations involving digital markets include StubHub, which resulted in a C$1.3 million penalty in February 2020[40] and *LiveNation/Ticketmaster*, with a C$4.5 million penalty in June 2019,[41] as well as investigations into the rental car industry, with penalties ranging from C$700,000 to C$3 million between 2016 and 2018.[42] In addition, the amendments to the Act included in the 2022 budget implementation legislation formally added drip pricing to the Act's civil and criminal misleading advertising provisions.

An advocate for competitive markets

While the Bureau's enforcement record is somewhat limited, the Bureau has been actively advocating for competition in digital markets over the past few years. For example, the Bureau hosted a financial technology (fintech) workshop in February 2017, followed by a fintech market study published in December 2017 that looked at the reasons why Canada lagged behind peer nations in the adoption of fintech innovations.[43]

The federal government introduced legislation in its 2021 budget, the Retail Payment Activities Act,[44] which created a new retail payments oversight framework under the supervision of the Bank of Canada, including a registration

40 Competition Bureau Canada, 'StubHub to pay $1.3 million penalty for advertising unattainable prices for event tickets', 13 February 2020, online: www.canada.ca/en/competition-bureau/news/2020/02/stubhub-to-pay-13-million-penalty-for-advertising-unattainable-prices-for-event-tickets.html.

41 Competition Bureau Canada, 'Ticketmaster to pay $4.5 million to settle misleading pricing case', 27 June 2019, online: www.canada.ca/en/competition-bureau/news/2019/06/ticketmaster-to-pay-45-million-to-settle-misleading-pricing-case.html.

42 See Competition Bureau Canada, 'Avis and Budget to pay a $3 million penalty to resolve concerns over unattainable prices', 2 June 2016, online: www.canada.ca/en/competition-bureau/news/2016/06/avis-and-budget-to-ensure-prices-advertised-are-accurate.html; Competition Bureau Canada, 'Hertz and Dollar Thrifty to pay $1.25 million penalty for advertising unattainable prices and discounts', 24 April 2017, online: www.canada.ca/en/competition-bureau/news/2017/04/hertz_and_dollarthriftytopay125millionpenaltyforadvertisingunatt.html; Competition Bureau Canada, 22 February 2018, 'Enterprise Rent-A-Car Canada to pay a $1 million penalty for advertising unattainable prices', online: www.canada.ca/en/competition-bureau/news/2018/02/enterprise_rent-a-carcanadatopaya1millionpenaltyforadvertisingun.html.

43 Competition Bureau Canada, 'Technology-led innovation in the Canadian financial services sector', 14 December 2017, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04322.html.

44 Retail Payment Activities Act, S.C. 2021, c. 23, s. 177., online: https://laws-lois.justice.gc.ca/eng/acts/R-7.36/FullText.html.

process that may be subject to national security review and ongoing operating requirements. The legislation became law on 29 June 2021; however, the majority of the bill is not yet in force.[45]

In January 2021 the Bureau provided comments to the Department of Finance's Advisory Committee on Open Banking in support of competitive and innovative open banking regulatory design.[46] The Advisory Committee on Open Banking's final report was published in April 2021.[47]

Similarly, with respect to digital healthcare, the Bureau launched a market study of Canada's healthcare industry on 30 July 2020 to examine how pro-competitive policies can support digital healthcare through greater innovation, choice and access. The market study focuses on three broad topics:

- data and information, including whether there are barriers preventing access, use or sharing of healthcare data, and how those barriers can be reduced;
- products and services, including barriers restricting the range and scope of products and services, how to facilitate the development and approval of digital products and services, and the impact of procurement and commercialisation processes on innovation and competition in the digital healthcare market; and
- healthcare providers, including barriers limiting the ability of providers to deliver digital healthcare to patients as well as the impact of billing codes and compensation mechanisms, medical licensing rules and rules about the healthcare provider scope of practice on delivery of digital healthcare.

The Bureau will not be considering issues pertaining to privacy, digital infrastructure including access, or the appropriateness and efficacy of specific products and services as part of the market study.

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45 The next stage in the legislation's coming into force is the drafting of regulations to clarify the details of the legislation. The Retail Payments Advisory Committee has a mandate to support the Bank of Canada's work on the design and implementation of its retail payments supervision framework, and met most recently on 16 June 2022. For more Information see www.bankofcanada.ca/core-functions/retail-payments-supervision/retail-payments-advisory-committee.

46 Competition Bureau Canada, 'Competition Bureau comments to the Advisory Committee on Open Banking', 18 January 2021, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04571.html.

47 See www.canada.ca/en/department-finance/programs/consultations/2021/final-report-advisory-committee-open-banking.html.

With respect to telecommunications markets, the Bureau conducted a market study in 2018 into competition in Canada's broadband internet sector[48] and made submissions to the Canadian Radio-television and Telecommunications Commission (CRTC) in response to notices of consultation relating to mobile wireless services.[49] The Bureau has also sought an order from the Tribunal blocking the acquisition of Shaw Communications by Rogers Communications, two of Canada's largest telecommunications companies.

Interaction with other parts of government

The approach being proposed in Canada to the regulation of digital markets is multi-pronged, with four different federal regulatory bodies enforcing laws that impact marketplace conduct in digital markets. The re-election of the Liberal Party in September 2021, together with the Supply and Confidence Agreement signed with the New Democratic Party in March 2022,[50] means that unrealised priorities of the previous parliament, including legislation to update the Broadcasting Act and PIPEDA, have been introduced and may pass into law in the coming years.

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48 Competition Bureau Canada, 'Delivering Choice: A Study of Competition in Canada's Broadband Industry', 7 August 2019, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04470.html.

49 See, for example, Competition Bureau Canada, 'Review of Mobile Wireless Services - Comments of the Competition Bureau on Telecom Notice of Consultation CRTC 2019-57', 15 May 2019, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04431.html; Competition Bureau Canada, 'Submission to the Telecom Notice of Consultation CRTC 2019-57 — Further Comments of the Competition Bureau', 25 November 2019, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04510.html; and Competition Bureau Canada, 'Submission to the Telecom Notice of Consultation CRTC 2019-57 - Final Comments of the Competition Bureau', 15 July 2020, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04540.html.

50 The agreement was announced on 22 March 2022, and lasts until Parliament rises in June 2025. The New Democratic Party (NDP) commit to supporting the government on confidence and budgetary matters, and not moving a vote of non-confidence or voting for a non-confidence motion during that time. The Liberal Party commits not to call an election during that period and to act on policy priorities identified by the NDP. The agreement is not legally binding, and either party can withdraw at its discretion. For more information, see: https://pm.gc.ca/en/news/news-releases/2022/03/22/delivering-canadians-now.

Bill C-11

Bill C-11, the Online Streaming Act,[51] proposes to bring all audio and audio-visual content sent and received through the internet under the oversight and regulation of the CRTC. The bill would allow the CRTC to set conditions for online undertakings, including Canadian content requirements, regulate spending on Canadian content by categories or individual undertakings, and levy administrative monetary penalties (AMPs) of up to C$15 million. As of the 2022 summer recess, the bill has passed all three readings in the house and will be reviewed by the Senate in the fall.

Bill C-11 has faced significant and sustained criticism, as did a similar bill that was introduced in the previous session of Parliament but died on the order papers when the 2021 federal election was called. Legal and privacy experts have expressed concern about the bill's discoverability requirements, whereby the CRTC would set rules requiring Canadian content to be prioritised and other content to be deprioritised in Canadians' feeds. The goal of these requirements is to promote Canadian stories and content.

These requirements, it is argued, would have undermined the principles of net neutrality by obliging companies that provide content – such as Spotify, YouTube and Facebook – not to treat all content in a neutral, equal fashion.[52] There is also concern that the discoverability requirement would threaten freedom of speech, as the CRTC would be able to mandate the targeted promotion or suppression of content uploaded by individuals onto social media platforms by the social media platforms themselves.[53] The bill would exclude individuals who post content on social media platforms from being subject to CRTC oversight.

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51 Bill C-10, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts, 2nd Sess, 43rd Parl, Canada, 2020, online: www.parl.ca/LegisInfo/BillDetails.aspx?Language=en&Mode=1&billId=10926636.

52 See Michael Geist, 'Why Bill C-10 Undermines the Government's Commitment to the Principle of Net Neutrality', 27 May 2021, online: www.michaelgeist.ca/2021/05/why-bill-c-10-undermines-the-governments-commitment-to-the-principle-of-net-neutrality; and Dwayne Winseck, Bill C-10 and the Future of Internet Regulation in Canada', 2 June 2021, online: www.cigionline.org/articles/bill-c-10-and-the-future-of-internet-regulation-in-canada.

53 See Bruce Pardy, Fraser Institute, 'Bill C-10 threatens freedom of expression in Canada', 7 June 2021, online: www.fraserinstitute.org/article/bill-c-10-threatens-freedom-of-expression-in-canada; Brian Lee Crowley, Macdonald-Laurier Institute, 'Bill C-10: A Full Blown Assault On Free Expression', 7 May 2021, online: www.macdonaldlaurier.ca/billc-10-free-expression.

Bill C-18

The Online News Act was introduced in April 2022 with the stated purpose of regulating online platforms to enhance fairness in the Canadian digital media news marketplace and to contribute to the sustainability of the news media industry. It has passed second reading and was referred to the Canadian Heritage Committee, where it has not yet been taken up.

The legislation would create a framework requiring online platforms that are used to access news content to enter into agreements with news organisations to compensate the organisations for their content. The framework would apply to 'digital media intermediaries', which have a significant bargaining power imbalance with news media organisations. These intermediaries would be obliged to participate in a bargaining process with news businesses, acting alone or as a group, regarding the intermediary's making available of news content produced by news outlets identified by the news businesses. There is a final offer arbitration backstop if the bargaining process fails.

The CRTC would be required to publish a code of conduct governing the bargaining process, including provisions addressing the obligation to bargain in good faith and addressing the information the parties will need to make informed business decisions. The legislation would also introduce AMPs of up to C$15 million and would permit the CRTC to disclose information to the Commissioner of Competition if the information is determined to be relevant to competition issues being considered in the proceedings or matter before the CRTC. Such information may only be used by the Commissioner of Competition to facilitate his participation in the proceedings or matter before the CRTC that led to the disclosure.

Conclusion

Steps taken by the government, including the Bureau, over past years demonstrate that the government has been exercising diligence in evaluating the various tools it has available to ensure proper functioning digital markets in Canada.

With some exceptions, the government is attempting to strike a balance between regulation that promotes trust and fairness in digital markets, while at the same time preserving and encouraging incentives to innovate. Building on actions and promises in its previous mandate, the government has moved decisively and appears positioned to take additional, substantive actions to address concerns through changes to the Competition Act and other legislative efforts.

Similarly, the Bureau has provided an aggressive set of policy changes that it would like to see implemented and is expected to focus the additional funding and resources it will receive from the government on digital markets. It remains to be seen the extent to which this wish list of amendments will be reflected in a future, substantive bill to update the Act.

CHAPTER 14

Mexico

Carlos Mena Labarthe and Jorge Kargl Pavía[1]

Today, everything revolves around digitisation: every company is transforming itself into a digital service or platform, every business is trying to participate more and more in e-commerce through its own or third-party platforms, and new large businesses are being created as digital platforms.

Increasingly, the digital world and technological tools are defining the way in which society informs itself, comparing and making decisions to purchase products and services, and generating new forms of interaction between suppliers and consumers with rules that are very different from the dynamics of traditional markets, while production processes are integrated and become dependent on technologies and telecommunications.

Today, cloud computing, big data, the internet of things and artificial intelligence have disruptively transformed various sectors and industries, and while they have generated lower costs and brought many benefits for consumers, they also raise new challenges to protect and promote innovation, the process of competition, the protection and privacy of personal data and the protection and promotion of freedom of speech and access to information.

Digital markets are dynamic, with abrupt changes, high levels of concentration and a convergence between traditional models and innovative models that are little or not regulated at all, which call into question traditional concepts and tools, ranging from techniques to define a relevant market to the application of the SSNIP[2] test, particularly in the case of 'multisided' markets.

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2 'Small but significant non-transitory increase in price'.

In Mexico, as in the rest of the world, digital platforms are technologies that are creating spaces for aggregating content and services, connecting users (in this case, consumers with producers or providers) through communication, carrying out transactions (e.g., buying and selling products or services) or sharing information.

Although competition authorities are working to ensure competition in digital markets, based on the technical knowledge required and the constant evolution of the digital economy, it is difficult to apply traditional competition laws and economic principles to this sector. This represents a continuous challenge as competition authorities not only face technical difficulties, but also geographical problems because of the global scope of digital economies, which requires cross-border cooperation between different competition authorities.

This Chapter seeks to address and set forth some of the challenges faced by the Mexican antitrust authorities, particularly the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT) (the Mexican Antitrust Authorities), as well as the criteria upheld by the Mexican specialised courts over the past few years. This Chapter will also highlight some of the key cases that have been analysed by the Mexican Antitrust Authorities regarding digital markets in recent years.

Jurisdiction

Both Mexican Antitrust Authorities have undergone a number of successful cases in digital enforcement in the past couple years; however, there exists a challenge arising from Mexico's unique situation, which may not be common in other jurisdictions: unlike in other jurisdictions, regarding antitrust and competition matters in Mexico, there are two different competition authorities with equal hierarchy that are responsible for the enforcement of the same law.

Pursuant to Article 28 of the Political Constitution of the United Mexican States, COFECE is an autonomous agency, with legal personality and assets of its own. Its purpose is to guarantee free and open competition and access to the markets, as well as to prevent, investigate and prosecute monopolies, monopolistic practices, unlawful concentrations and other restrictions to the efficient functioning of the markets.

Likewise, also in accordance with Article 28, the IFT is an autonomous agency, with legal personality and its own assets, whose purpose is to guarantee free market access and economic competition, but exclusively in the broadcasting and telecommunications sectors.

Jurisdictional conflicts

In light of the above, the IFT is the authority with exclusive powers in the broadcasting and telecommunications sectors, while COFECE is the authority with exclusive powers in the other sectors. Although this distinction seems, in principle, simple, it has generated doubts and jurisdictional conflicts between both authorities on five occasions, including three regarding digital markets and platforms (one in 2020, one in 2021 and one in 2022).

Article 5 of the Federal Economic Competition Law (the Competition Law) provides a procedure in cases where a competition conflict arises between the Mexican Antitrust Authorities, (i.e., if either, or neither, of them accepts jurisdiction over a certain matter or case). The Article states the following:

> *When one of the entities mentioned in the previous paragraph [IFT or COFECE] has information that its counterpart is processing a matter under its jurisdiction, it shall require the submission of the corresponding file. If the requested entity acknowledges its own lack of jurisdiction to resolve in a given case, it shall submit the file, within the following five days after receiving the request. In case the entity considers that it has jurisdiction in a given case, it shall notify the requesting entity of its resolution in the same period, suspending the procedure and submitting the file to the specialized Federal Collegiate Circuit Court in Economic Competition, Broadcasting and Telecommunications, which shall resolve on the jurisdictional issue within a period of ten days.*
>
> *In case one of the entities mentioned in paragraph one of this article is processing a matter and considers it lacks the jurisdiction to resolve it, said entity shall submit the corresponding file to the other entity within the following five days. If the latter accepts it has jurisdiction, it shall further undertake the procedure of the case, on the contrary, within the following five days, it shall notify the entity that it has declined jurisdiction of the case and submit the file to the specialized Federal Collegiate Circuit Court in Economic Competition, Broadcasting and Telecommunications, which shall resolve on the jurisdiction issue in a period of ten days.*

To date, there have only been five jurisdictional conflicts between the Mexican Antitrust Authorities that have been resolved by the specialised courts. Of those, only the last three have been related to digital markets.

- The first case was related to a merger between Uber and Cornershop.
- The second case involved an investigation into barriers to entry and essential facilities in the markets of online search services, social networks, mobile operating systems and cloud computing services.

- The third case related to the jurisdiction regarding over-the-top (OTT) services in the context of the merger between Discovery and WarnerMedia.

Uber/Cornershop

This merger control case involved the acquisition of Cornershop by Uber. Cornershop is a home shopping and delivery application for supermarkets and local retail stores (grocery shopping app). Uber is a transportation or ride-sharing app.

The parties initially submitted the pre-merger filing with COFECE; however, the IFT considered itself to have jurisdiction over the case and to analyse the transaction. Since both Mexican Antitrust Authorities considered themselves to have jurisdiction, the case was forwarded to a federal circuit court, as provided for in the Competition Law.

The IFT considered that it had jurisdiction over the transaction since both Uber's and Cornershop's activities were carried out through digital platforms and through internet signals, which, according to the IFT, were a part of the telecommunications sector and, therefore, within the scope of the IFT's jurisdiction and not COFECE's.

On the contrary, COFECE argued the transaction fell under its jurisdiction, arguing that Uber's and Cornershop's services related to the intermediation and logistics services, which are not part of the telecommunications and broadcasting sector. COFECE also considered that, although Cornershop and Uber use the internet to provide their services, their economic activities (i.e., intermediation) are independent from the internet and do not in any way impact the telecommunications sector.

The case was assigned to the First Collegiate Circuit Court in Administrative Matters, specialised in Economic Competition, Broadcasting and Telecommunications (the First Specialised Court), which, after a long analysis extending over six months, ruled in favour of COFECE. The First Specialised Court agreed with COFECE in the sense that 'the underlying economic activity remains the same, regardless of the channel used [in this case, the internet] for the commercialisation of the product or service in question',[3] and that a comprehensive assessment must be made to identify the competitive dynamics with traditional businesses to determine which is the competent Mexican Antitrust Authority.

This case represented the first merger between platforms ever reviewed and cleared unconditionally by COFECE.

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3 First Collegiate Court in Administrative Matters, specialised in Economic Competition, Broadcasting and Telecommunications. CCA 4/2019.

Investigation into barriers to entry and essential facilities

This jurisdictional conflict between COFECE and the IFT derived from an investigation initiated by the IFT to identify barriers to entry or essential facilities in the markets of online search services, social networks, mobile operating systems and cloud computing services.

The IFT initiated the investigation because there seemed to be a lack of effective competition conditions in those markets owing to several reasons, including a reduction in the number of competitors within some of the investigated markets because of a generalised practice of purchasing companies that represent a potential threat (i.e., killer acquisitions), and a high degree of concentration in the hands of very few economic agents.

When COFECE became aware of the IFT's investigation, it requested the IFT to forward the investigation, arguing that those markets were not related to the telecommunications and broadcasting sectors and that the use of the internet was not sufficient to grant jurisdiction to the IFT, as this would mean an improper extension of its original jurisdiction. The IFT, in turn, rejected the request, arguing that the internet fell under its jurisdiction based on its constitutional purpose, which is the efficient development of telecommunications and broadcasting, for which it holds the responsibility of the regulation, promotion and supervision of, among other things, access to active and passive infrastructure and other essential inputs. In this regard, the IFT stated that broadband and transition towards internet protocol networks favoured an integration and interconnection of markets that had previously not been considered connected.

As the Mexican Antitrust Authorities did not reach an agreement., the case was sent to the First Specialised Circuit Court. In its ruling, the Court agreed with COFECE that jurisdiction over online search services, social networks and cloud computing did not require the use or exploitation of spectrum frequencies related to telecommunications and broadcasting, and the main players in those markets were not active in telecommunications or broadcasting. It also mentioned that, although the operation of digital platforms involves specialised techniques and technological complexities that the IFT is competent to know, the nature of the underlying economic activities must be considered as well (as determined in the *Uber/Cornershop* pre-merger filing); therefore, COFECE should have jurisdiction to deal with those markets.

Regarding jurisdiction over mobile operating systems, the First Specialised Circuit Court ruled, in summary, that, in accordance with the Federal Telecommunications and Broadcasting Law, the IFT has the authority to issue technical guidelines regarding the infrastructure and equipment connected to telecommunications networks, as well as in matters of homologation and conformity

assessment of such infrastructure and equipment; therefore, the Court noted the necessary link between operating systems and mobile equipment with public telecommunications and broadcasting services and, consequently, determined that the IFT should have jurisdiction over the market of mobile operating systems.

Discovery/WarnerMedia

In the acquisition of WarnerMedia by Discovery, the parties submitted the pre-merger filing before both Mexican Antitrust Authorities, as some of the markets in question were under the jurisdiction of COFECE (e.g., IP licensing for consumer products) and others were under the jurisdiction of the IFT (e.g., pay-TV services). Both authorities considered themselves to have jurisdiction in OTT platforms; therefore, the case was forwarded to a federal circuit court, as provided for in the Competition Law.

As in previous precedents, the Second Collegiate Circuit Court in Administrative Matters considered that to determine the authority that should have jurisdiction over the OTT markets, the underlying nature of the activity and the key players within the relevant sector should be taken into consideration.

The Court ruled that the IFT should analyse the market given that the nature of the OTT platform is the remote distribution of content through the internet, which itself is based on telecommunications networks. Consequently, even though the distribution of audiovisual content over the internet does not require a concession, as is the case for pay TV, telecommunications networks are necessary for the transmission of the platforms' content; hence, audiovisual content is not independent from the telecommunications sector.

The Court also argued that this connection is evidenced by the asymmetric regulations imposed by the IFT on the preponderant economic agent in the broadcasting sector (Televisa), previous pre-merger filings and a previous jurisdictional conflict (*AT&T/Time Warner*) in which the court ruled that the distribution of audiovisual content through cinema, physical or digital forms falls under the jurisdiction of COFECE, whereas streaming platforms fall under the jurisdiction of the IFT.

This jurisdictional conflict lasted five months, during which the merger review process by both Mexican Antitrust Authorities was suspended.

First precedents

Uber/Cornershop, the investigation into barriers to entry and essential facilities and *Discovery/WarnerMedia* represent the first precedents involving multisided markets or platforms. Prior to those cases, there had been no clarity regarding which of the Mexican Antitrust Authorities had jurisdiction to review and

analyse matters involving those markets and industries, and private parties had to conduct their own assessment and, in many instances, guess what the position of the Mexican Antitrust Authorities would be regarding a given market; in other words, although both Mexican Antitrust Authorities had previously conducted investigations into digital markets, those three cases were the first investigations expressly aimed at digital platforms.

Although each case has its particularities and may differ from one another, these precedents serve as guidance for future transactions, allowing the parties involved to focus on the markets being impacted by their activities, rather than on the inputs being used to conduct their activities.

Investigations

Both Mexican Antitrust Authorities have been more active in terms of investigations into digital markets. Among other actions, there have been several *ex officio* investigations and market probes.

COFECE has conducted:

- an investigation for potential relative monopolistic practices (abuse of dominance) in the market of e-commerce platform services in Mexico;[4]
- a market probe to determine the existence of barriers to entry or essential facilities in the market of payment services that involve compensation of payments through debit and credit cards;[5]
- a market study related to the retail of food and beverages;[6] and
- a market probe to determine the existence of barriers to entry or essential facilities in the retail e-commerce market.[7]

4 Federal Economic Competition Commission (COFECE), 'COFECE probes the market of e-commerce platform services in Mexico', File No. IO-002-2017, 1 February 2018: www.cofece.mx/wp-content/uploads/2018/02/COFECE-06-2018-COFECE.pdf. According to COFECE, this was the first time an investigation into digital markets was opened in Mexico.

5 COFECE, 'COFECE investigates possible barriers to competition and/or essential inputs in card payment systems', File No. IEBC-005-2018, 26 October 2018: www.cofece.mx/wp-content/uploads/2018/11/COFECE-047-2018-English-.pdf.

6 COFECE, 'COFECE initiates market study in retail food and beverage sector', File No. REC-001-2019, 20 May 2019: www.cofece.mx/wp-content/uploads/2019/05/COFECE-031-2019-English.pdf.

7 COFECE, 'Cofece investigates possible barriers to competition and essential inputs in retail e-commerce market', File No. IEBC-001-2022, March 2022: www.cofece.mx/wp-content/uploads/2022/04/COFECE-013-2022_ENG.pdf.

Similarly, the IFT (in addition to the barriers investigation that gave rise to the jurisdiction conflict mentioned previously in this Chapter) initiated a probe into potential abuse of dominance in the market of production, distribution and commercialisation of content transmitted through internet (streaming), as well as in the distribution and commercialisation of streaming devices.

Merger control

COFECE has also analysed merger control cases involving digital markets (even if the mergers are not between two platforms). One of the first transactions in which COFECE had the opportunity to analyse digital platforms was the proposed concentration involving Cornershop and Walmart, where COFECE ultimately blocked the deal, considering it 'could generate incentives to unduly displace or impede the access of other competitors to the Cornershop platform and/or hinder the development of new platforms'.[8]

Another important merger analysed by COFECE in 2020 was the acquisition by Despegar.com of Best Day (both online travel agencies). This case involved the first in-depth review of a transaction between relevant online travel agencies in Mexico, which required COFECE to analyse markets that had not been previously subject to a detailed assessment and to analyse the interrelation between the relevant players in both channels (online and offline). After a seven-month in-depth review, COFECE ultimately cleared the transaction without imposing any remedies.

As a consequence of the investigations and merger control cases mentioned in this Chapter, in 2020, COFECE created the General Direction of Digital Markets to advance analysis of the digitalisation of the Mexican economy and to exercise its authority more effectively. According to COFECE, 'this new unit is part of COFECE's Digital Strategy, a document that defines the actions to be implemented by COFECE to successfully address its analysis and research in digital markets.'[9]

COFECE has also published studies such as the COFECE Digital Strategy,[10] where it has expressed its position, work and concerns in digital markets.

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8 COFECE, Press Release COFECE-032-2019: www.cofece.mx/cofece-resolvio-no-autorizar-la-concentracion-entre-walmart-y-cornershop/.

9 COFECE, '15 Acciones Relevantes 2020': www.cofece.mx/wp-content/uploads/2021/01/15del20-VF.pdf.

10 COFECE, 'Estrategia Digital COFECE': www.cofece.mx/wp-content/uploads/2020/03/EstrategiaDigital_V10.pdf.

The IFT has also undertaken several efforts to address and analyse the digital economy and digital markets. In addition to its ongoing analysis of the parties' OTT platforms in *Discovery/WarnerMedia*, it has published different studies related to the digital economy, including the Performance of Market Indicators and the Digital Economy[11] and the Challenges of Competition in the Digital Economy.[12] It has also organised roundtables inviting panellists and experts in the field to discuss the impact that those markets have had on the telecommunications and broadcasting sectors.

Conclusion

The Mexican Antitrust Authorities have made significant efforts in recent years in relation to digital markets. One of the biggest challenges for the Mexican Antitrust Authorities has been adapting to the new way of analysing mergers related to digital markets and learning to analyse:

- the possible indirect network effects;
- economies of scale;
- multi-homing and its effects on competition in terms of users using multiple platforms simultaneously to analyse the best choices;
- the impact of big data;
- the relationship between the different sides of a platform; and
- the relevance of market shares in rapidly changing markets, among other particular characteristics of those markets.

Likewise, the Mexican Antitrust Authorities should try to be as expeditious as possible when analysing and resolving transactions involving digital markets, since they usually involve new economic agents – in many cases, creators of a new market. It is also important to emphasise that lengthy antitrust analysis discourages, on the one hand, innovation and, on the other hand, the investment of private equity funds in those new projects, which, in many instances, is essential for the development of an emerging business.

11 Federal Telecommunications Institute (IFT). 'Comportamiento de los Indicadores de Mercado y ls Economía Digital 2020': www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/Cindicadores2020.pdf.

12 IFT, 'Retos de la Competencia en el Entorno Digital 2021': www.ift.org.mx/sites/default/files/contenidogeneral/multimedia/gacetapdfaccesibleretosdelacompetenciaenelentornodigital20211.pdf.

The Mexican Antitrust Authorities must take into account the dynamism of digital markets, in which conditions can change abruptly, and take into account the fact that blocking transactions involving nascent markets through direct application of traditional tools can slow innovation and investment, and negatively affect the growth and expansion of new products and services that result from the combination of business models, strategies and technologies, which, in many instances, increase competition and benefit consumers.

The Mexican Antitrust Authorities must continue to try to understand the digital economy and its markets and perform the best possible analysis in the shortest possible time; however, at present, we believe that, despite having provided precedents regarding which authority is the competent authority in digital markets, companies will continue to face uncertainty on jurisdictional issues in Mexico, which may cause delays when cases go to court. The Mexican Antitrust Authorities should devote their best efforts to reach agreements before going to court to avoid unnecessary delays, and the circuit courts should bear in mind that monthly delays to decide jurisdiction may end up killing a deal and increasing transaction costs unnecessarily; such bureaucratic issues weaken Mexico's position as an attractive market for innovation.

As in other jurisdictions, the Mexican Antitrust Authorities will continue to face different challenges related to the digital economy and its markets, and will have to adapt to the dualism of adapting traditional markets and these new digital markets. The tools they develop and the criteria they define will shape the competitive landscape in digital markets for years to come and will either foster competition and innovation or become barriers for the expansion and development of businesses.

Part 3

Asia-Pacific

CHAPTER 15

Australia

Louise Klamka, Andrew Low, Amelia Douglass and Michelle Xu[1]

Australian approach to digital markets

Relevant legislation

The legislation governing competition in digital markets is the Competition and Consumer Act 2010 (Cth) (the Act), which is the competition law framework that applies economy-wide in Australia. In addition to competition law, the Act also contains:

- the Australian Consumer Law (ACL), which covers consumer protection issues; and
- the News Media and Digital Platforms Mandatory Bargaining Code (the News Media Bargaining Code), which is intended to address bargaining power imbalances between news media businesses and certain designated digital platforms.

The Australian Competition and Consumer Commission (ACCC) is the independent government agency responsible for enforcing the Act in Australia. With a few exceptions (such as small administrative fines under the ACL and the grant of exemptions), the ACCC is not a determinative body and must apply to the Federal Court of Australia to seek orders enforcing the Act. The Act gives the ACCC standing to do so and powers to seek penalties and injunctions in Court.

There are currently no special rules or exemptions applying to digital markets (though, as noted below, this is currently the subject of debate in Australia).

1 Louise Klamka and Andrew Low are partners, and Amelia Douglass and Michelle Xu are lawyers at Gilbert + Tobin.

The Act gives the ACCC the power to conduct an inquiry into markets or undertake price monitoring activities at the direction of the Australian Treasurer. Once directed, the Act gives the ACCC compulsory information gathering powers (including documents, information and testimony) to allow it to report on and make recommendations to the government on matters of competition and broader policy.

Inquiries may also result in ACCC enforcement action. This power has been used to examine digital markets in three separate inquiries (one ongoing): the Digital Platforms Inquiry 2017–2019 (DPI), the Digital Advertising Services Inquiry 2020–2021 (the Ad Tech Inquiry) and the Digital Platform Services Inquiry 2020–2025 (DPSI).

Structure of the ACCC

The ACCC has a number of divisions, including the Mergers, Exemptions and Digital division. Within that division is the Digital Platforms branch, which is responsible for the ongoing scrutiny of digital platform markets through conducting its digital inquiries. The Digital Platforms branch also works with other units within the ACCC on specific matters, such as the Merger Investigations Branch (responsible for merger control) and the Competition Division (responsible for competition law enforcement).

Cooperation with other regulators

The ACCC actively cooperates with international competition agencies with respect to digital enforcement and regulation. In September 2020, it signed a memorandum of understanding with competition regulators in the US, the UK, Canada and New Zealand to share intelligence, case theories and investigative techniques. The ACCC announced that cooperation was needed to better coordinate investigations across international borders, as the global economy is increasingly interconnected and many large companies, especially in digital markets, operate internationally.

Further, ACCC chair Gina Cass-Gottlieb has recently stated the importance of international cooperation on regulating digital platforms, including considering the obstacles for intervention in the digital economy.

The ACCC also cooperates with other domestic regulators with respect to digital regulation. In March 2022, the ACCC, the Australian Communications and Media Authority, the Office of the Australian Information Commissioner, and the Office of the eSafety Commissioner formed the Digital Platform Regulators Forum (DP-REG) to share information and collaborate on issues relating to the regulation of digital platforms. DP-REG's strategic priorities

for 2022 to 2023 include focusing on transparency, the development and use of algorithms, and increasing collaboration and capacity building between the four regulators forming DP-REG.[2]

Key developments to date

ACCC inquiries and advocacy in digital markets

Over the past five years, the ACCC has conducted three key inquiries in relation to digital platforms: the DPI, the DPSI and the Ad Tech Inquiry.

The primary purpose of these inquiries is to examine digital markets and make any relevant findings or recommendations to the federal government. The inquiries also present an opportunity for the ACCC to proactively monitor digital markets and develop institutional capabilities in digital markets. They may also result in enforcement actions.

DPI report

In July 2019, the ACCC published the DPI report following its Digital Platforms Inquiry. The DPI report was the ACCC's first substantive inquiry into digital markets, focused on the impact that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets.

The DPI report has played a major role in shaping the future direction of the legal framework relating to competition in, and regulation of, digital markets, including by:

- recommending subsequent inquiries into digital markets (the Ad Tech Inquiry and the DPSI);
- establishing the specialist digital platforms branch within the ACCC;
- introducing the News Media Bargaining Code, which intends to address bargaining power imbalances between news media businesses and digital platforms by setting standard obligations for registered news businesses to bargain individually or collectively with designated digital platforms, and providing a compulsory arbitration process where an agreement cannot be reached. To date, the government has not designated any digital platforms; rather, commercial deals have been struck between news media businesses and Google and Meta (formerly known as Facebook);

2 Office of the Australian Information Commissioner, Digital Platform Regulators Forum communique: www.oaic.gov.au/updates/news-and-media/digital-platform-regulators-forum-communique.

- introducing a review of the Privacy Act 1988 (Cth) (the Privacy Act) and proposing amendments to the Unfair Contract Terms regime of the Act;
- flagging multiple investigations, which have since resulted in consumer law enforcement actions commenced by the ACCC against Google and Meta; and
- identifying conduct specific to digital markets that it considers may result in anticompetitive harm.

Most of the ACCC's recommendations were accepted by the government, and a road map to advance the recommendations from the DPI report is in place.[3]

DPSI

Following the DPI report, the government directed the ACCC to conduct an inquiry into markets for the supply of digital platform services (DPSI), in particular: search engines, social media, online private messaging, digital content aggregation, media referral services and electronic marketplaces. The ACCC was tasked with investigating: the intensity of competition in these markets; practices that may result in consumer harm; market trends that may affect the degree of market power and the durability of that market power; changes to the nature of these services arising from innovation; and technological change and developments in markets outside Australia.

The government directed the ACCC to provide interim reports on the inquiry every six months for five years, and a final report is due on 31 March 2025. To date, the DPSI has published four interim reports and has released a discussion paper for the fifth interim report.

The first interim report examined competition, consumer and privacy issues associated with online private messaging, and to a lesser extent search services and social media. Key findings of this report were that Facebook and Apple are the two largest suppliers of stand-alone online private messaging in Australia, Facebook has a competitive advantage relative to alternative stand-alone services that Apple cannot constrain, and Apple has a degree of freedom from competitive constraint over Apple users (limited by Facebook). This first interim report also reinforced the recommendations made in the DPI report, with a continued focus on power imbalances leading to unfair contract terms, and data collection practices (including around improved consumer choice and control), tracking and privacy in relation to these services.

3 Treasury, Government Response and Implementation Roadmap for the Digital Platforms Inquiry: https://treasury.gov.au/publication/p2019-41708.

The second interim report examined app marketplaces (primarily Apple App Store and the Google Play store). The ACCC found that Apple and Google operate a global duopoly in the market for mobile operating systems and this provides them with significant market power in the market for app marketplaces. The ACCC identified that a lack of competitive constraint allows both platforms to charge 15 to 30 per cent commission rates for in-app purchases. The ACCC put forward a set of interim measures that Apple and Google could implement to address the concerns raised in the report and indicated it will continue to monitor and explore these issues (including overseas developments).

The third interim report examined web browsers and search services. The ACCC expressed concerns regarding Google's dominant position in general search services and recommended that it be given the power to implement a mandatory choice screen and consider other measures to improve competition and consumer choice in search.

The fourth interim report examined online retail marketplaces. The ACCC did not identify any one dominant marketplace, instead expressing concerns regarding transparency of factors influencing marketplace display, self-preferencing behaviour in hybrid marketplaces, and data practices. The fourth interim report continues to support the recommendations for dispute resolution mechanisms and amendments to the ACL addressing unfair contract terms and unfair trading practices made in the DPI report.

The ACCC has also published a discussion paper seeking responses that will inform the fifth interim report. This report is the mid-point of the DPSI and will consider:

- competition and consumer issues identified in the course of the DPSI, as well as issues identified in the Ad Tech Inquiry and the DPI to the extent they fall within the scope of the DPSI; and
- whether Australia's current competition and consumer protection laws are sufficient to address these issues and, if reforms are needed to supplement existing laws, the options for regulatory reform.

Ad Tech Inquiry

Following the DPI report, the ACCC was directed to commence the Ad Tech Inquiry, which examined markets for the supply of digital advertising technology services and digital advertising agency services. These services are both concerned with personalised digital display advertising on websites or apps, namely advertisements that are shown before or alongside online content, as distinct from search advertising or classified advertising.

As part of the Ad Tech Inquiry, the ACCC considered the level of transparency in auction and bidding processes in online advertising and supplier behaviour (including vertically integrated suppliers offering ad tech services and ad agency services).

The Ad Tech Inquiry final report was published on 28 September 2021. The ACCC found that competition in ad tech services is dominated by Google, which is underpinned by Google's access to data, access to exclusive inventory and advertiser demand, and integration across services. The ACCC recommended a range of remedies to promote more robust competition and encourage transparency in the ad tech supply chain.

The ACCC also found that Google's vertical integration and dominance across the ad tech supply chains and in related services allowed it to engage in leveraging and self-preferencing conduct. The ACCC considers that over time, this conduct has had the cumulative effect of substantially lessening competition for the supply of ad tech services and has allowed Google to establish and entrench its dominant position in the ad tech supply chain.

PJC inquiry

On 25 March 2021, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) began an inquiry into mobile payment and digital wallet financial services (the PJC inquiry).

The PJC inquiry has sought to understand concerns in mobile payment and digital wallet financial services from both the sector and independent government agencies like the ACCC, the market regulator (ASIC), the banking regulator (APRA) and the central bank (RBA), without a clear policy or legislative agenda.

The ACCC's testimony to the PJC accepted concerns with Apple's conduct with respect to its restriction of access to third-party digital wallets to the Near Field Communication technology (NFC) used on Apple devices to facilitate contactless payments. The ACCC noted issues associated with self-preferencing by Apple, as well as issues associated with Apple controlling an essential gateway for digital payment commerce.

The PJC's mobile payment and digital wallet financial services report was published in October 2021. The report acknowledged that there was evidence suggesting that anticompetitive practices were emerging in the payments ecosystem that may be jeopardising consumer choice, stifling innovation and driving up payment costs. The PJC considered that for this reason, it was critical that legislation, regulators and regulatory approaches are nimble and flexible enough to adapt to the future of the sector.

While the PJC identified Apple's restriction of access to its NFC technology as the most contentious and prominent issue, it did not consider that regulatory intervention was necessary at the time; however, the PJC made a recommendation for the ACCC to consider the impact of Apple's restrictions on competition and innovation.

Enforcement actions

ACCC actions

The ACCC has not taken action against a digital platform alleging breaches of the competition law provisions of the Act; however, it has disclosed that it is currently investigating:

- Apple's restriction of third-party access to NFC technology on its mobile devices and the terms it imposes for use of Apple Pay by third parties; and
- Google's limitation of access of third-party demand-side platforms to YouTube ad inventory, its channelling of demand from its demand-side platforms to its own supply-side platforms, and its use of its publisher ad server to preference its supply-side platform.

The ACCC has taken action against digital platforms under the ACL in circumstances where it has alleged that consumers have been misled about the data collection practices of digital platforms:

- On 29 October 2019, the ACCC commenced enforcement action against Google, alleging misleading or deceptive conduct in relation to Google's communication to consumers on the collection and use of location data. In April 2021, the Federal Court found in favour of the ACCC and held that Google misled consumers, with penalties yet to be determined.
- On 27 July 2020, the ACCC commenced action against Google alleging misleading or deceptive conduct around Google's use of consumers' personal data.
- On 16 December 2020, the ACCC commenced proceedings against Facebook for misleading consumers about the use of their personal activity data in its Onavo VPN app.
- On 7 August 2019, the ACCC commenced proceedings against HealthEngine for misleading consumers about the use of their data. On 20 August 2020, the Federal Court ordered by consent that HealthEngine pay A$2.9 million in penalties for engaging in misleading or deceptive conduct.

More recently, the ACCC has instituted proceedings against:

- Uber, which admitted it breached the ACL by making false or misleading statements in cancellation warning messages and Uber taxi fare estimates. The parties agreed to make joint submissions with the ACCC to the Federal Court for penalties totalling A$26 million to be imposed; and
- Airbnb, alleging it misled consumers into believing prices for Australian accommodation were in Australian dollars when, in fact, for many consumers they were in US dollars.

The ACCC also identified competition and consumer issues relating to digital platforms as one of its 2022 compliance and enforcement priorities.[4]

ACCC consideration of transactions in digital markets

Section 50 of the Act prohibits mergers that have the effect or likely effect of substantially lessening competition. The ACCC has an informal merger clearance process and a formal merger authorisation process. The ACCC does not itself have the power to block an acquisition, however, it can bring an action in the Federal Court to prevent an acquisition it considers breaches Section 50 of the Act. If a transaction completes and the ACCC successfully brings an action against the parties, the Court may order divestiture of assets.

This framework governs all mergers, including transactions involving digital platforms. The vast majority of mergers are reviewed within the informal merger clearance framework.

The ACCC's last opposition of a merger of two online businesses was in relation to Carsales.com's proposed acquisition of the Trading Post on 20 December 2012, in the context of online car classifieds.[5]

In Google's proposed acquisition of Fitbit, the ACCC did not reach a decision before the deal ultimately completed in January 2021. In June 2020, the ACCC raised a number of competition concerns in its statement of issues (SOI).

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4 ACCC, Compliance and enforcement priorities for 2022/23, 3 March 2022: www.accc.gov.au/media-release/compliance-and-enforcement-priorities-for-2022-23.

5 In 2020, the ACCC subsequently granted Gumtree merger authorisation for its acquisition of Cox Media (which operates online platforms CarsGuide and Autotrader) in the same online car classifieds market: www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register/gumtree-au-pty-ltd-proposed-acquisition-of-cox-australia-media-solutions-pty-ltd.

In the SOI, the ACCC defined data relevant markets by reference to the potential commercial use of the data being aggregated (as opposed to any actual competitive overlap in that commercial use).

In response, Google offered court enforceable undertakings, which were ultimately rejected by the ACCC. Google proposed a number of behavioural remedies to address the ACCC's concerns about data aggregation by restricting the ways in which Google would use Fitbit data. To date, the ACCC has not taken any enforcement action in relation to the parties closing the deal, but the ACCC indicated that it will continue a post-completion review.

The ACCC is also currently investigating Meta's acquisition of Giphy. The ACCC proactively commenced this review after the transaction was completed in May 2020. To date, no enforcement action has been taken.

In digital markets, the ACCC's authorisation process has been used to obtain antitrust immunity agreements between competitors that may otherwise breach the Act:

- In 2021, the ACCC granted authorisation to members of Country Press Australia (a collection of independent regional and local newspapers) and Commercial Radio Australia (a national radio industry association) to collectively bargain with Facebook and Google in respect of payments for producing content featured on those platforms.
- In 2017, the ACCC denied granting authorisation to several Australian banks who sought to collectively bargain with and boycott Apple in relation to access to Apple's iPhone NFC controller.
- In March 2016, the ACCC allowed ihail Pty Ltd, a joint venture between a number of taxi companies and other participants, to launch its ihail smartphone taxi booking app.

Private enforcement

Private enforcement supplements the role of the ACCC in enforcing the provisions of the Act. These actions often allow for a faster resolution for the parties involved (i.e., injunctive or real-time relief) as opposed to ex post investigation by the ACCC.

Similar to ACCC enforcement proceedings, private actions can also have wider implications for the broader community (e.g., by deterring or prohibiting monopolistic behaviour) and contribute to the development of the relevant law (e.g., findings of the court in private enforcement actions will add to the jurisprudence for the relevant provisions).

In 2017, the legislative framework surrounding private enforcement (and competition law more generally) was amended. This change clarified that admissions of fact in one proceeding (e.g., in proceedings brought by the ACCC) may be relied on by private litigants in other proceedings, which will likely increase the ease of commencing private enforcement actions (once more cases are tried and heard).

Currently there are six private actions ongoing in Australia alleging a contravention of competition law involving digital platforms:

- *Epic Games v. Apple*: Epic Games, developer of Fortnite, commenced proceedings against Apple, alleging that Apple engaged in misuse of market power (among other things) by forcing developers to use Apple's App Store and Apple's payment platform for consumers making in-app purchases, while taking a 15 to 30 per cent commission on all payments. Epic also commenced similar proceedings in the US and the UK. Following commencement, Apple filed for a stay of proceedings in favour of proceedings in the Northern District of California. After an initial decision in Apple's favour, Epic appealed to the full Federal Court, which found that there are serious public policy issues that should be adjudicated in Australia. Apple has since applied to the High Court for special leave to appeal. At the time of writing, no decision on special leave has been made. If leave to appeal is not granted, trial will commence in November 2022.
- *Epic Games v. Google*: Epic brought proceedings against Google alleging misuse of market power (among other things) by Google for hindering Epic's ability to supply Fortnite in the Google Play store. On 6 August 2021, Google filed an interlocutory application to stay proceedings in Australia. As at the time of writing, the hearing for the stay application is scheduled for October 2022.
- *Anthony v. Apple Inc & Anor and McDonald v Google & Ors*: in June 2022, these two class actions were filed against Apple and Google in the Federal Court, alleging they engaged in anticompetitive conduct in the operation of their respective app stores, which resulted in consumers paying inflated commissions on certain app and in-app purchases. The claims in these class actions largely replicate Epic's case against Apple and Google (respectively); however, the classes are seeking declarations and damages only (not injunctive relief) on behalf of end consumers of apps and in-app content (as opposed to app developers) for the same conduct.
- *Dialogue Consulting v. Facebook/Instagram*: Dialogue, a start-up offering social media content scheduling, brought proceedings against Facebook alleging that Facebook's decision to deactivate Dialogue's access to its platforms was designed to harm Dialogue's ability to compete with Instagram's content

publishing software. Dialogue claims that Facebook misused its market power, engaged in exclusive dealing and made contracts with the purpose or effect of substantially lessening competition. Facebook argues that its decision to deactivate access was in response to contractual breaches by Dialogue. In April 2019, Dialogue was granted an interim injunction against Facebook, restraining it from terminating, suspending or refusing Dialogue's access to its platforms. In December 2020, Facebook sought a stay of the proceedings, but not as they related to Section 46. The stay application was dismissed at first instance in the Federal Court and on appeal to the Full Federal Court.

- *Hamilton v. Facebook and Google:* in August 2020, a class action was commenced in the Federal Court against Google and Apple, claiming they engaged in cartel conduct and concerted practices that substantially lessened competition by banning all cryptocurrency-related advertising. The proceedings are being brought on behalf of 33 different cryptocurrency holders. The case is currently active.

In a recent case management hearing for *Epic Games v. Apple*, *Epic Games v. Google* and *Anthony v. Apple Inc & Anor and McDonald v. Google & Ors*, a new class action (yet to be filed) against Apple and Google relating to app distribution was mentioned.

While private actions in Australia are still rare compared to other jurisdictions, the recent uptick may be a sign of future growth in this area.

Upcoming developments and proposed reforms

The ACCC's DPI, Ad Tech and DPSI reports have sparked major changes to the frameworks surrounding digital markets.

Privacy Act review

In the DPI report, the ACCC recommended the strengthening of protections in the Privacy Act as well as broader reform of Australian privacy law to ensure that consumers' personal information is protected in light of the increasing volume and scope of data collection in the digital economy.

In December 2019, the Attorney General announced that the government will commence a review of the Privacy Act. In its review, the government will consider:

- whether the Privacy Act protects personal information and provides a framework that promotes good privacy practices;
- whether individuals should have direct rights of action to enforce privacy obligations under the Privacy Act;
- whether a statutory tort for serious invasions of privacy should be introduced;

- the effectiveness of enforcement powers and mechanisms under the Privacy Act; and
- whether an independent certification scheme should be implemented to monitor and demonstrate compliance with Australian privacy laws.

In October 2021, the government published an issues paper seeking feedback on possible reforms. In June 2022, the Attorney General indicated that the review's final report may be released in the coming months.

Proposed merger reform

In April 2021, the ACCC released a joint media statement with the UK's Competition and Markets Authority and Germany's Bundeskartellamt, which advocated that the best way merger control can protect competition is through completely opposing a transaction or divestitures and that behavioural remedies are inappropriate.[6]

In August 2021, the ACCC announced a proposed overhaul of the current merger control regime. The ACCC is not a legislative body, and there is no draft legislation before Parliament; however, the ACCC can be expected to strongly advocate for its proposed reform.

The ACCC has since expanded on its proposal for a digital-specific merger regime, setting out in the discussion paper for its fifth DPSI interim report potential rules that could apply to digital platforms that meet predefined criteria linked to their market power or strategic position (e.g., a gatekeeper) in one or more digital markets, if the ACCC determines that reform is necessary. Subject to consultation, potential measures could include:

- a bespoke notification regime for digital platforms, including mandatory notification of all acquisitions where the target is carrying on business in Australia;
- a lower probability of competitive harm threshold or adopting the balance of harm assessment taken in the UK;

6 ACCC, Landmark joint statement on merger control enforcement from ACCC, UK's CMA and Germany's Bundeskartellamt (20 April 2020). Accessible online at: www.accc.gov.au/media-release/landmark-joint-statement-on-merger-control-enforcement-from-accc-uks-cma-and-germanys-bundeskartellamt.

- reversing the of onus of proof for showing the acquisition does not substantially lessen competition, or introducing a rebuttable presumption that certain acquisitions by digital platforms that meet relevant criteria result in competitive harm;
- amending the merger factors to place greater focus on structural changes and factors relating to the loss of potential competition rivalry or increased access to or control of data, technology or other significant assets;
- a new deeming provision applicable to digital platforms with a substantial degree of market power whose position would likely be entrenched, materially increased or extended by the acquisition, and an enhanced deeming provision applying to digital platforms that meet relevant criteria where the acquisition raises barriers to entry, or removes or weakens a source of future or partial competitive constraint; and
- a prohibition on acquiring businesses in certain categories (e.g., businesses in the same or adjacent markets) for certain digital platforms.

While there is significant overlap between the above elements of the proposed digital-specific merger regime and the proposed economy-wide merger framework changes, the ACCC will consider the digital-specific proposals first in its fifth DPSI interim report.

UCT exposure draft legislation

Australia's existing unfair contract terms (UCT) regime is designed to protect consumers and small businesses from UCTs in standard form contracts. In the DPI report and the first DPSI report, the ACCC recommended additional protections from UCTs, owing to issues arising from the power imbalance between small businesses and consumers, and large digital platforms. The ACCC found that the terms and conditions must be accepted by default and often leave businesses and consumers at a significant disadvantage.

In August 2021, the government released its draft Treasury Laws Amendment (Measures for a later sitting) Bill 2021: unfair contract terms reforms, which seeks to amend both the ACL and the Australian Securities and Investment Commission Act 2001 (Cth) to strengthen the UCT legislative framework. The key changes proposed by the draft include:

- making unfair contract terms unlawful (as opposed to void);
- the application of UCT protections to more businesses, covering standard form contracts where one party either has annual turnover of less than A$20 million or employs under 100 employees (as opposed to the current 20-employee threshold);

- introducing civil penalties for proposing, applying or relying on a UCT. For corporations, this would be the greater of A$10 million, three times the value of the benefit derived from the contravention or 10 per cent of annual turnover; and
- introducing a rebuttable presumption for UCTs in similar circumstances.

These proposed changes are only set to apply to new contracts, contracts that are renewed or terms that are varied after the legislation's commencement date.

The exposure draft legislation lapsed owing to the May 2022 federal election; however, in the days before the election, the Australian Labor Party (which was elected) announced its intention to proceed with UCT reforms if elected.

Key themes and trends

The ACCC is ramping up its focus on digital platforms, which we can expect to continue. Some of the key themes and trends we are likely to see develop are:

- The Digital Platforms branch will continue to proactively advance investigations and inquiries into the practices of digital platforms, and we are likely to see more court action.
- The ACCC has made a number of comments regarding market power of digital platforms, although its prosecution under Section 46 has been limited and undeveloped. It is likely its approach to abuses of market power in digital markets will develop rapidly (and will substantially draw on work it has already undertaken as part of its inquiries).
- Beyond merger control, the ACCC considers there are broader issues in digital platform markets that may need rules that apply to conduct of specific companies in those markets. The ACCC is currently considering the introduction of regulatory tools targeted at addressing a broad range of issues identified in digital markets, as set out in its discussion paper for the fifth interim report of the DPSI.
- The ACCC is continuing to consider options for merger control policy reform, with the proposed framework containing specific provisions for digital platforms that would be stricter than in other non-digital markets. The ACCC is particularly concerned where digital platforms purchase 'nascent competitors' without notification and has signalled a more interventionist approach. It is currently undertaking a post-completion investigation of *Facebook/Giphy*.

- The ACCC is focused on the treatment of data and its role in competition law – with data ownership and portability being flagged as key issues. This focus also highlights the intersection between privacy and competition law, with data being the intersection point. In particular, we have already seen:
  - the implementation of the Consumer Data Right in the financial sector, with the intention that it will apply to the telecommunications and energy sectors (and potentially other sectors);
  - action taken by the ACCC under the ACL for misleading use of consumer data against Google and Facebook;
  - a full review of the Privacy Act to ensure privacy settings empower consumers, protect data and best serve the Australian economy;
  - concerns raised in the DPI report about unfair trade practices related to data collection from large digital platforms; and
  - concerns in the PJC inquiry over where consumer data in Australian mobile payments is stored.

CHAPTER 16

China

Susan Ning, Ruohan Zhang and Weimin Wu[1]

Introduction

The emergence of internet platforms has been the driver of a series of new economic sectors and industrial reforms but, at the same time, the abuse of the platform's power has brought chaos to not only the digital market but also the new economy. Because of the characteristics of the internet, the digital market is prone to forming a 'winner takes all' situation. Therefore, according to the Central Economic Work Conference,[2] intensifying antitrust enforcement and preventing 'disorderly capital expansion' have become the top priorities in China.

On 1 August 2022, the first amendment to Anti-Monopoly Law of the People's Republic of China (AML) came into effect. Before that, the Anti-Monopoly Guidelines for the Platform Economy Industries (the Guidelines) were implemented on 7 February 2021. The Guidelines are enacted based on the AML to prevent and prohibit monopolistic conduct in the field of platform economy. The promulgation of the Guidelines is a milestone, initiating China's anti-monopoly movement against internet platforms. Within just one month of the draft Guidelines being introduced, the State Administration for Market Regulation (SAMR) had imposed administrative penalties on internet companies in three cases of unreported concentrations, all of which are typical of transactions

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2 The Central Economic Work Conference is the highest-level economic conference held by the Chinese Communist Party's Central Committee and the State Council. Its task is to summarise the achievements of the year's economic work, analyse and judge the current international and domestic economic situation, and formulate macroeconomic development planning for the following year.

involving variable interest entities (VIEs), a common governance structure adopted by Chinese internet companies. In April 2021, the SAMR imposed an unprecedented 18 billion yuan administrative fine on Alibaba, the biggest online retailer platform in China, for the abuse of its dominant position.

Against the backdrop of intensifying scrutiny of digital platforms, the aim of this chapter is to shed light on China's latest legislation and law enforcement activities in the area of digital platforms and e-commerce. The chapter covers monopoly agreements, the abuse of market dominance and merger control.

Monopoly agreements

As a technological force under the control of human beings, artificial intelligence (AI) and digital algorithms play an inconspicuous but significant role in market competition. Big data enhances market transparency and makes it much easier for companies to understand the market, and AI can improve the efficiency of decision-making. However, these tools may also be used to exchange information or make decisions that have anticompetitive effect, such as fixing prices and segmenting markets. Thus, the second chapter of the Guidelines specifically stipulates the methods to regulate monopoly agreements in the context of digital platforms.

On the basis of the AML, the Guidelines take full account of the dynamic, systematic and complex nature of the platforms, and provide clarification of the specific scope of monopoly agreements and their operation mode. The Guidelines recognise that undertakings may use algorithms and platform rules to enter into horizontal monopoly agreements, vertical monopoly agreements and hub-and-spoke agreements to exclude or restrict competition.

Algorithmic collusion

AI stands out as a transformational technology in the digital market.[3] AI using machine learning, especially price algorithms, is now widely employed in many fields and industries. Algorithms can provide quick and easy price adjustment strategies and facilitate dynamic market transactions. Many undertakings in transactional areas, such as hotel bookings and online stores, use pricing algorithms to automatically adjust prices to match those of their competitors. However, the use of algorithms may also lead to anticompetitive behaviours, of which algorithmic collusion is typical.

3 See 'Notes from the AI Frontier – Insights from Hundreds of Use Cases', Discussion paper, April 2018, McKinsey Global Institute.

Algorithmic collusion is collusion agreed between human beings and executed with the assistance of technology.[4] Because of the advent of algorithms, different competing parties can directly use pricing algorithms to reach tacit collusion to maximise their collective interests instead of going through traditional discussions, negotiating or signing agreements, which makes it harder for antitrust authorities to find evidence of a cartel's existence. In addition, algorithms increase market transparency on the supply side, allowing undertakings to gather sufficient information about competitors, so that they can quickly adjust prices, which further reinforces the anticompetitive situation in the market and the stability of a cartel.

Given that algorithmic collusion is a new form of collusion, whether it should be tackled had been controversial, but now the AML and the Guidelines clearly identify the anticompetitive characteristics of algorithmic collusion. Article 9 of the AML prohibits business operators from utilising data and algorithms to engage in monopolistic conducts. Article 5 of the Guidelines emphasises that 'other concerted acts' mentioned in Article 16 of the AML include concerted acts by means of algorithms; Article 6, Paragraphs (II) and (III) of the Guidelines stipulate that using technical means to communicate and using data, algorithms and platform rules to achieve coordination and consistency can constitute horizontal monopoly agreements; and Article 7(III) of the Guidelines sets forth that directly or indirectly restricting prices using data and algorithms may also constitute vertical monopoly agreements. The stipulation of the AML and the Guidelines provides the legal basis for authorities to deal with algorithmic collusion and demonstrates the authority's will to combat algorithmic collusion.

Although traditional collusion is usually solved by law enforcement using investigative tools to detect a cartel or by cartel members providing information, the advent of algorithms has made it even harder to find evidence from outside or to crack cartels from inside. To tackle this problem, the Guidelines first lower the evidential standard of identifying collusion, stating in Article 9 that 'if it is difficult to obtain direct evidence, in accordance with Article 6 of the Interim Provisions on Prohibition of Monopoly Agreements, the level of access by undertakings to the relevant information may be determined based on logically

4 A Ezrachi and M E Stucke, 'Algorithmic Collusion: Problems and Counter-Measures', Roundtable on Algorithms and Collusion (21-23 June 2017), https://one.oecd.org/document/DAF/COMP/WD(2017)25/en/pdf.

consistent indirect evidence'. In addition, the Guidelines highlight the use of leniency programmes and encourage undertakings involved in cartels to self-report and hand over evidence.

Though currently there are no reported cases of algorithmic collusion in China, using computer algorithms to improve pricing models, customise services and predict market trends has become a common practice for companies in China, especially in the e-commerce area. Thus, it is highly likely that the antitrust authorities will later attach great importance to this topic.

Hub-and-spoke agreements

Hub-and-spoke arrangements are horizontal restrictions at the supplier or retailer level (the spokes), which are implemented through vertically related players that serve as a common hub (e.g., a common manufacturer, retailer or service provider). The 'hub' may facilitate the coordination of competition between the 'spokes' without direct contact between the spokes. In the extreme, the effects of a horizontal hardcore cartel can be achieved purely based on communications between a hub and the spokes.

Article 19 of the AML prohibits business operators from organising or providing substantive assistance to other operators to reach monopoly agreements. Considering the characteristics of online platforms, it is very easy for platform operators and operators on the platform to form a hub-and spoke cartel. To be more specific, the 'double identity' nature of platforms enables platform operators to play the roles of both hub and spoke.

Thus, the Guidelines specifically emphasise this special collusion by:

- recognising that a hub-and-spoke agreement, though vertical in form, may have the same effects on market competition as a horizontal monopoly agreement;
- stating that such an agreement could be analysed under Article 17 or Article 18 (or both) of the AML; and
- including a few factors for consideration to determine whether a hub-and-spoke agreement constitutes a horizontal monopoly agreement regulated by Article 17 of the AML or a vertical monopoly agreement as regulated by Article 18 of the AML although no legal test for such determination is laid out.

In addition, hub-and-spoke collusion is often conducted using algorithmic technology, platform rules and other means. For instance, the online car hailing platforms provide drivers with passengers' orders and allow the transactions to take place. However, platforms use algorithms to assign orders that customers

cannot choose, so there is no competition among drivers. Besides, the amount to be charted is also determined by platforms, and both customers and drivers are deprived of the right to bargain and reach an agreement. The plaintiff in the US case of *Meyer v. Kalanick* mentioned this when he expressed his concern about Uber, and we understand that the situation is quite similar in China. Although the Guidelines do not set forth the specific solutions to hub-and-spoke agreement, the SAMR clearly signals that these agreements should undergo more strict antitrust scrutiny.

MFN clause

Most-favoured nation (MFN) clauses (also known as anti-discrimination clauses) are provisions by which an undertaking requires its suppliers or customers to treat it no worse than all other undertakings. Setting up MFN clauses in contracts is a typical act of the platform operator requiring operators on the platform to provide it with trading conditions equal to or superior to other competitive platforms in terms of commodity prices and quantity, among other things. The widespread use of such clauses not only binds the contracting parties but also impedes the overall competition condition of the whole market. MFN clauses are widely used on price comparison websites, online travel agencies and the like, and there have been already some enforcement practices in the United States, the United Kingdom and the European Union. The SAMR also mentioned in response to a reporter's question on the Guidelines that platform operators might not impose requirements for the trading conditions of operators on the platform with other competing platforms.

The main concern of the antitrust law enforcement agencies is that the use of MFN clauses tends to have an exclusive effect on competitors. Low-cost competition strategy is a common method of increasing market share. However, if the seller signs an MFN clause with certain platforms, it may not be able to offer lower prices to other platforms. In this way, the cost of market entry or expansion of other platforms will significantly increase.

Therefore, setting up MFN clauses can raise issues with both abuse of market dominance and vertical monopoly agreements. The draft Guidelines emphasise that MFN clauses may constitute vertical monopoly agreements and clarifies the factors to be considered when evaluating their influence, stating that 'in order to analyse whether MFN treatment clauses constitute a vertical monopoly agreement, the commercial motivation for entering into such clause, the ability to control the market and the impact of the implementation of such clause on market competition, consumer interests and innovation may be comprehensively considered'. Although the final version of the Guidelines does not contain

this stipulation, Article 7 of the Guidelines clarifies that an MFN clause may constitute a monopoly agreement as well as abuse of market dominance. Those factors still stand as good reference when assessing relevant risks. Because the vertical monopoly agreement offence does not require market dominance, companies should pay particular attention to the potential risk when considering MFN clauses, even if not with a dominant position.

Safe harbour rule

Article 18 Clause 3 of the AML newly introduces a safe harbour rule. Under the rule, vertical monopoly agreements are not prohibited if certain requirements, including a market share ceiling, are met. The detailed requirements for safe harbour are still in draft. Although not explicitly targeting the digital market, the safe harbour rule will apply to all industries.

Abuse of market dominance

The traditional determination of the abuse of a dominant position usually follows the steps of: defining the relevant market; analysing whether the undertaking has a dominant position; and determining whether the act in question constitutes an abuse. However, the nature of the internet makes the traditional analysis and identification approach extremely difficult.

Owing to multiple factors such as the innovation of the information technology industry, the SAMR has been very cautious in terms of the antitrust regulation of digital platforms. Since the release of the Guidelines, the SAMR has begun to focus on the abuse of market dominance by digital platforms and is making a start on drastic reforms and remediation.

Key factors in identifying market dominance

Digital platforms are characterised by multiple unique economic phenomena such as network effects, two-sidedness or below-cost pricing, which makes it more complex to define relevant market positions and identify dominance.

The Guidelines provide a detailed list of factors that should be considered in defining the relevant market. Article 4 of the Guidelines stipulates the factors that can be used when conducting substitution analysis, such as platform functions, business models, application scenarios, user groups, multilateral markets and offline transactions for demand substitution analysis, and market access, technical barriers, network effects, lock-in effects, transfer costs and cross-border compe- tition for supply substitution analysis. This is discussed further in the 'Merger control' section, below.

Article 11 of the Guidelines specifies the factors to identify a market dominant position in light of the characteristics of the platform economy industries, including an undertaking's market share and the status of competition, an undertaking's ability to control the market, financial and technical conditions, the degree of dependence of other undertakings on the undertaking in question in respect of transactions, the degree of difficulty for other undertakings to enter the relevant market, as well as other factors based on the characteristics of the platform economy industries. The diversity of the considered factors gives antitrust law enforcement more flexibility.

In view of the above, the Guidelines set forth the requirements and methods in terms of the relevant market in platform economy. Furthermore, considering the specialty and complexity of the digital area, we understand that the SAMR may also cooperate with other relevant regulatory bodies to jointly study and investigate antitrust compliance issues.

Big data killing

Big data killing refers to the practice of some platforms using algorithms to discriminate in pricing practices.[5] Big data killing can increase profits because many of the regular or important customers are less sensitive to price increases and they may pay more for a product or service compared with new customers. This phenomenon is particularly common on food delivery and online travel agency platforms.

In general, big data killing is regarded as illegal in two respects: (1) differential pricing based on consumer profiling violates consumers' personal information rights; and (2) the act of charging different prices for the same item violates consumers' right to fair trade.

In practice, it is difficult for consumers to prove whether a company's price increase is justified or discriminatory. To address this issue, regulators have taken several approaches to prevent internet companies from using big data to practise price discrimination. Apart from the Guidelines, big data killing is also regulated under other laws and regulations, including the Consumer Protection Law, the E-Commerce Law, the Measures for the Supervision and Administration of Online Transactions, among others. Draft regulations on algorithms recently issued by the Cyberspace Administration of China also address this issue.

5 'China to Introduce New Laws to Regulate "Big Data Killing" by Internet Enterprises' (16 August 2021), Pandaily, https://pandaily.com/china-to-introduce-new-laws-to-regulate-big-data-killing-by-internet-enterprises/.

Furthermore, local governments have carried out a series of enforcement activities against big data killing. For example, under the organisation of the Guangzhou Administration for Market Regulation, 10 internet companies signed a pledge not to use big data to conduct price discrimination.

In addition, a court has shown its consideration for consumers in a decision of 7 July 2021. Keqiao District Court of Shaoxing City, in Zhejiang Province, heard the case of Ms Hu and Shanghai Ctrip Commercial Co, Ltd (Ctrip), a well-known online travel agency in China. The Court ruled in favour of the plaintiff in the first instance. Ms Hu is a 'diamond VIP' client of the Ctrip app, but she paid fees higher than the actual price when she booked a hotel room instead of enjoying the VIP discount. The Court held that the Ctrip app, as the intermediary platform, is obliged to report the actual value of the subject matter truthfully. As Ctrip failed to report, the Court determined that the app had committed fraudulent promotion, price fraud and deceptive acts, and supported the plaintiff 's request for a full refund and punitive damages at three times the original payment. This is the first successful case for customers concerning big data killing. We understand that Keqiao District Court's ruling in favour of the consumer and the frequent law enforcement activities against the use of platform data shows the will of judicial and administrative authorities to protect consumers.

Picking one from two

'Picking one from two' is technically not a legal term. The practice refers to a situation in which a platform requires the undertakings on the platform to do business only on that platform instead of others. For instance, since 2015, sellers have been asked to choose in marketing battles between Alibaba and its competitors. Alibaba used its market power, platform rules and technical means such as data and algorithms to adopt a variety of incentives and penalties to ensure the implementation of the requirement.[6] In 2017, one of its competitors engaging in e-commerce, JD.com, filed a lawsuit against Alibaba for abusing its position to prevent merchants from selling on its platform, and Pinduoduo and Vipshop soon joined the lawsuit.[7] However, owing to the complexity of the jurisdiction involved in the case, the court has not expressed any views on the substantive issues involved for the past few years.

6 See http://www.samr.gov.cn/xw/zj/202104/t20210410_327702.html (in Chinese).

7 'Sellers asked to choose in battle between Alibaba and Pinduoduo', *Financial Times*, at https://www.ft.com/content/b55d0e0a-33a1-11ea-9703-eea0cae3f0de.

The authorities' ambiguity on the issue began to change in November 2020 when the SAMR clearly indicated that online trading operators should not abuse their dominant market positions to eliminate or restrict competition based on their technical advantages, number of users, the ability to exert control over the relevant industry and other operators' dependence. In April 2021, the SAMR and Shanghai Administration for Market Regulation (Shanghai AMR) each issued within a short time of each other high-profile administrative penalty decisions against operators within the platform economy industry for the abuse of market dominance, namely Alibaba and Sherpa's. Alibaba was fined 18 billion yuan (4 per cent of its domestic revenues in 2019) for the aforementioned abusive act. The two cases clearly signal a trend of a significant increase in antitrust enforcement activities now and for the future.

More importantly, the SAMR and Shanghai AMR have established a specific analysis model based on market power in these two cases, which is different from the theory mentioned by the Supreme Court eight years ago. In *360 v. Tencent*, the Supreme Court ruled that competition within the internet market is highly dynamic and distinct from traditional markets, so the boundaries of the relevant markets are much less clear, which shows that the indicative role of market share should not be overestimated.[8] Alibaba made the argument that the indicators for evaluating the online retail service are various and the dominant position cannot be identified based solely on market share. However, the SAMR did not approve of this argument, stating that Alibaba has long held a high market share and has a high level of market recognition and customer 'stickiness', with high migration costs for undertakings within the platform. As regards Sherpa's, Shanghai AMR used a hypothetical monopolist test model to identify its dominant position. It is clear that owing to changes in the competition environment, the antitrust law enforcement agencies are taking a more active and aggressive approach towards identifying the relevant market.

Community group buying

Compared with other formats of the online new economy, community group buying is definitely unique and has distinctive Chinese characteristics. Community group buying refers to a form of business in which a certain number of consumers buy the same goods at a low discount through certain organisations in their communities. Customers can order goods online and get them offline. During the covid-19 pandemic, community group buying rapidly became popular with

8 http://www.court.gov.cn/paper/content/view/id/7973.html (in Chinese).

customers. To open up the market and gain customers quickly, platforms offered customers high subsidies and sold goods at very low prices. This predatory pricing behaviour not only brought chaos to the community group-buying market but also affected traditional farmers, traders and self-employed people.

To address this issue, the SAMR and the Ministry of Commerce jointly held an administrative guidance meeting to regulate the order of community group buying, at which six internet platform enterprises participated, including Alibaba, Tencent and Meituan. The SAMR emphasises that internet platform enterprises should strictly regulate the operation of community group buying and strictly abide by the 'nine don'ts', such as not abusing their pricing rights and reaching monopoly agreements. In addition, in March 2021, the SAMR imposed fines totalling 6.5 million yuan on five community group buying platforms for unfair price behaviours excluding or restricting competition.

From the above enforcement activities, we can tell that although online fresh food retail services and offline services may not be the same relevant market, the emergence of community group buying may distort the market for the traditional retailing of vegetables, fruits and other commodities, potentially leading to the loss of a large number of undertakings engaged in traditional fresh food retailing. We understand that the SAMR's focus has extended beyond traditional market competition to a number of areas, such as other undertakings' interests, public interests and employment, but how these multiple values will fit in is still a matter of debate.

Merger control

SAMR confirms notifiability of VIE structures

The notifiability of VIE structures has long been controversial in China because the VIE structure is considered a legal grey area. Companies in China often set up VIE structures to bypass foreign investment restrictions. In practice, many foreign-listed major Chinese technology companies have VIE structures.

Historically, if a transaction party adopts a VIE structure, merger notification of the transaction would be difficult since the merger review agency did not want to be seen as tacitly recognising the legality of VIE structures. As a result, many transactions involving VIE-structured Chinese tech companies were not notified even though they have met the notifying threshold.

The uncertainty hanging over the notification of VIE structured transactions was finally lifted with the publication of several guidelines and review decisions in the past years. In the following, we briefly explain the sequence of events that crystallised the notifiability of VIE structures.

The SMZ case

On 20 April 2020, the SAMR published on its website a notice in relation to the simple case review decision involving the establishment of a new joint venture between Shanghai Mingcha Zhegang Management Consulting Co, Ltd and Huansheng Information Technology (Shanghai) Co, Ltd (the SMZ case). On 20 July 2020, the SAMR unconditionally cleared the transaction.

According to information disclosed in a public notice, the ultimate controller of Mingcha Zhegang (a purely domestic company) is Leading Smart Holdings Limited, a Cayman Islands listed company. Control is exercised through related entities based on a series of contractual arrangements.

This case marked the first time that the SAMR has officially accepted a merger control filing in respect of a transaction in which the VIE structure was adopted by a party to the transaction.

Publication of the draft Guidelines

In November 2020, the SAMR released for public consultation a draft version of the Guidelines, which expressly stated that transactions involving VIE structures were subject to merger notification requirements.

Publication of failure to notify decisions

On 14 December 2020, the SAMR published decisions to fine three companies for failing to notify their respective VIE-related transactions. This was the first time that the SAMR has imposed the maximum fine (500,000 yuan) under the AML for failure to file regarding VIE-related transactions. The reasons for the penalties were summarised as follows:

- Alibaba Investment Limited, an investment vehicle of Alibaba Group, for its failure to notify its acquisition of Yintai Retails (Group) Co, Ltd, which is active in department stores and other retail outlets;
- China Literature Limited, a Hong Kong-listed company ultimately controlled by Tencent, for its failure to notify its acquisition of New Classics Media, a company incorporated in the Cayman Islands, which controls a domestic company via a VIE structure that is primarily active in the production and distribution of television series, films and web series; and
- Shenzhen Hive Box Network Technology Co, Ltd (Hive Box), an affiliate of SF Express, which operates intelligent terminal service facilities through a subsidiary controlled via a VIE structure, for its failure to notify its acquisition of China Post Smart Express Technology Co, Ltd, which is active in the same sector as Hive Box.

These decisions clarified the SAMR's position on VIE structures in the merger review context. The SAMR held a press conference regarding the three penalty decisions during which SAMR officials reiterated that the AML does not exempt VIE-structured transactions from merger notification requirements.

Promulgation of the Guidelines

In February 2021, the SAMR issued the final version of the Guidelines, which now unambiguously state that 'concentration of business operators involving agreement control (VIE control) falls within the scope of concentration of business operators and needs antitrust clearance before implementation'. In concert with the Guidelines, some local anti-monopoly enforcement agencies have also issued guidelines emphasising that VIE-structured transactions are subject to merger notification requirements, including Tianjin Antitrust Compliance Guidelines for Business Operators published by Tianjin Municipal Market Regulatory Commission on 10 August 2021 and Zhejiang Competition and Compliance Guidelines for Platform Enterprises published by Zhejiang Provincial Administration for Market Regulation on 24 August 2021.

New trends

It has become crystal clear that transactions involving VIE-structured parties are subject to merger filing requirements if they meet the notification threshold. Since in practice most VIE-structured Chinese companies operate within the internet industry, the transactions in the internet sector can no longer eschew merger review in China going forward.

SAMR details how revenue should be calculated for online platforms Pursuant to the AML, if a transaction gives rise to 'a concentration of business operators' (i.e., a change of control) and the parties to the transaction meet the turnover threshold, a merger notification is required.

Owing to the complexity of calculating turnover in digital platform industries, the Guidelines give more detailed guidance on how the SAMR may calculate the turnover of operators. First, the Guidelines recognise that calculating turnover in the platform industry differs in principle from traditional industries. Second, the Guidelines provide for a bifurcation of methods for calculating turnover:

- for platform operators who only provide information matching and receive service charges such as commissions, turnover may be calculated according to the service fees charged by the platform and other revenues generated by the platform; and

- for platform operators who specifically participate in competition or play leading roles in one side market of the platform, the transaction amounts involved in the platform can also be calculated.

As an example, an online hailing platform that only operates the platform, the turnover will be the charges levied against parties that use the platform (e.g., customers or taxi companies). For an online hailing platform that not only operates the platform but also provides transportation services, the turnover will be the aggregate of the charges and the service fees from the transportation services.

Merger remedies in the digital economy

Because the digital platforms market is characterised by special features such as platform duality (i.e., a platform operator, as well as promoting the platform, often participates in transactions on one side of the platform, being data-driven and interoperability-centric), the Guidelines have set forth some specific restrictions that the SAMR may consider imposing. Article 21 of Platform Anti-Monopoly Guidelines states that the SAMR may consider the following restrictive conditions: divestiture of data, opening up platforms and data that constitute essential infrastructure, modifying platform rules or algorithms, a commitment to be compatible or not to reduce the level of interoperability.

Overall, the SAMR has stepped up merger enforcement in the digital platform market not only by clarifying that VIE-structured transactions are notifiable, but also by increasing the intensity of substantive review on reported transactions. The SAMR issued its decision prohibiting a merger between Huya and Douyu on 10 July 2021 and published its decision imposing remedies on Tencent's acquisition of a controlling stake in China Music Group on 24 July 2021. Both decisions are milestones as the *Huya/Douyu* decision was the first transaction blocked by the SAMR in the digital platform industry and *Tencent/China Music Group* is the first case in which the SAMR has imposed remedies post-closing, in a failure-to-file procedure.

Huya/Douyu case

Both Huya Inc (Huya) and DouYu International Holdings Limited (Douyu) are publicly traded companies listed on US stock exchanges. Tencent is a shareholder in both companies. Tencent solely controls Huya and jointly controls Douyu with the founder of Douyu. Through the transaction, Huya planned to acquire 100 per cent shares of Douyu and, as a result, Tencent would acquire sole control of Douyu.

The SAMR identified a horizontal overlap in the live broadcast gaming market in China, in which Douyu and Huya had a combined market share of more than 70 per cent in terms of revenues. In addition, the SAMR found a problematic vertical relationship between the upstream internet gaming operation services market (in which Tencent was found to have a market share above 40 per cent) and the downstream live broadcast gaming market. The SAMR was concerned that Tencent who would solely control Douyu, and Huya post-transaction would likely engage in foreclosure tactics at both levels (input foreclosure and customer foreclosure).

After the SAMR found that the remedies proposed by Tencent were unsatisfactory, the SAMR prohibited the transaction.

Tencent/China Music Group case

In July 2016, Tencent signed an agreement to acquire 61.64 per cent of shares in and, consequently, sole control over China Music Group. The transaction was closed in December 2017.

Tencent filed the merger notification to the SAMR through a failure-to-notify procedure.

What distinguishes *Tencent/China Music Group* from all other decisions is that it is the only failure-to-file decision in which the SAMR found the transaction to have anticompetitive effects. In particular, the SAMR found Tencent post-transaction to have a very high market share (70 per cent in terms of revenues and higher on other metrics) in the internet music broadcast platform market. To ensure that the transaction would not foreclose other internet music platforms from obtaining music rights licences and that other internet music platforms would have the ability to compete with Tencent, the SAMR imposed multiple conditions on the conglomerate.

Tencent is prohibited from entering into new exclusive music rights licensing agreements with record labels and other licensors (except for individual artists and for new songs) and was ordered to rescind existing agreements of this kind; absent valid reasons, Tencent is not allowed to request conditions from music rights licensors that are more favourable than those granted to other internet music platforms. Existing agreements to the contrary need to be amended.

Tencent cannot offer excessive pre-payment to licensors so as to indirectly raise competitors' costs.

If Tencent has a 'concentration' (i.e., an acquisition of a controlling right in another company) that does not meet the filing thresholds but may have anti-competitive effects, it is obliged to submit a filing to the SAMR and suspend closing until the SAMR gives clearance.

SAMR reviews of killer acquisitions in the digital platform industry

In recent years, internet giants have invested heavily in mergers and acquisitions of start-up platforms and emerging enterprises by relying on huge capital. Owing to huge gaps in capital, scale, human resources, technology, market shares, among other things, start-up platforms and emerging enterprises often find it hard to resist a takeover offer from an internet giant. If they refuse to accept the takeover offer, they may face existential threats.

The concern triggered by killer acquisitions in the internet platform is continuing. In September 2021, the SAMR published its Annual Report on Anti-Monopoly Law Enforcement in China (2020), in which is mentioned the severity of killer acquisitions. It says small and medium start-up enterprises may grow rapidly by researching and developing advanced technologies and innovating business models, so as to promote competition in the industry and stimulate market vitality. The killer acquisition of internet giants has sparked widespread public concern about stifling competition and impeding innovation. To this end, the authorities in China are paying close attention to the actions of their counterparts in other jurisdictions.

One way to respond to killer acquisitions is case-by-case review. Both Article 26, Clause 2 of the AML and Article 6 of Interim Provisions on the Examination of Concentrations of Undertakers stipulate that if a concentration between undertakings does not meet the notification threshold, but the facts and evidence establish that the concentration has, or may have, the effect of eliminating or limiting competition, the SAMR may demand a merger filing by the business operators. However, since the criteria for excluding or restricting competition are not clear, this factor is difficult to apply and it is not clear how the SAMR will conducted reviews of concentration that do not meet the threshold.

Another way to respond is introducing new transaction value thresholds. According to the draft implementation rule on notification threshold, transactions involving one party with more than 100 billion yuan turnover and another party with no less than 800 million yuan valuation, among other requirements, require merger filing to the SAMR. We believe this is intended to capture transactions involving a large business operator and star-ups/nascent competitors.

Furthermore, the Guidelines confirm that the SAMR may conduct ex officio investigations into technology deals below turnover thresholds in digital platform economy industries, when the party in question is a start-up or an emerging platform, the turnover of a participating party of the concentration is relatively low owing to the free or low-price model, the concentration of the relevant market is high or the number of competitors is small, among other things.

CHAPTER 17

India

Nisha Kaur Uberoi, Radhika Seth and Pramothesh Mukherjee[1]

Introduction

It is not just the digital economy that is changing the traditional tools of competition; antitrust authorities all over the world are playing catch-up with the digital economy and widening their analytical tools in assessing such conduct. As global antitrust regulators up the ante on closely surveying digital market players, the Indian antitrust authority, the Competition Commission of India (CCI), has also begun to delve deeper into its analysis of digital and high-technology markets.

Naturally, the CCI finds itself playing a decisive role in determining the course of the tech scrutiny in India, which has initiated probes into the likes of Amazon, Facebook, WhatsApp and other large indigenous digital market players. In so doing, it has recognised newer issues posed by the peculiarities of the digital world and has also attempted to adopt legal tests beyond that which is applied to the traditional competition models.

In this piece, we examine how the CCI has adapted its assessment of various competition issues raised by the digital sector in recent years.

The growth of India's digital economy

A study conducted by McKinzie Global Institute reflects India as the second fastest digital adopter among 17 major digital economies. With covid-19 deeply entrenching online services in people's day-to-day lives – and cementing the

1 Nisha Kaur Uberoi is a partner, Radhika Seth is a senior associate and Pramothesh Mukherjee is an associate at Trilegal. This chapter was accurate as at November 2021.

market position of players,[2] the digital economy has seen tremendous growth in India in the past year. The e-commerce segment is expected to grow to US$200 billion in 2026, from US$38.5 billion in 2017.[3]

The market features several global and local undertakings, such as Amazon, Reliance's JioMart (e-commerce platforms owned by one of India's largest conglomerates, Reliance Industries Ltd.), MakeMyTrip (online travel and ticketing), Uber and Ola – just to name a few. At the same time, the Indian e-commerce market features a host of new entrants who operate within a niche space and cater only to the requirement of a particular kind of product or service. The e-commerce market also features new entrants such as Nykaa (personal care and beauty), PharmEasy (online pharmacy), PayTM (online payments) and Zomato (food delivery) – who have capitalised on the e-commerce model and now cater to many consumers. These companies are now growing to the stage of publicly listing their shares, which speaks of the potential for growth in the Indian digital economy.[4]

In recent years, the players in the digital markets have grown from strength to strength as they enter multiple, related verticals. While this has fuelled growth and widespread use of e-commerce services, players have also altered their growth strategies, with some resorting to anticompetitive means. The Indian competition watchdog found itself in the midst of many such instances.

Competition regulation and the CCI's assessment of conduct in digital markets

With the growing prominence of digital markets in India, the CCI has assessed issues like net neutrality, leveraging, network effects and collection of data leading to accumulation of market power, in both, its merger assessment and enforcement cases. Albeit a young regulator as compared to its international peers, the CCI has been quick to adapt to the emerging issues of the digital markets, as seen in some of its important decisions.

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2 'How Digital India can become a success story', *Fortune India*. 4 July 2021. [Accessible at: https://www.fortuneindia.com/opinion/how-digital-india-can-become-a-success-story/105599].

3 India E-Commerce Report. IBEF. June 2021. [Accessible at: https://www.ibef.org/industry/ecommerce.aspx].

4 'PayTM and Zomato IPOs point to coming wave of Indian Tech Listings', Live Mint. 21 July 2021. Accessible at: https://www.livemint.com/market/ipo/paytm-and-zomato-ipos-point-to-coming-wave-of-indian-tech-listings-11626869939883.html.

The merger control regime

In 2020, the CCI approved the acquisition of 9.99 per cent equity share capital by a wholly owned subsidiary of Facebook in Reliance Jio Infocomm Limited (*Facebook/Reliance*).[5] Reliance Jio is a subsidiary of Reliance Industries and is the largest telecommunications company in India. The investment enabled collaborations between the two undertakings in the online advertising and e-commerce space.

An interesting aspect of the collaboration was the commercial arrangement with the instant messaging platform WhatsApp (a subsidiary of Facebook), in relation to connecting users with Reliance's new e-commerce marketplace, JioMart.

Acknowledging the growing synergies between the telecommunication industry and the digital technology space, the CCI approved the transaction, recognising its pro-competitive effects. At the same time, in its analysis, the CCI evaluated probable anticompetitive issues that could emerge as a fallout of such transactions. The CCI remarked that combinations can be analysed in light of data-backed market power, in which case the analysis ought to dwell upon the incentive that the parties have to pool or monetise such data. The nature of data possessed by Reliance Jio and Facebook was found to be complementary owing to a symbiotic relation between telecommunications service providers and mobile applications. Interestingly, this finding had little bearing on the analysis of the CCI, given that the parties submitted that they do not intend to share such complementary data as a part of the transaction. While there was no observation made on the potential avenues of data sharing between the parties, competition regulators are not strangers to revisiting merger control orders in case parties decide to share data at a later stage.[6] The CCI safeguarded such risks in this case by specifically leaving scope for an ex post enforcement review in case the transaction were to lead to any anticompetitive impact in future.

Although the pace at which players operate in digital markets is rapid, as is the elevation of certain players to becoming entrenched market leaders, the reliance on an ex post approach in an ex ante assessment may create market powers in this space that are difficult to challenge through competition.

5 Combination Registration No. C-2020/06/747.

6 'Facebook faces EU fine over WhatsApp data-sharing' [Accessible at: https://www.ft.com/content/f652746c-c6a4-11e6-9043-7e34c07b46ef].

Another issue pointed out in passing by the CCI in its assessment of the *Facebook/Reliance* combination was net neutrality. Owing to the complementary nature of the products offered by the parties, the CCI recognised the impact that such synergies may have on platform neutrality. However, it did not delve deeper into this issue and sought for a safety net from the role that other statutory regulators, such as the Telecom Regulatory Authority of India, may play in preventing exclusionary conduct as a result of such synergies. While the CCI is empowered to look into conduct that may violate principles of net neutrality, the telecommunications regulations in India deal with such issues and prohibit platforms from treating entities differently. These rules are specifically intended towards ensuring that telecommunications service providers do not manipulate traffic in a manner so as to provide enhanced internet services to certain players.[7] The CCI, relying on these rules, noted that the telecommunications regulations ensured that parties would abide by net neutrality.

Given that a remedy under the Competition Act may only lie after parties cross a certain degree of market power or jurisdictional thresholds, such rules are helpful in ensuring that already established players in a particular relevant market do not assert their market powers in related markets by leveraging their positions.

To cater to situations like these, international jurisdictions, such as the EU, have come up with gatekeeper laws to regulate the conduct of digital players. In India, a related role is sought to be played by the e-commerce rules, which were passed with an outlook to make the e-commerce industry more transparent.[8]

The CCI is also ensuring in its ex ante analysis that any perceived competitive harm is addressed. In approving the acquisition of shares by Hyundai Motor Company (and Kia Motor Company) in ANI Technologies (which is the parent of an Indian ride-sharing platform Ola),[9] the strategic agreement between the parties piqued the CCI's interest insofar as its algorithm could (hypothetically) promote the use and leasing of Hyundai cars, among Ola's drivers. In response, a voluntary modification was submitted to clarify that the strategic collaboration will be on a non-exclusive basis and no preference on OIa's algorithm will be based on brand of vehicle.

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7 Regulatory Framework on Net Neutrality, Department of Telecommunications, 2018 [Accessible at: https://dot.gov.in/sites/default/files/DoT%20Letter%20on%20Net%20Neutrality%20Regulatory%20Framework%20dated%2031%2007%202018_0.pdf?download=1].

8 Consumer Protection (E-Commerce) Rules, 2020 [Accessible at: https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf].

9 Combination Registration No. C-2019/09/682.

In another assessment of players trying to make inroads into related markets within the digital space, the CCI assessed the acquisition of 49 per cent shares of Future Coupons Private Limited by Amazon (through its subsidiary). The competition regulator demarcated the different markets in which the parties were present, including online payments and logistics services. Notably, the CCI appreciated the intersectionality between the offline logistic services market and e-commerce platforms. It analysed the transaction in view of such vertical relationships, examining how such vertical relations could be a cause for concern. However, the presence of multiple logistics service providers in India assuaged concerns for the CCI. The CCI also noted that larger players existed in the online payments segment and, therefore, the transaction posed no concerns in that regard in such other markets where the parties' activities overlapped.

These inroads by players operating in the digital space in related markets are being increasingly seen in the digital economy and are a testimony to diversification, which helps players to occupy a larger portion of the value chain and the digital ecosystem.

The tussle between Amazon and Reliance for acquisition of the various Future Group business arms, including its logistics and warehousing business, is an exemplary outcome of such attempts.[10] Reliance Industries Limited (Indian conglomerate giant and ultimate parent of Reliance Jio), through its subsidiaries, acquired the entire retail, wholesale, logistics and warehousing business of Future Group (a competing Indian conglomerate). The CCI in its analysis particularly took note of the complementary nature of the logistics business with retail and wholesale businesses, both online and offline. However, it concluded that the combination did not have any adverse impact on competition based on the presence of multiple competitors throughout the various segments, including logistics and last mile delivery, which included several new entrants.

While Reliance's acquisition of the Future Group was challenged before an arbitral tribunal in light of Amazon's right of first refusal, the CCI in the interim approved the transaction. However, Amazon has now been able to successfully refute Reliance's acquisition before the Supreme Court of India, which recognised Amazon's right of first refusal in the acquisition of Future Group. The order enforcing the award of the arbitral tribunal, has been further challenged before the Supreme Court of India and the transaction finds itself in the midst of protracted litigation.

10 Combination Registration No. C-2020/09/771.

The merger control regime in India has benefited from the CCI's consideration of new methods of competing in the digital economy. The CCI has balanced ease of doing business with their regulatory mandate to safeguard against potential anticompetitive impact of certain transactions. However, deeper examination of the potential effects of a transaction can, in problematic transactions, aid the regulator in its attempt at ensuring that combinations do not result in high levels of concentration in the long run, given that network effects and feedback loops help assert market power in digital markets. The CCI has relied upon the presence of competitors to allay concerns of anticompetitive effects from a transaction. However, given that digital platforms operate in tandem with related markets (such as 'e-commerce platforms and logistics' or 'online advertising and telecommunication services'), synergies between a large player in one market with another in a related market could help leverage its position in the value chain, leading to an overall high market power in the digital ecosystem.

The enforcement regime

India has seen a marked shift of consumers from brick-and-mortar industry to the online space, and the peculiarities in how competition takes place in the digital world have challenged and unsettled traditional producers and manufacturers in their competitive strategies. This has led them to express concerns regarding the way online players compete in the market. The vigorous growth of such players has not escaped the eye of the antitrust regulator either.

The chairperson of the CCI recently expressed concerns over digital players abusing their market power. Expressing concerns over platform neutrality, Ashok Gupta said: 'In search ranking, you have to be transparent and your algorithm has to be unbiased. You cannot just rank businesses in your own opaque ways which nobody knows'.[11] The Department for Promotion of Industry and Internal Trade, in formulating the draft e-commerce policy bill, remarked upon the efficiencies attached to the use of data, while commenting on the level of opacity that companies using such data and algorithms maintain.[12]

11 Rankings must be transparent; digital dominance a concern: CCI Chairman. *Indian Express*. 11 August 2021. [Accessible at: https://indianexpress.com/article/business/rankings-must-be-transparent-digital-dominance-a-concern-cci-chairman-7444824/].

12 Consumer rights & data to be part of new e-commerce policy: DPIIT secretary. *Financial Express*. 6 February 2021. [Accessible at: https://www.financialexpress.com/industry/consumer-rights-data-to-be-part-of-new-e-comm-policy-dpiit-secy/2188962/].

The CCI has been mindful of potential anticompetitive conduct in e-commerce markets and the digital economy. The CCI's 2020 e-commerce market study expressed concerns over potentially problematic conduct relating to issues such as platform neutrality and exclusivity agreements, among other things.[13] The CCI assessed competitive concerns in multiple e-commerce markets, including online marketplaces, online travel agencies, etc. Soon after its report, the CCI found merit in allegations that exclusive tie-up between one of India's largest online travel agencies and hotel franchises led to the foreclosure of other competing hotel franchises. The CCI had expressed in its *prima facie* order that MakeMyTrip Pvt Ltd (a hotel aggregator) website was involved in an exclusivity agreement with budget hotel undertaking Oyo Rooms (MakeMyTrip Case), which required delisting of other hotel franchises, namely Fab Hotels and Treebo.[14]

The CCI also recognised the value of time in the digital economy. Pending the DG's investigation report, the CCI appreciated that such delisting and the passage of time during investigation would diminish the value of the hotel franchise's business. Granting an interim relief, MakeMyTrip was directed to relist the hotel chains on its website. The interim order of the CCI of India has been set aside by the Gujarat High Court. However, this order remains noteworthy as it was one of the first interim reliefs granted by the CCI in the digital space and demonstrates that the rapidly evolving digital economy and the elevation of players to market leaders is being increasingly recognised by the Commission.

Separately, despite growing concerns of leveraging in related markets against e-commerce players, the CCI has been careful in utilising its jurisdiction. Notably, the CCI found no merit in allegations against WhatsApp for mandatory pre-installation of WhatsApp Pay services, on all devices that used WhatsApp.[15] WhatsApp argued that their payment interface is in its beta testing phase and even if pre-installed would remain dormant unless a user actively registers to use it. The regulator dismissed the allegations since an unfair term must be intrinsically linked to injury or harm caused to consumer. Since the WhatsApp pay programme was an optional feature, its pre-installation caused no harm to consumers or restrict their choice to use other payment interfaces.

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13 Market Study On E-Commerce In India Key Findings and Observations. 8 January 2020. [Accessible at: https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf].

14 Case No. 14 of 2019. Order under Section 33 of the Competition Act, 2002.

15 Case No. 15 of 2020, *In Re: Harshita Chawla and WhatsApp Inc.*

The CCI also had an opportunity to briefly assess the algorithmic pricing by online players and its likely fallout from cartelisation. The CCI's findings, which dismissed allegations that the drivers of the two major cab aggregators in India indulged in a hub-and-spoke cartel by fixing prices through the pricing algorithms of the cab aggregators, passed the final test of the Supreme Court of India. The Supreme Court affirmed the finding of the CCI, denying the existence of a hub-and-spoke cartel between the drivers, allegedly facilitated through these aggregators. The CCI held that there was no evidence of any agreement among the cab aggregators *inter se* to establish a hub-and-spoke cartel. The CCI accepted the arguments of the cab aggregator that the price of each ride is decided on a number of factors such as the time, traffic, peak period, etc., and are very dynamic in nature.

In another instance, however, the CCI initiated investigation on its own motion against the changes made by WhatsApp to its privacy policy. The order is a first-of-its-kind investigation into a non-price factor for abuse by an alleged dominant entity. In its *prima facie* view (which was issued before the investigation had commenced), the CCI pointed out that WhatsApp's new privacy policy was imposed on users mandatorily.[16] The policy allowed WhatsApp to share data with Facebook. The CCI ordered an investigation for want of consumer consent in WhatsApp's actions that gave no choice to consumers as WhatsApp was tentatively considered to be dominant in the market of instant messaging.

The order of the CCI was assailed before the Delhi High Court, for want of jurisdiction. The case sits at the interface of competition laws and the data privacy laws in the country. Therefore, the CCI's jurisdiction was challenged, arguing that the subject matter related to privacy, and was outside its regulatory mandate. The Delhi High Court upheld the jurisdiction of the CCI. It held that, although the substantial examination of the privacy policy is subject matter of litigation before the Supreme Court of India, the CCI's investigation was limited to the examination of WhatsApp's dominant position and its ability to impose terms and conditions on its users. The Delhi High Court also appreciated the competitive concerns in the matter, including lack of substitutes and high switching costs. However, appeals have been filed against the decision before the division bench of the High Court and the final outcome remains awaited.

16 Suo Moto Case No. 01 of 2021, *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*.

Legislative changes

The process on the legislative front has not been nearly as dynamic. While initiatives have been taken by way of law reform committees and draft legislations, the changes still await Parliament's assent.

The draft Competition Amendment Bill 2020 has been pending introduction before Parliament for some time now.[17] The Bill holds certain powers of the CCI in abeyance, including powers to introduce new thresholds for merger control assessments. Once introduced, the CCI may use such an enabling provision to expand its jurisdiction on mergers that exceed a particular deal value. This will particularly enhance the CCI's scope of review over digital markets.

On the merger control side, legislatures around the world are considering assessing combinations based on deal value thresholds. It has been argued that the assets and turnover based thresholds have allowed many digital mergers to slip past antitrust regulators. The deal value thresholds have been adopted in a few jurisdictions. Notably, the German and Austrian competition authorities have amended the respective provisions on pre-merger notification to include transaction value thresholds.

As such, a few legislative changes have also been affected to account for the peculiarities of the way relevant markets are defined in the digital space. For example, the meaning of relevant market has been redefined within the German Competition legislation to include markets that involve free-of-cost services.[18]

Despite its efforts, the CCI's powers remain limited by virtue of its inability to assess transactions below the dated thresholds of the current Indian competition law. The amendment act seeks to introduce a threshold based on the deal value, which would increase the level of scrutiny by the market regulator. The Indian Parliament is presently in its monsoon session. The passage of the Competition Amendment Bill 2020 will be a welcome development.

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17 The Competition Amendment Bill 2020 (the Amendment Bill) was formulated in September 2020 after detailed deliberations by the Competition Law Review Committee, which was formed by the government of India to ensure that the Competition Act remains at speed with the market trends and practices.

18 The Tenth Amendment to the Act Against Restraints Of Competition – Digital Competition Act is in force. Gleiss Lutz. [Accessible at: https://www.gleisslutz.com/en/Digital_Competition_Act_is_in_force.html].

Market studies

On the advocacy side, the CCI has also conducted market studies to enhance the existing literature from an Indian perspective. Its market studies have covered three broad but connected subjects, including e-commerce, telecommunication and blockchain, which have a better informed host of readers, including consumers and industry stakeholders.

Recently, in late 2020, the CCI released an insightful market study on the telecommunications sector.[19] The study noted that, although the telecommunications services in India are extremely price sensitive, the introduction of a new player in the form Reliance Jio has shifted the meter of competition towards quality of service rather than merely price, and more importantly product bundling with related e-commerce services. The e-commerce segments are adding to an increasing number of non-price competition factors, which thrive on value-added services that are paired with telecommunications plans.

It was noted that any likely anticompetitive outcome resulting from the synergies between over-the-top (OTT) content providers and telecommunication companies would be safeguarded by way of the net neutrality principles that the telecommunication companies need to adhere to as part of the telecommunication rules. This was observed to ensure that there may not be any discrimination arising out of the partnerships between telecommunication companies and the OTT content providers. Stakeholders currently view this as a win-win situation, whereby both consumers and companies benefit.

The study also points out that the vertical convergence is not limited merely to OTT content, but also extends to other related e-commerce industries, such as e-commerce marketplaces, digital payment platforms and cloud-based technology services. This, the CCI notes, can be beneficial to consumers, but also has the tendency to create dependency. Although consumers benefit from lower search costs, such a suite of services creates a cul-de-sac,[20] making it difficult for users to switch. The study finds such integration to be analogous to the linking of numerous Facebook messaging applications including WhatsApp, Instagram and Messenger. The CCI thereby demonstrated a thorough awareness of the market realities, cautioning against the scrutiny of discriminatory practices in markets featuring such high walled gardens.

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19 Market Study On The Telecom Sector In India, Key Findings and Observations. Competition Commission of India. 22 January 2021. [Accessible at: https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf].

20 ibid.

Conclusion

An ever-developing economy poses the CCI with an extremely dynamic regulatory space. Therefore, the complexity of regulation that the CCI of India is tasked with, is constantly evolving. The digital economy in India is in its nascency. To foster the recently observed growth, the competition regulator needs to balance regulation or intervention while ensuring that it does not chill innovation. The CCI, like all major competition regulators, is adopting a calibrated approach with intervention, if any, typically occurring after a full investigation. Only in extremely rare cases, like *MakeMyTrip*,[21] has the CCI intervened by way of interim relief like the European Commission did in *Broadcomm* (in relation to set-top-box and modem chipsets).[22] It would be interesting to assess whether the CCI mirrors the US, EC or German approach or creates its own model for assessment of digital economy issues going forward.

Although changes have been suggested by way of the Amendment Bill, pending its passage, the CCI has managed to creatively utilise its jurisdiction over the unique challenges posed by the digital economy in India. Digital economies are constantly evolving. High market shares can tend to be ephemeral in such constantly evolving markets. The CCI, in recognition of this, has in certain instances gone beyond traditional indicators of market shares and price parameters to focus on how competition in digital economy is evolving around non-price parameters, including privacy, to initiate an investigation into Facebook's WhatsApp.

As the CCI strives to keep in step with international peers, the worldwide debate on the adequacy of existing competition and antitrust laws to deal with the ever-evolving issues raised by digital markets is picking up steam. With so many investigations pending before the CCI in the digital space, their conclusion would give further clarity as the CCI finds its place on the world stage.

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21 The decision, however, was set aside by consent by the state High Court and remanded back to the CCI.

22 Commission opens investigation into Broadcom and sends Statement of Objections seeking to impose interim measures in TV and modem chipsets markets [Accessible at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3410].

CHAPTER 18

Japan

Hideki Utsunomiya, Yusuke Takamiya and Yuka Hemmi[1]

Introduction

In recent years, the Japanese government has been keen to scrutinise the digital markets from various perspectives, including competition policy, cybersecurity and privacy. To implement appropriate competition policy promptly and effectively in order to enhance competition and innovation in digital markets, the government formed an inter-ministry organisation, the Headquarters for Digital Market Competition (DMCH) in 2019.

The Japan Fair Trade Commission (JFTC) has also shown its great interest in the digital markets. It created a special taskforce to deal with digital related matters by reforming existing taskforce and thereafter established a subdivision within its investigation bureau in 2020. In the same year, it also formed the Office of Policy Planning and Research for Digital Markets to study and gather information from the digital markets. In 2021, the JFTC announced that it engaged four experts in digital area, such as 5G, articial intelligence (AI), digital advertising, and digital privacy, as 'digital special advisers'. The JFTC contemplates to reflect their advisers in its practices and policymaking efforts.

Legislative developments

The JFTC has been updating and amending its guidelines to apply the Antimonopoly Act (AMA) more effectively and improve transparency in its operation of the AMA. In 2017, the JFTC amended its Guidelines Concerning Distribution Systems and Business Practices (the Distribution Guidelines) to

1 Hideki Utsunomiya and Yusuke Takamiya are partners and Yuka Hemmi is an associate at Mori Hamada & Matsumoto. This chapter was accurate as at November 2021.

modernise their overall structure and to apply them to e-commerce more easily. In 2019, the JFTC issued new guidelines to regulate digital platform operators on their activities to collect and use consumers' personal data.

On merger control, the JFTC amended its guidelines on merger review (the Merger Review Guidelines) in 2020 to clarify the JFTC's approach to various issues mainly relating to digital economy. At the same time, the JFTC also introduced a new quasi-threshold mainly based on transaction value to more appropriately capture mergers that do not meet the target's turnover threshold but may have an negative impact on competition in Japan.

In addition to these efforts by the JFTC, the government studied business practices involving digital platform operators, and based on such efforts, introduced a couple of new laws, the Act on Improving Transparency and Fairness of Digital Platforms (the Transparency Act, enacted in 2020 and made into effect in 2021) and the Act for the Protection of Consumers who use Digital Platforms (the Digital Platformer Consumer Protection Act, enacted in 2021) were introduced to ensure transparency and fairness of business practices involving digital platforms.

Enforcement actions

With the updates of relevant guidelines, the JFTC has been very active in investigating and reviewing cases involving digital or e-commerce businesses.

In recent years, the JFTC has vigorously investigated digital platform operators for their potentially anticompetitive conduct and terminated the investigations on conditions of voluntary remedial actions by the digital platform operators. The commitment procedure introduced in 2018 encourages the JFTC to aggressively intervene in anticompetitive behaviour in the digital markets.

For example, the JFTC investigated two Amazon group companies operating online sales platform and e-books delivery business from 2016 to 2017 for their practices to contain parity clauses in the contracts with the merchants and publishers or distributors that use Amazon platform. In 2017, the JFTC initiated an investigation against Airbnb group companies, which operate online private lodging service platform, for their alleged exclusionary practices. In 2018, the JFTC investigated Minna no Pet Online (Minna no Pet), which operates online platforms connecting pet breeders and consumers, for its alleged exclusionary practices. All of these investigations were closed upon the JFTC's confirming the suspects' voluntary remedial measures.

In 2019, the JFTC investigated online travel platform operators for their alleged practices to contain parity clauses in the contracts with hotel operators, and announced that it approved the commitment plan submitted by one of the

suspects. In 2020, the JFTC announced that it approved the commitment plan submitted by Amazon Japan regarding the suspected violation by Amazon Japan for the abuse of superior bargaining position. In 2021, the JFTC announced that it closed an investigation against Apple, Inc. for its suspected violation of the AMA concerning Apple's restrictions to application developers that distribute applications on App Store after confirming certain measures taken by Apple to eliminate the JFTC's concerns.

On merger control, the JFTC has carefully reviewed various digital-related mergers, such as *Yahoo! Japan/Ikyu* (2015, online travel/restaurant platform and digital advertising); Y*ahoo! Japan/eBOOK Initiative Japan* (2016, e-book distribution platform); *Media Do/Digital Publishing Initiatives Japan* (2016, e-book distribution platform); *M3/Nihon Ultmarc* (2019, medical information platform); *Z holdings/LINE* (2020, various digital services); *Google/Fitbit* (2021, health-related data and operating systems); and s*alesforce.com/Slack Technologies* (2021, CRM software and business chat service).

Studies and policy discussions

The JFTC is also active in gathering information and studying further measures to enforce the AMA in digital markets more effectively. It has been conducting sector inquiries on e-commerce and digital platform operators from various perspectives and issued reports of trade practices on various digital platforms, such as 'Online Retail Platform and App Store' (final report issued in 2019), and 'Digital Advertising' (final report issued in 2021). It held a study group and released a report on 'Data and Competition Policy' in 2017' (the 2017 Report on Data), which discusses and analyses whether and how to apply the AMA to various competition issues concerning data.

In 2018, the JFTC released, jointly with other ministries, an interim study group report on 'Trade Environment concerning Digital Platform Operators', which discusses possible issues concerning digital platforms and effective ways to keep markets involving digital platform operators in good condition.

In May 2019, the JFTC, jointly with other ministries, also released two reports titled 'Options for Ideal Approaches to Rulemaking for Securing Transparency and Fairness in Trading Environments' and 'Options for Ideal Approaches to Data Transfer and Disclosure'. These reports present some policy options that the Japanese government may take to ensure the transparency and fairness of the trade environment with respect to digital platform operators.

In 2021, the JFTC released two new study group reports: the 'Report on Algorithms/AI and Competition Policy' (the Algorithms Report) and the 'Report on Competition Policy for Data Markets' (the 2021 Report on Data Markets).

The DMCH and its working group have discussed rule-making for the digital markets, and to that end, they studied practices in the digital markets by holding public hearings and examined study group reports issued by the JFTC, the Consumer Affairs Agency, and the Ministry of Internal Affairs and Communications on digital advertising services and digital platform services. These efforts were embodied in the new laws, the Transparency Act and the Digital Platform Consumer Protection Act.

This Chapter covers these recent developments in the regulations, enforcements and policies.

Discussions of individual issues

How data affects competition

Overview

In recent years, along with the progress of AI and internet-of-things technology, the range of available data has expanded, and the potential for its use has increased as well. In this regard, data should be considered as a source of competitiveness and generating innovation. Under this background, the JFTC published two reports focusing on the relationship between data and competition: the 2017 Report on Data; and the 2021 Report on Data Markets. These two reports are briefly examined here but they address how data affects competition and suggest how the JFTC should address the issue.

Market definition in data-related business areas

Scope of goods and services

Basically, as is the case for any product, the market for data-related business is defined from the viewpoint of substitutability for consumers and, if necessary, for suppliers. However, the 2017 Report on Data provides that the following points should be kept in mind when analysing actions related to the collection and utilisation of data transactions owing to the characteristics of the data itself:

- Data analysis may be considered to be the same as research and development of various products, so the market impact of future technologies or products resulting from such analysis may need to be considered. In the case of vertical business combinations between companies that hold vast amounts of data and those that hold critical technologies, it is also necessary to consider the synergies between that data and those technologies.
- When the data itself is the subject of a transaction, there may be cases where an evaluation is made of the market for trading the data. In such case, owing to the nature of the data, it is difficult to calculate the market share for the transaction based on the amount or quantity of data. Instead, it may be effective

to evaluate the status of the parties in the market based on the source of the acquired data. Even if no data is being transferred by the parties upon implementation of the transaction, it may be appropriate to consider the market for potential data transactions where the parties are likely to trade data in the future.

- If a multi-sided market comprises digital platforms such as social networking services (SNSs) where free services are deployed and there is non-price competition over quality, such a market may be defined as a free market.

Scope of geography

Since data transactions are less constrained by transportation needs than physical product transactions are, and the data itself can potentially be used in other fields, their geographic scope is often broader. As such, the geographic scope of data for which there is global demand can be formed across national borders.

Methods of competitive analysis in data-related business areas

Traditionally, data has been considered to have characteristics that differ from those of other goods. The 2017 Report on Data and 2021 Report on Data Markets provide that the following characteristics of data for competition analysis must be taken into account:

- ease of duplication;
- exclusive possession cannot be conceived;
- meaningful knowledge may be obtained only when a certain amount of data of a certain type is secured (entering the market without the proper amount may be difficult);
- the value of use arises only through aggregation and analysis;
- the combination of different types of data may engender synergies;
- the potential for sustained improvement in data accumulation owing to network effects and economies of scale; and
- the amount of available data does not decrease after utilisation by multiple parties.

The 2021 Report on Data Markets provides that given these characteristics, it is desirable to distribute as much data as possible from the standpoint of efficiency, and that it is important to abolish the hoarding of data by certain businesses, to make access to data free and easy, and to maintain the possibility of new entrants to industries that utilise data.

Further, the same report provides that the factors to be considered in competitive analysis of data include whether it is technically or economically feasible for new entrants to achieve data accumulation with the same level of value the data creates. For example, such an achievement is difficult for new entrants in the following cases:

- when the raw data is essential for the product itself, and it is technically or economically difficult for business operators other than the specified business operator to obtain the same raw data due to restrictions on the installation of sensors or other circumstances, and there is no alternative data for that product; and
- when raw data collection and product improvement by such raw data are accelerated by network effects.

Further, although the right to data portability has not been established in Japan, it is generally thought that the lock-in effect may be mitigated if data portability is allowed, but switching platforms would be difficult for users in practice if the network effects are strong.

In addition, the 2017 Report on Data provides that when data protection is an important competitive measure in digital platforms such as SNSs that provide free services, the level of such protection may be regarded as an element of product quality and be considered in the competitive analysis. In fact, in a recent case in Japan, there was a sale of data gathered by a digital platform using measures that at least some users assumed were inappropriate without their consent that caused a significant decrease in the number of users of the platform.

Actions related to the collection and use of data

Data collection

Collection by a single entity

There are two types of cases where a single entity collects data: one party in a business or other alliance collects data from the other parties; or an entity operating a platform collects data through services on the platform.

Type I

Data is not subject to ownership under Japanese law, and the concept of 'data ownership' itself has not been established either. Therefore, rights and obligations regarding data are determined by contract between the parties. The Guidelines for AI and data contracts, which include a model contract as reference, has been

prepared by the Ministry of Economy, Trade and Industry, which suggests that it is important to set detailed terms of use for determining which data can be used by which parties and under what conditions, depending on the case at hand.

The 2021 Report on Data Markets suggests that situations such as taking advantage of a dominant position by one party over another party when concluding a contract between individual businesses should be addressed by the AMA. In addition, in relation to the fact that increasing the degree of freedom of access to data is desirable in terms of promoting competition, the report also suggests that it is desirable from the standpoint of competition policy to avoid requiring data providers to trade data only among themselves to make exclusive use of certain data.

The 2017 Report on Data suggests that the act of one party in a business or other alliance to unilaterally provide data, such as attributing data or technology, to the other parties may lead to the strengthening of the acting party's dominant position in the relevant market if the data is scarce, or impair the other parties' motivation for research and development and impede the development of new technology, thereby reducing competition in the market. In such case, the transaction may fall under the category of unfair trade practices (transactions with restrictive conditions) or abuse of superior bargaining position.

Type II

The 2017 Report on Data suggests that if the platform operator has market dominance over the services provided through the platform, and platform users have difficulty switching to other similar services, even if the terms of trade for the services are changed to the detriment of users with respect to data collection, then it may be difficult for the users to stop using those services. In such case, the platform operator may be able to use the collected data to form, maintain or enhance its dominance in the market.

In this regard, policies such as those allowing data portability are necessary to ensure freedom of choice for users. The 2021 Report on Data Markets also suggests that, if interoperability is a required precondition for data portability, the cost burden will become a barrier to entry and new entrants will be discouraged.

Collection by multiple businesses

In recent years, business alliances are being used for the purpose of joint data collection and utilisation, or as a basis for business activities. For example, there was a case where a joint venture was established by map companies and automobile manufacturers for the purpose of promoting studies for the development, demonstration and operation of dynamic maps, which are necessary for the realisation of

automatic driving and safe driving support. Data collection by multiple businesses can reduce costs, enable the collection of complementary data, including a wider range of data than that collected by single entities, and promote the creation of new value, which generally has a pro-competitive effect in many cases.

However, the 2017 Report on Data provides the following problematic cases under competition law:

- when the data to be jointly collected enables other participants in a competitive relationship to mutually understand the content, price and quantity of products to be sold in the future, which may lead to concerted behaviours; and
- where, in a market for products that rely heavily on data, most of the participants in a competitive relationship collect data jointly, even though each participant could do so independently, and restrict the collection of data by each participant separately, thereby substantially restricting competition in the market for those products.

Further, the Study Group Report on Alliances also published by the JFTC provides the following problematic cases under the AMA:

- sharing data beyond the necessary scope;
- manipulating and amplifying strong network effects related to data collection and dominating the market through unfair methods;
- restricting the participation of certain businesses in a data collection alliance when data essential to the businesses is created; and
- unilaterally attributing and restricting the use of jointly collected data.

Access to collected data

In recent years, as the collection of real-time data such as the operating status of equipment using sensors has become possible, there have been cases where such data is being relied upon heavily for providing services, but the channels for obtaining the data are sometimes limited. In terms of competition policy, although wider access to the data is desirable, each party can decide to whom and under what conditions it provides data. However, there may be potential issues caused by denied access, as follows.

Access denied by a single entity

The 2017 Report on Data provides that, when a certain company dominates a certain market, the data collected through business activities in that market is essential to the business activities in that or other markets, and the obtainment

of alternative data is technically or economically difficult (for example, in the following two cases), there may be a competition problem if access to the data is limited by others without reasonable grounds:

- denying access to data that was previously available without reasonable grounds, even though no reasonable purpose can be envisaged other than to exclude competitors in the market for the goods using the data; or
- denying access to data to any competitors or customers without reasonable grounds, even though this would eliminate those competitors from the market for the goods or services using the data, where there is an obligation to provide such access.

The 2021 Report on Data Markets provides that, given the characteristics of platforms that are prone to monopolisation from the perspective of economies of scale and network effects, it is important to go beyond the regulations under the traditional antitrust framework, provided that certain conditions are met from the perspective of promoting competition in the data markets. For example, if a platform gains control of the market and there are competition policy concerns, the report suggests that necessary measures, such as imposing a certain level of responsibility to provide value-added services or ensuring that newly launched venture companies and new entrants from other industries have access to the market under fair conditions, should be considered.

Access denied by a joint action

With respect to data that is jointly collected by multiple businesses with a significantly high aggregate market share, restricting participation in the joint collection to a specific business operator and not allowing access to collected data under reasonable conditions may exceptionally cause a competitive problem if any third party's business activities become difficult as it is unable to find alternative measures to acquire the data and likely to be excluded from the market.

In addition, it should be noted that the bulk licensing of data through data pools by entities in a competitive relationship in the data-trading market has the aspect of competition avoidance among entities regarding the licensing and provision of multiple goods in combination, which may have the effect of reducing competition.

Further, with regard to any situation where data generated by multiple parties is processed and analysed, and the analysis results and know-how obtained from such data are used to provide services to third parties, the 2021 Report on Data

Markets suggests that fair contract rules should be formed since large companies may not allow small or medium-sized companies to provide services to third parties by making use of such data.

Merger reviews in the digital age

Overview

In order to explore the topic of merger reviews in the digital economy in Japan, we need to address the JFTC's recent amendments of the Merger Review Guidelines made on December 2020. The amendments are collectively one of the most remarkable updates of the guidelines since their enactment. With the updated Merger Review Guidelines, the JFTC has already conducted several reviews of business combinations between parties running digital services and data-related businesses.

Amendments of the Merger Review Guidelines

Market definition

Multi-sided market

The amendments of the Merger Review Guidelines add the concept of the multi-sided market to the Chapter on market definition. Specifically, they state that the multi-sided market may be defined if a platform mediates business transactions between different user segments that have a strong indirect effect on the market. The updated guidelines also suggest that markets of each user segment may be defined in an overlapping manner.

In the *Z Holdings/LINE* case (2020), the JFTC found that the code-based payment service business conducted by both parties should be considered a multi-sided market and defined the relevant market for the service as a 'code-based payment service for member stores as users' and 'for consumers as users'.

Factors to be considered when defining the digital market

The amendments of the Merger Review Guidelines add a description of the factors to be considered when defining the market for digital services.

With regard to product and service perspectives, the new Merger Review Guidelines explain that the following factors may need to be taken into consideration when defining the market for digital services: content characteristics (e.g., type and function of the content); qualities (e.g., sound quality, image quality, communication speed, level of security); or user-friendliness (e.g., usable languages and terminals) of the relevant services.

When defining the geographic market for digital services, the amended Merger Review Guidelines describe that the following factors are to be considered, among others: the range within which users can enjoy the services provided by a supplier on or for the same terms such as in quality, etc.; and the range within which the users can enjoy such services that are provided by suppliers.

In the *Salesforce.com/Slack Technologies* case (2021), the JFTC appeared to take these factors into consideration when it defined the product market. It also defined the CRM software market as multiple markets comprising the overall market and several markets differentiated by functions.

Competition analysis

The competition analysis sections of the Merger Review Guidelines have also been significantly updated by the amendments. The update adds substantial descriptions to the Chapter on competition assessment of both horizontal and vertical or conglomerate mergers.

Horizontal mergers

Network effects

The updated Merger Review Guidelines explicitly state that network effects will be taken into account in reviewing business combinations in markets where they function, and define the effects as the cases where consumers are unable to switch to the other suppliers due to switching costs or other reasons, and where competitive pressure from consumers does not work effectively. Indirect network effects are mentioned as well. The updated guidelines state that in mergers in multi-sided markets, such as those of platform operation businesses, the impact of indirect network effects on competition is taken into consideration.

In the *Z Holdings/LINE* case (2020), the JFTC found that indirect network effects exist between the parties' various services provided via their platforms and their digital advertisement services. It also found that indirect network effects also exist between the 'code-based payment service for member stores as users' and 'for consumers as users'.

Single or multi-homing

The updated Merger Review Guidelines also state that the difference between single and multi-homing will be taken into account, and that the former will have a greater impact on competition than the latter.

In the analysis of the code payment service market in the *Z Holdings/LINE* case (2020), the JFTC appears to pay attention to the parties' explanation that there exists significant multi-homing by users in the market and concludes that certain (but not high-level) multi-homing exists there.

Vertical or conglomerate mergers

Assessment of the importance of data

The updated Merger Review Guidelines add a description of how to assess the importance of data in the context of merger reviews, stating that it is to be assessed using the following relatively common '1W3H' framework, which is essential when conducting risk assessment of merger reviews of future data-driven mergers:

- What kind of data is held or collected by one of the parties (Company A)?
- How much data or how wide a range of it is collected by one of the parties on a daily basis as well as how much data is already held by it?
- How frequently does one of the parties collect data?
- How much does the data held or collected by Company A relate to the improvement of the services, etc., by data provided by the other parties (Company B) in the product market?

In the *M3/Nihon Ultmarc* case (2019), the JFTC evaluated the level of essentiality of a medical database provided by Nihon Ultmarc by using a framework similar to the 1W3H framework and found that the database may be critical for downstream competitors.

Data foreclosure

The updated Merger Review Guidelines mention the input closure in the digital market, where refusal to supply data can make competitors' businesses difficult in the downstream market.

In addition, the refusal to license important intellectual property rights may affect the business activities of competitors in the downstream digital market. In practice, there are cases where competitors in that market are suffering from disadvantageous positions due to the loss of API interoperability with one of those parties. The impact of such refusal is explicitly mentioned in the updated version of the Merger Review Guidelines, and the impact of such loss of API interoperability is taken into consideration in recent cases, most notably in the *Google/Fitbit* case (2020) and *Salesforce.com/Slack Technologies* case (2021).

Killer acquisitions

Killer acquisitions, where a company that is not currently a major competitor but is expected to become a potentially strong one and intensify competition is eliminated from the market through an early acquisition or other means, are increasingly being discussed all over the world especially in the context of the digital market. In the updated Merger Review Guidelines, killer acquisitions are certainly explained, including the mechanism of its anticompetitive effects. In Japan, there have been no actual cases in which such concerns have been tested so far. The updated guidelines explain that, among other concerns, whether and how to consider the impact on future competition is expected to be reviewed in the event that such concerns are realised.

Introduction of new thresholds

In Japan's merger review regulations, thresholds are established based on domestic turnover of the parties relevant to the business combinations. However, as mentioned earlier, it is sometimes important to evaluate the impact on competition of the acquisition of a company with small existing turnover but huge future growth potential (i.e., killer acquisition). In light of such concerns, new thresholds, mainly based on transaction size, have been introduced in conjunction with the revision of the Merger Review Guidelines.

While the transaction size-based thresholds are not mandatory notification thresholds in the traditional meaning, a JFTC policy document (Policies Concerning Procedures of Review of Business Combination) strongly recommends that the merging parties voluntarily consult with it. Therefore, the newly introduced transaction size-based thresholds are expected to function like a kind of notification threshold in practice. The exact description of the newly introduced thresholds is when the total consideration for the acquisition exceeds ¥40 billion and the business combination plan is expected to affect domestic consumers in one of the following three ways, parties with a notification-free business combination plan are recommended to consult with the JFTC:

- when the business base or research and development base of the acquired company, etc., is located in Japan;
- when the acquired company conducts sales activities targeting domestic consumers, such as opening a Japanese website or using a Japanese pamphlet; and
- when the total domestic sales of the acquired company exceed ¥100 million.

Among the recent publicly announced precedents, the *M3/Nihon Ultmarc* case (2019) and *Google/Fitbit* case (2020) were reviewed by the JFTC, although the mandatory notification thresholds were not met.

Since the JFTC pays extra attention towards business combinations in the digital sector, the commission is expected to contact the parties to business combinations in this sector where the transaction sizes appear to exceed the above-mentioned thresholds even if the domestic turnover of the targets appear not to meet the traditional thresholds.

Concerted practices in the digital market

As for concerted practices in the digital market, the JFTC has recently issued a noteworthy study group report, the Algorithms Report.

The relationship between algorithms or AI and competition policy has been the subject of worldwide debate for the past several years, starting with a discussion held at an OECD forum. A series of policy documents, discussion papers, and guidances by competition authorities in various countries have been released to date. The Algorithms Report is positioned as one of these papers. Similar to other materials released by the various authorities, it discusses four scenarios of concerted practice caused by algorithms and AI: monitoring algorithms, parallel algorithms, signalling algorithms and self-learning algorithms.

The fundamental argument of the Algorithms Report is that the existing AMA adequately addresses the concerted practices caused by algorithms and AI. The report also suggests that the JFTC will closely watch technological developments and how new technologies are used in business activities, as well as cases of concerted practices caused by self-learning algorithms.

So far, no specific cases of concerted practices in which algorithms and AI have played a substantial role are known in Japan, but close attention to future developments may be required.

Future trends

In 2020, the Transparency Act was enacted and certain digital platform operators were designated in 2021 to comply with the Act. The Transparency Act focuses on ensuring transparency for digital platform operators in their dealings with other businesses and imposes various codes of conduct on those operators regarding, among other things, information disclosure and self-reporting. In addition, the JFTC and other government authorities have conducted a wide range of fact-finding surveys on various digital transactions such as those made in e-commerce, app stores and the digital advertising market. The findings generally suggest that companies operating businesses in the digital market should conduct

their business activities in accordance with the AMA and competition policy. In this regard, Japan is establishing rules to regulate practices in the digital markets largely through ex ante regulations. On the other hand, compared to Europe, ex post regulations, which strictly apply competition law to giant digital platform operators for abusing their powerful market positions, apparently have not been actively implemented in Japan.

To keep its eyes on the market, the JFTC has recently established the Office of Policy Planning and Research for Digital Markets, a new department that analyses the application of the AMA on the digital markets. On merger control, the JFTC strengthened the team that reviews digital-related mergers.

In light of these developments, companies running businesses in the digital market in Japan must keep abreast of the most up-to-date information on the competition laws and policies applied to digital markets.

APPENDIX 1

About the Authors

Ben Allgrove
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Ben's practice includes product counselling for market-leading technology companies, advising on cutting-edge technology regulation issues, content and digital commerce, and acting in major digital and consumer disputes and regulatory investigations. Ben has a particular focus on advising providers of platform business models on topics including copyright, intermediary liability, artificial intelligence, content issues, data protection and emerging technology regulation.

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Gabriela Baca is an associate in White & Case LLP's global competition practice. She represents clients in all phases of US and global merger investigations before the US Department of Justice, the US Federal Trade Commission, the European Commission and other foreign antitrust authorities. She also counsels clients in responses to antitrust-related inquiries and subpoenas issued by the US Federal Trade Commission and the US Department of Justice, and regularly advises on a wide-range of antitrust issues, including compliance with US antitrust laws and filing obligations under the Hart-Scott-Rodino Act. She represents clients in a wide variety of sectors and industries, including healthcare, technology, digital media, chemicals, and oil and gas.

Daniel S Bitton
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Daniel Bitton heads Axinn's West Coast antitrust practice. Trained in the EU and the US, Daniel navigates clients through antitrust litigation, government investigations and merger clearance processes across the globe. He is regular antitrust counsel to major Fortune 500 companies including Google, McKesson and Stanley Black & Decker.

His recent matters include representing Google in highly publicised litigation and various investigations of its advertising technology business in the US and other jurisdictions; defending McKesson subsidiary RelayHealth in antitrust class actions and representing it in a related FTC litigation against Surescripts; defending three Danfoss Group companies in cartel litigation; securing global clearance for Johnson Controls' US$2 billion sale of Scott Safety to 3M; securing clearance for several significant deals by McKesson, including its US$3.4 billion healthcare technology joint venture with Change Healthcare and its US$1.4 billion acquisition of CoverMyMeds; securing global clearance for Dell's US$67 billion acquisition of EMC; securing global clearance for Thermo Fisher Scientific's US$13.6 billion acquisition of Life Technologies; and securing clearance for Google's US$2.35 billion sale of Motorola Home to ARRIS, and its US$700 million acquisition of ITA Software.

Rebecca Bland
Baker McKenzie

Rebecca's practice focuses on a broad range of digital technology issues including product counsel, intermediary liability and copyright. She has a particular focus on platform regulation having advised major social media and tech companies on the raft of new EU and national legislation seeking to regulate this area. Rebecca has a specific interest in the music industry, having recently concluded a secondment to a leading international streaming service, and uses this experience to assist clients assimilate competing business and legal priorities.

Philippe Chappatte
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Philippe Chappatte was head of the competition group for over 10 years. He is resident in the firm's London office, but also spends a proportion of his time in Brussels.

Philippe has extensive experience of both EU and UK competition law with expertise in merger, cartel, behavioural and competition litigation cases in both jurisdictions.

Philippe's recent highlights include advising Booking Holdings in relation to the investigations throughout Europe into hotel online bookings both under competition and consumer law; Illumina on its acquisition of Grail, the first case called in by the European Commission under its new Article 22 policy, including the Commission's Phase 2 review and the parallel application to the General Court to annul the Commission's decision; and Allergan in relation to its acquisition by AbbVie, one of the largest recent mergers in the pharmaceutical sector.

Philippe is listed as a leading individual by *Chambers*, *The Legal 500* and *Who's Who Legal*. He is the president of the European Competition Lawyers Forum, which is used as a sounding board on policy and practice-related issues by the European Commission's Competition Directorate General.

Safter Burak Darbaz
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Safter Burak Darbaz is a senior vice president in AlixPartners' economics practice. Experienced in all stages of disputes, Burak has advised clients across various industries in a wide range of matters including damages estimation in follow-on cartel cases, economic analysis in competition and IP litigation, mergers, regulatory proposals and competition investigations. Burak holds a PhD in economics from the University of Edinburgh and a postgraduate diploma from King's College in EU competition law.

Miguel del Pino
Marval, O'Farrell & Mairal

Miguel del Pino joined Marval, O'Farrell & Mairal in 1998 and was made a partner in 2008. His area of specialisation is centred on competition and mergers and acquisitions. His professional work focuses on advising clients and representing them before the antitrust authorities on matters relating to pre-merger control, cartel investigations, anticompetitive investigation and general market investigations.

He has also dealt with mergers, acquisitions and joint venture transactions, advising buyers and sellers on the transfer of shares or assets in Argentina. He has been very active in advising foreign clients on setting up businesses in Argentina and compliance with local regulations.

He has published several works on topics within his area of expertise and has participated as a panellist and moderator in different conferences covering his area of expertise.

He is assistant professor of competition law for postgraduate courses on business and economics law at the Catholic University. In 1995, he was assistant professor of economics at the School of Law of the University of Buenos Aires.

He graduated as a lawyer from the University of Buenos Aires in 1994 and in 1997 he obtained a master of laws degree from the University of Pennsylvania (Philadelphia, US).

Nele Dhondt
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Nele Dhondt works in Slaughter and May's London office as a PSL counsel. Her main areas of interest and expertise are competition law and policy, state aid/subsidy law and sector-specific regulation. She regularly contributes to client publications, and designs and delivers high-quality competition law training. Before becoming a PSL counsel, she worked as a senior associate at Slaughter and May. Her experience includes advising several companies on the competition and regulatory aspects of acquisitions. She also regularly advised firms on compliance with antitrust rules (including in the context of cartel investigations) and sector-specific regulation such as energy and telecoms law. Ms Dhondt has taught and published widely in the area of competition, state aid and environmental law. She is fluent in English and Dutch and good in French.

Michael Dietrich
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Michael Dietrich advises clients on all aspects of European and German competition law with a particular focus on cartel and abuse proceedings, internal investigations and follow-on damage claims. He focuses on automotive, consumer goods, retail and financial services.

More recently, Michael's advisory work includes legal aspects linked to the digital transformation of businesses triggered by the creation of digital platforms, disruptive innovations as well as the increasing digitisation of production, logistics and distribution networks.

In 2004, he received his doctorate with a thesis on competition law in markets with network effects. Michael has been conceiving and delivering individually tailored compliance trainings and e-learning programmes in companies for many years.

Amelia Douglass
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Amelia Douglass is a lawyer in Gilbert + Tobin's competition and regulation group with a range of experience in competition and regulatory matters. These include competition law compliance, merger clearance, ACCC investigations and consumer law advice. Amelia has advised clients in transport and logistics, financial services and digital and data industries, including in relation to the ACCC's Digital Platform Services Inquiry.

Marcos Exposto
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Marcos is a partner in BMA's competition practice area, and has also done much work in anticompetitive conduct matters, such as cartel investigations, unilateral conduct investigations, and negotiations for administrative settlements. He also has solid experience in the creation and implementation of antitrust compliance programmes. He has participated in some of the most important merger reviews and cartel investigations in Brazil, including major acquisitions in the health, food and finance industries. He has worked as a visiting foreign attorney with Jones Day, New York (2012–2013). Marcos holds an LL.M. in competition, innovation and information law from the New York University (2012), and an LL.B. with emphasis on business law from the Universidade de São Paulo – USP (2006). Marcos Exposto is frequently distinguished in the competition and antitrust area by international publications such as *Chambers Latin America*, *The Legal 500* and *Who's Who Legal*. Also, Marcos has been recognised as a Client Choice winner by the International Law Office - ILO.

Maria Garibotti
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Maria Garibotti specialises in the application of economics and statistics to questions arising in antitrust, government investigations, healthcare, finance and commercial litigation. She has evaluated market definition, market structure, competitive effects and efficiencies in merger reviews and investigations, and has assessed the appropriateness of class certification. Dr Garibotti has analysed competition issues in the hospital, pharmaceutical and automobile parts manufacturing industries.

Gerwin Van Gerven
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Gerwin Van Gerven is widely respected as a highly skilled European competition lawyer, advising on complex competition issues, including on merger control, anti-cartel enforcement, monopolisation cases and other conduct investigations. He is a partner based in the firm's Brussels office and regarded as one of the leading competition lawyers of his generation. He has over 30 years' experience in representing clients in a broad range of sectors, such IT, internet, telecommunications, healthcare, consumer electronics, fast-moving consumer goods, energy, air transport, industrial products and chemicals. He has been ranked consistently among the top-10 competition lawyers in the world for many years, based on input from peers, corporates and regulators.

Brian S Gorin
Analysis Group

Brian Gorin's work in antitrust and competition cases has included the analysis of alleged anticompetitive behaviour and the evaluation of the competitive impact of mergers and acquisitions in strategic, regulatory and litigation contexts. In these cases, Mr Gorin has defined and analysed relevant markets, assessed potential or past competitive impact, simulated the outcome of mergers and acquisitions in the marketplace and evaluated potential antitrust remedies.

Felix Hammeke
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Felix Hammeke has been part of AlixPartners UK LLP's economic consulting practice since 2015. He is an experienced economist with a specialisation in competition and antitrust economics, holding a master of science in economics (with distinction) from the London School of Economics.

His case experience ranges from cartel follow-on claims to stand-alone cases involving both horizontal agreements and abusive practices. He was a core member of the teams that supported Derek Holt in his role as expert for Visa Inc and Network Rail, respectively. In addition, Felix was involved in various mergers and market investigations at the UK and European level. Throughout his time at AlixPartners, he has completed projects in various sectors, including payment systems, pharmaceuticals, automotive components and others.

Before joining AlixPartners, Felix worked as economic adviser for the government of Malawi, advising policymakers on investment climate reforms and other areas of regulatory reform.

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Yuka Hemmi is an associate at Mori Hamada & Matsumoto. She deals with a broad range of corporate matters covering digital industry and competition law.

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Joshua Hollenberg is an associate in the Toronto office at Davies Ward Phillips & Vineberg LLP. He is developing a broad practice in competition law. Joshua has assisted on a range of transactions, including lending, mergers, acquisitions and cartel investigations. He has worked with clients in a range of industries, including mining, healthcare, cannabis and financial services. Before joining Davies, he worked as a lobbyist and on provincial and federal political campaigns.

Derek Holt
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Derek Holt is a managing director in AlixPartners UK LLP's economics practice. He has 24 years of experience in the fields of competition litigation and regulatory disputes. He has testified in a range of high-profile matters concerning horizontal agreements, abuse of dominance and regulatory pricing matters before the UK and European competition authorities, regulators and courts, including the UK High Court and the UK Competition Appeal Tribunal (CAT).

Recently, he has acted as expert for Visa Inc before the High Court and the European Commission regarding multilateral interchange fees; for Ping in relation to the economic effects of its ban on online sales; for Peugeot in a follow-on damages case before the CAT; and for Network Rail in a recent abuse of dominance claim (on which judgment from the CAT is pending). He is acting on various matters before the High Court for a defendant in an allegation that its selective distribution system breaches competition law; for a memory chip producer in relation to follow-on claims against it; and for a European bank in relation to an investigation regarding trading activity in various bonds markets.

Derek has featured in *Who's Who Legal Thought Leaders: Competition* as a thought leader and a leading economic expert.

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Matt Hunt leads AlixPartners' European economics practice, which is part of a broader litigation and investigations practice. Matt represents clients in complex competition, regulatory, intellectual property and commercial matters that often

require testimony in court. He has worked on numerous abuse of dominance cases and has served as an expert in cases in the English High Court, Irish High Court, UK Competition Appeal Tribunal, and Hong Kong courts. Matt leads AlixPartners' economics work in the telecoms, media and technology industries and has significant experience in the sports, financial services, electricity, healthcare and gaming sectors. *Who's Who Legal* describes Matt as 'absolutely excellent, very knowledgeable, responsive and so client friendly', and recommends him for his 'depth of expertise in economics matters'.

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Claire is a partner at Slaughter and May and works in the firm's Brussels and London offices. She was educated at Cambridge and Brussels universities and has been involved in a large number of high-profile merger cases before the UK and EU competition authorities, as well as coordinating merger approvals worldwide. On the contentious side, she has been involved in many cartel and other behavioural cases, including on appeal to the General Court in Luxembourg. Highlights include advising Suez on the public takeover bid by Veolia; Facebook on its proposed acquisition of Kustomer; and Google in relation to the European Commission's antitrust investigation into its AdSense for Search advertising services and its appeal to the General Court against the Commission's decision.

She has been named in *W@Competition*'s list of '40 in their 40s Notable Women Competition Professionals' and *The Lawyer's* Hot 100 list. Claire was awarded 'Dealmaker of the Year' by Global Competition Review in 2017 and 2022, and shortlisted in the 'Lawyer of the Year' category in the 2019 Global Competition Review awards.

She is listed as a 'Leading Individual' by *Chambers* and *The Legal 500*, and recognised as a 'Thought Leader' in *Who's Who Legal: Competition*.

Claire is fluent in French and Russian and speaks good German.

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Paul is a partner in Baker McKenzie's European competition and regulatory affairs practice in Brussels. His practice is focused on solving complex antitrust issues for technology companies, and he regularly represents clients on merger control, abuse of dominance cases and regulatory developments before the European Commission and competition authorities around the world. He is listed as a future leader in competition law by *Who's Who Legal*, and is the author of award winning articles on EU, UK and global competition law.

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Nelson rejoined the firm from the UK's Competition and Markets Authority, where he was the director of the Mergers Group. He previously held a number of senior positions at the CMA's predecessor, the Office of Fair Trading, including Director of Competition Enforcement and Head of Mergers.

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Elisa Kearney is a partner in the Toronto office at Davies Ward Phillips & Vineberg LLP. She advises leading technology and media companies, retailers, cannabis companies and industrial product, food and consumer product manufacturers on Canadian law and policy relating to mergers and business ventures, marketing and branding, pricing and distribution, e-commerce and consumer protection, privacy and ethics and regulatory compliance.

Elisa is a thought leader on issues of law and policy relating to innovation, including the digital economy, big data and cannabis. She also counsels clients on foreign ownership and control restrictions in regulated sectors. She regularly appears before the Competition Bureau and has acted as external counsel to the Commissioner of Competition and the Canadian Radio-television and Telecommunications Commission. Select recognition: *Chambers Global*; *Chambers Canada*; GCR's 40 Under 40 (2016); Lexpert Special Editions: Agribusiness and Cannabis and Technology; *The Best Lawyers in Canada*; and *Who's Who Legal: Competition*.

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Melanie Kiser is counsel in Axinn's Washington, DC office. She has experience investigating and litigating civil antitrust matters in the telecommunications, media, technology, energy and healthcare industries. Previously a trial attorney

with the US DOJ Antitrust Division, Melanie played a key role in numerous significant matters. She has developed and presented the government's second witness in a major merger trial; led third-party discovery, exhibit admissions and objections, and proposed findings of fact in a successful merger litigation; argued evidence admissibility several times in court and before a special master; and negotiated remedies in several matters. She has participated extensively in all phases of merger review and litigation, from taking depositions and negotiating CIDs to drafting recommendations and taking cases to trial. Melanie earned four Awards of Distinction for her work at DOJ.

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Louise Klamka is a partner in Gilbert + Tobin's competition and regulation group. She has over 18 years of commercial experience advising on the implications of the Competition and Consumer Act for mergers, strategic alliances and joint ventures, complex supply arrangements, and the use of the ACCC's merger clearance and authorisation processes to achieve the commercial objectives of her clients.

Louise is also deeply experienced in advising on ACCC investigations, cartel prosecutions and immunity applications, including in a criminal context. She has also advised a broad range of clients in regulated industries, including in relation to competition, pricing, privatisation and access issues for energy networks, airports and ports.

Louise has specialist expertise in the aviation and travel industries, and is a strategic adviser to companies in the digital world, including in relation to the ACCC's Digital Platform Services Inquiry.

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Christina Kolotourou is an associate in Quinn Emanuel's Brussels Office. Christina joined the firm in 2019. Her practice focuses on all aspects of European and Greek competition law, advising clients on issues related to cartels, vertical agreements, abuse of dominance and merger control.

Prior to joining the firm, Christina worked at a leading law firm in Athens, assisting with M&A transactions and handling commercial contracts. Her experience also includes a legal internship in a major antitrust firm in Brussels as well as an internship with the Hellenic parliament's Directorate General for Legislative Affairs. Christina is admitted to the Athens Bar.

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Will Leslie is a counsel in Linklaters' global antitrust and foreign investment practice. Will has extensive experience advising clients on complex merger control, antitrust and state-aid matters before the European Commission and the UK Competition and Markets Authority, with a particular focus on the tech, telecoms, fast-moving consumer goods and financial infrastructure spaces.

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Andrew Low is a partner in Gilbert + Tobin's competition and regulation group, with over 12 years' experience. Andrew's practice is directed at providing complex advice and advocacy for clients across a range of high-profile and business-critical matters spanning competition merger clearance, enforcement and internal investigations, industry inquiries, dispute resolution and commercial litigation (in the Federal Court of Australia).

Andrew has specific in-depth knowledge and experience across a number of industries, including technology and digital, financial, resources and industrial, telecommunications, health and retail. Andrew also has experience with advising on various aspects of the Competition and Consumer Act, in particular the Australian Consumer Law.

Andrew is recognised as a thought leader in matters relating to digital regulation and policy, and has delivered keynotes on the topic and written extensively on the issue. Prior to joining Gilbert + Tobin, Andrew was an associate to a Federal Court judge.

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Annamaria Mangiaracina is a partner based in the firm's Brussels office and is Italian law-qualified. She represents clients in global merger control investigations before the European Commission, as well as antitrust matters before the Italian Antitrust Authority and regulatory authorities worldwide. Her experience spans many sectors, with a focus on financial services, healthcare, IT, private equity and telecoms and data infrastructure.

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Alysha Manji-Knight is a partner in the Toronto office at Davies Ward Phillips & Vineberg LLP. She advises clients on all aspects of competition law, with a particular focus on mergers and acquisitions, cartel investigations, reviewable conduct, misleading advertising and litigation. Her deep knowledge of complex regulatory requirements has made her a trusted adviser to clients across a range of industries, including mining, retail, commercial real estate, telecommunications, consumer products and financial services. She also counsels clients on Canadian ownership and control laws as well as privacy matters.

Alysha is a frequent speaker at industry conferences and holds leadership positions within the Canadian Bar Association and American Bar Association.

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Stephen Mavroghenis is a partner in Quinn Emanuel's Brussels office. He was previously head of Shearman & Sterling's Brussels office and co-head of its global antitrust group. His practice focuses on competition law and policy.

Stephen's practice focuses on EU and UK competition law, in addition to EU regulatory and intellectual property law. Stephen has extensive experience in the aviation, chemicals, energy, high-tech and information technology, pharmaceuticals and medical devices, manufacturing, and media and entertainment industries. He regularly appears in proceedings before the European Commission and the European Courts in Luxembourg. He also appears before the national competition authorities of several member states.

Stephen regularly advises multinational corporations on international mergers, acquisitions, joint ventures and corporate takeovers and defends clients against allegations of cartel participation and abuses of dominance, including issues relating to refusals to deal/license, intellectual property rights, rebates, predatory

and excessive pricing. Stephen also regularly counsels clients on a broad variety of business practices including licensing and supply agreements, distribution, agency and the establishment and maintenance of compliance programmes.

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Ola is an English-qualified solicitor practicing in Baker McKenzie's European competition and regulatory affairs practice in Brussels. Her practice focuses on EU and UK competition law, and she advises on EU merger control (notifications and third-party complaints), as well as supporting clients in understanding regulatory and legislative developments, competition compliance, and engaging with regulators across EMEA in behavioural and market investigations.

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Carlos Mena is a partner in the competition law practice of the firm, where he advises and represents clients in competition-related matters, including compliance and litigation.

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Neelesh Moorthy is an associate in Axinn's San Francisco office. His practice focuses on antitrust law, including litigation, government investigations and merger reviews. Prior to joining Axinn, Neel served as an intern with the US District Court for the District of Columbia under the Honourable Timothy Kelly. Neel was a summer associate at Axinn in 2020. He earned his JD at The University of Chicago Law School. He holds a Bachelor of Science in economics from Duke University.

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Pramothesh Mukherjee is an associate in the competition law practice at Trilegal. Pramothesh advises on a range of merger control and enforcement matters. He has recently joined the team after graduating from O.P. Jindal Global University.

Susan Ning
King & Wood Mallesons

Susan Ning is a partner and the head of the compliance group. Ms Ning's main areas of practice include antitrust and competition law, and cybersecurity and data compliance. In addition, she practices international trade and investment law.

Since 2003, Ms Ning and her team have undertaken hundreds of merger control filings on behalf of clients, mostly consisting of multinational corporations from industries such as chemicals, semiconductors, luxury goods, transportation, hotels, automobiles, high technology, finance, trade, telecommunications, energy and the internet. Ms Ning has also assisted a number of clients on confidential investigations of cartel conducts, resale price maintenance and abuse of dominance, and has represented several landmark litigation cases in relation to monopoly agreements and abuse of dominance. She has advised a number of clients regarding establishing and improving their antitrust and competition compliance systems and conducting internal audits.

Ms Ning joined King & Wood Mallesons in 1995. She holds a bachelor of laws degree from Peking University and a master of laws from McGill University. She was admitted as a Chinese lawyer in 1988.

Kerry O'Connell
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Kerry has extensive experience of both EU and UK competition law and has acted on a wide range of merger control, antitrust, state aid and regulatory matters. She has dealt extensively with the European Commission and the UK competition authorities, as well as other regulators around the world. Kerry is based in the firm's Brussels office.

Kerry's recent highlights include advising Vodafone on the acquisition of certain operations of Liberty Global; S&P Global on its proposed merger with IHS Markit; Elanco on its acquisition of Bayer's Animal Health Business and on the related sale of Elanco's Osurnia product business to Dechra Pharmaceuticals; and Platts in respect of the European Commission's oil and biofuels investigation.

Kerry has been recognised by W@Competition in its list of '30 in their 30s' notable women competition practitioners and as a 'Global Leader' in *Who's Who Legal: Competition*.

Leslie C Overton
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Leslie Overton is a partner in Axinn's Washington, DC office. Leslie also serves as Axinn's chief diversity, equity and inclusion officer. Having previously served in senior positions at the US DOJ Antitrust Division, Leslie Overton offers her clients a valuable combination of experience and insight. Leslie guides companies through merger reviews, civil non-merger investigations, cartel investigations and litigation involving federal, state and foreign antitrust authorities. Her recent matters include representing Google in the headline-making investigations by DOJ and state attorneys general. She also represents clients in matters concerning anticompetitive conduct and consolidation by competitors, suppliers or customers. In her counselling practice, Leslie provides strategic advice and practical solutions on activities such as pricing, distribution and licensing. She customises antitrust compliance programmes to match her clients' exposure and business realities.

While serving as deputy assistant attorney general for civil enforcement at DOJ during the Obama administration, Leslie managed merger challenges and supervised litigation and civil non-merger investigations, as well as several criminal antitrust matters. Additionally, she oversaw the Antitrust Division's international engagement and healthcare policy work. During the Bush administration, she served as counsel to the assistant attorney general, where she contributed to investigations, litigation and the seminal healthcare hearings and report with the FTC.

George L Paul
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George Paul is an antitrust lawyer who advises clients on a range of international competition issues, with a particular focus on merger clearances, cartel defence and agency litigation. George has deep experience in advising clients in global merger clearances and conduct investigations, regularly coordinating and managing matters across many jurisdictions in complex industries such as technology and healthcare.

As reported by *The Legal 500 US*, clients said George's 'depth of experience, ability to make the complex simple and business-oriented and succinct approach' make him 'an in-house lawyer's dream'. Further acclaimed as a 'world-class' practitioner, George's reputation is based on his 'impressive track record', spanning more than 20 years on cases in the US, EU, Latin America, India, South Africa, China, Japan and South Korea.

He has played a key role in numerous high-profile cases, which have often involved multiple competition agencies across the globe. George provides 'succinct and practical advice' to clients regarding complex regulatory environments.

Lodewick Prompers
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Lodewick Prompers is a managing associate in Linklaters' global antitrust and foreign investment practice. He is based in Brussels and qualified in the Netherlands. Lodewick advises on the full range of competition matters with an emphasis on global merger control and Belgian and Dutch merger control and behavioural matters. Lodewick has particular experience in complex (Phase 2) merger control matters that involved remedies.

Barbara Rosenberg
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Barbara Rosenberg is a partner in BMA's competition practice area. She has extensive experience in acting for companies in investigations of national and international cartel cases and anticompetitive conducts, as well as in representing clients in merger reviews, having been involved in the most significant transactions in Brazil over the past decade. Barbara holds a Ph.D. in Economic-Financial Law from the Universidade de São Paulo – USP (2004), an LL.M. from the University of California, Berkeley (2001), and a LL.B. from the Universidade de São Paulo – USP (1997). Barbara is frequently recommended in competition and antitrust law rankings released by well-known legal publications such as *Chambers Latin America*, *Global Competition Review*, *Latin Lawyer*, *The Legal 500*, *Who's Who Legal*, *LACCA Approved (The Latin American Corporate Counsel Association)*, *IFLR1000 – International Financial Law Review*, *ILO – International Law Office*, Acritas Sharplegal and *Best Lawyers*.

Ashwin van Rooijen
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Ashwin van Rooijen is a partner in the Brussels antitrust practice, advising household name clients on competition matters, with a focus on technology markets and intellectual property.

Ashwin previously worked as a software engineer and leverages his tech background to advise his clients on the particular challenges they face.

Robert Scherf
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Robert Scherf is a senior vice president in AlixPartners' economics practice. He has advised clients in various adversarial proceedings such as competition litigation, merger reviews and regulatory matters. Clients benefit from Robert's expertise in advising in a broad range of industries such as pharmaceuticals,

telecommunications, and automobiles, as well as government regulators. Robert has a doctorate in economics from the University of Bonn and a masters in economics from the University of Cambridge.

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Radhika Seth is a senior associate in the competition law practise at Trilegal. Radhika works on a wide range of competition law cases, including cartel enforcement, abuse of dominance, leniency applications and merger control across various industries. Her area of special focus is cartelisation and bid rigging cases. She regularly appears before numerous forums including Competition Commission of India, the National Company Law Appellate Tribunal, various high courts, and the Supreme Court of India.

D Daniel Sokol
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Daniel Sokol is a full-time law professor at the USC Gould School of Law with a secondary appointment at the USC Marshall School of Business, and a part-time senior adviser at White & Case. He also serves as the academic adviser to the US Chamber of Commerce's antitrust group and is a non-governmental adviser for the ICN.

Yusuke Takamiya
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Yusuke Takamiya is an antitrust partner at Mori Hamada & Matsumoto; the International Competition Network's non-governmental adviser to the JFTC; and former researcher at the Competition Policy Research Centre of the JFTC. Mr Takamiya provides a wide range of legal advice on antitrust and competition laws such as merger controls, cartel and leniency matters, unilateral conducts and unfair trade practices. Mr Takamiya also has significant expertise on cases requiring multilateral responses (e.g., the EU, the US and China), and regularly collaborates with major international law firms around the world. Mr Takamiya not only advises on clients' issues with the antitrust and competition authorities, but is also involved in consultation relating to clients' compliance with antitrust and competition laws. In addition to traditional antitrust and competition law issues, Mr Takamiya energetically engages in the analysis and examination of legal issues under antitrust and competition laws when companies start brand

new business. With his broad background, Mr Takamiya also provides advices on emerging competition law issues such as digital competition, cross over field of IP and competition and competition law and sustainability (SDGs).

Nisha Kaur Uberoi
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Nisha Kaur Uberoi is a partner and the national head of the competition law practice at Trilegal, leading one of the largest competition law teams in India, across Mumbai, Delhi and Bengaluru.

Nisha advises on a full range of competition matters, including cartel enforcement, abuse of dominance, leniency applications, merger control, competition law audit and compliance. Nisha represents clients in cartel investigations as well as abuse of dominance proceedings and regularly appears at the Competition Commission of India (CCI), the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India.

Nisha currently serves as India's non-governmental adviser for the International Competition Network (ICN). Nisha also serves as a member of the Ad Hoc Working Group on Merger Control of the IBA Antitrust. Nisha also periodically assists the CCI in reviewing and amending the merger regulations.

Nisha is internationally recognised as one of India's leading competition lawyers. She was the first Indian lawyer to win the 'Dealmaker of the Year' at the Global Competition Review (GCR) Awards 2021. Nisha has been recognised by *Chambers* (Band 1), *Who's Who Legal Thought Leaders* in Competition 2019, *Who's Who Legal: Competition*, *IFLR 1000*, *Asia Law Leading Lawyers* and *Euromoney Women in Business*. Nisha has also featured in the inaugural *ALB Asia*'s 40 under 40, the GCR 100 Women in Antitrust as well in the A-List of India's top 100 lawyers by the *India Business Law Journal* and Indian Corporate Counsel Association.

Hideki Utsunomiya
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Hideki Utsunomiya is a partner at Mori Hamada & Matsumoto. He handles a full range of competition law matters. He has extensive experience of obtaining merger clearances in large and complex cases and of handling cartel investigations and follow-on damage actions, and other infringement cases, many of which have multi-jurisdictional aspects. He also advises on various competition law matters such as alliance, marketing and distribution, pricing, licensing and standard setting and competition compliance. He has a deep insight on competition in digital economy and served as a member of the JFTC's study group on 'Data

and Competition Policy'. He is a non-governmental adviser to the JFTC in the International Competition Network. He has taught Japanese competition law at Keio Law School for a decade. He is recognised as a leading antitrust practitioner in Japan by major media, such as *GCR*, *Who's Who Legal, Chambers Asia-Pacific, The Legal 500*, and *The Best Lawyers*.

Weimin Wu
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Weimin Wu is an associate in the antitrust and competition division at King & Wood Mallesons (KWM).

Since joining the firm, Mr Wu has participated in related work including merger filing, antitrust litigation, antitrust administrative investigations and corporate antitrust compliance. The clients he has served include transportation, petrochemical, automotive parts and other industries.

Mr Wu joined KWM in October 2018. Mr Wu has a bachelor's degree in mechanical engineering from Tongji University and a master's degree in mechanical engineering from the University of Southern California. He received juris doctor and doctor of juridical science degrees from Iowa Law School.

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Michelle Xu is a lawyer in Gilbert + Tobin's competition and regulation group. She has experience in a range of competition and regulatory matters, including in relation to ACCC investigations, merger clearance, regulatory compliance and consumer law advice. Michelle has advised clients in the telecommunications, software, logistics, financial services and health industries.

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Ruohan Zhang is an of counsel in the antitrust and competition division at King & Wood Mallesons (KWM).

Mr Zhang's practice in antitrust areas includes representing clients to obtain antitrust clearance from antitrust authorities (including designing and implementing a divestiture plan in complex cases); advising clients in antitrust administrative investigations and dawn raids; providing antitrust compliance advice on business models, pricing policies, and distributor management, etc.; and assisting clients in conducting internal audits and training on antitrust compliance.

As a member of the KWM project team, Mr Zhang has been actively involved in drafting regulations, measures for implementation and guidelines accompanying the Anti-Monopoly Law.

Mr Zhang joined KWM in 2014. Before that, he worked in an international law firm in Chicago, US, and worked in an investment bank in Beijing. Mr Zhang holds a bachelor of laws degree from China University of Political Science and Law and a master of laws from University of Pennsylvania.

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The digital economy is transforming day-to-day lives, with a rise in connectivity not only between people but also between vehicles, sensors, meters and other aspects of the Internet of Things. Yet, even as the Fourth Industrial Revolution accelerates, traditional concerns are keeping pace and the digital economy has also been a powerful force, increasing competition across a broad sweep of products and services. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is thus critical.

The *Digital Markets Guide* provides just such detailed guidance and analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which international businesses operate. The guide draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as how pricing algorithms intersect with competition law and antitrust enforcement in certain tech mergers – for all competition professionals.

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