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# COMPETITION LAW IN THE DIGITAL AGE

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## ANTITRUST ENFORCEMENT IN THE DIGITAL SECTOR: TAKING STOCK OF DIGITAL CHALLENGES AHEAD

Algorithms, personalised pricing, online platforms and big data are recurring topics for discussions on competition policy in the digital age. But digitisation moves at such speed that competition authorities seem to lag behind in their enforcement response to potential anti-competitive effects. Despite ongoing enforcement - see the [case tracker](#) below - competition authorities are contemplating various ways to prepare for the digital challenges ahead (see: [Competition authorities are preparing for upcoming digital challenges](#)). More enforcement investigations into digital conduct and more tailor-made digital enforcement tools are likely to come soon. In addition, further regulation (see: [European Commission unveils a proposal for a regulation on online platforms](#)) and clarification by the EU courts (see: [European Court of Justice clarifies that price discrimination by dominant companies is not always abusive](#)) can be expected.

## COMPETITION AUTHORITIES ARE PREPARING FOR UPCOMING DIGITAL CHALLENGES

Practically all competition authorities are talking about new policies but very few are taking measures to catch up with the new business and pricing models of the fast-moving tech world. Most competition authorities seem to be taking stock of the challenges ahead first by commissioning studies and appointing experts in the digital field (see also: [Online platforms: NCAs look to market studies and consumer protection powers in our earlier newsletter](#)).

### The European Commission

According to Director-General Laitenberger, the digital age requires competition enforcement to strike the right balance *'between preserving the incentives for innovators and detecting the "tipping point" when today's disruptors become tomorrow's dominators'*. To find this balance, the European Commission has [appointed](#) three independent experts to advise on the key upcoming digital challenges affecting markets and consumers in a report which is due by the end of March 2019. The Commission has also called for a tender to [study](#) the growing concentration of markets in the EU by collecting market share and concentration data per industry level. The link between ever-increasing [concentration](#) in some industries and the development of digital markets raises [concerns](#) for innovation and consumers choice with many regulators. The results of the study should help the Commission and the national authorities in the EU to adapt to this market trend.

### UK

The CMA has taken it one step further than the Commission and has set up a brand-new [data unit](#), headed by Stefan Hunt as Chief Data and Digital Insights Officer. The data unit will provide the CMA with the necessary insights on the impact of data and algorithms on markets and consumers so as to ensure that the CMA is *'fully prepared to respond to the fresh challenges and opportunities'* they present.

### Germany and France

The German Bundeskartellamt has closely monitored the digital economy ever since 2015. A [Think Tank](#) of legal experts and economists to keep an eye on digital developments was set up as early as 2015 and a separate [digital agency](#) was first mentioned as a possibility in 2017. In 2016, the Bundeskartellamt published a [working paper](#) on market power and platforms and networks, as well as a [joint study](#) with the French competition authority on potential competition concerns relating to Big Data as an "essential facility". Most recently, the Bundeskartellamt launched a [sector inquiry](#) into online advertising to assess the impact of the technical developments on the market structure and opportunities of market players. Questionnaires will be sent out this spring to further pinpoint the scope of the sector inquiry.

Meanwhile, the French Autorité de la concurrence has published its [conclusions](#) of the online-advertising sector inquiry it launched last year. According to the study, Facebook and Google are the two main operators active in the online advertising sector. Market players raised a number of concerns varying from bundling strategies, leveraging effects and discriminatory treatment to interoperability restrictions and restrictions on the collection and access of certain data. The Autorité de la concurrence is currently contemplating whether to initiate one or more enforcement investigations into the sector.

### The Netherlands

The Dutch ACM has made the digital economy one of its top [priorities](#) for 2018-2019. Its main concerns relate to market power, the use of algorithms and the risks of price discrimination. In its annual publication *InSight*, the ACM calls upon lawmakers to help it cope with the rapid digitalisation of markets. According to the ACM, the speed of the digital economy requires more speedy regulatory intervention than currently available.

The prohibition on abuse of dominance may put the brakes on resolving market power in digital markets because of the thorough investigations required before taking an enforcement decision. To come to a more speedy solution, the ACM suggests looking into the possibilities of ex ante, ex post and self-regulation at EU-level to keep powerful market participants in check.

Similarly, the ACM suggest extending its current toolkit to combat the unwanted effects of self-learning algorithms and personalised prices. The ACM is currently conducting a study into the technologies used in the design of algorithms and their theoretical effects on competition to assess the risks involved. Apart from extending its toolkit and amending statutory rules, the ACM suggests more structural solutions such as a code of conduct, transparency and arrangements on who is responsible for the algorithm.

## EUROPEAN COMMISSION UNVEILS A PROPOSAL FOR A REGULATION ON ONLINE PLATFORMS

The European Commission committed in June 2017, as part of its [mid-term review](#) of the Digital Single Market strategy to “*prepare actions to address the issues of unfair contractual clauses and trading practices identified in platform-to-business relationships, including by exploring dispute resolution, fair practices criteria and transparency*”. It was confirmed shortly afterwards that these actions would be regulatory in nature, and the Commission unveiled its proposal for a [regulation](#) on platform-to-business relationships on 26 April 2018 (the “**Regulation**”).

While the Commission is careful in its proposal to outline the economic and consumer benefits of online platforms, this initiative is driven by a perceived growing dependence of businesses on online platforms as a source of revenue and access to consumers. This trend, in the Commission’s view, has in turn increased the scope for platforms to develop potentially harmful trading practices. Its intervention is therefore aimed at ensuring the online platform “ecosystem” remains fair and transparent.

As currently drafted, the Regulation will apply to “online intermediation services” – a term drafted so as to:

- capture online platforms that facilitate transactions between businesses and consumers, such as e-commerce market places, app stores, social media services for businesses and price comparison tools; and
- exclude online advertising and payment services, as well as business-to-business intermediaries.

A number of the Regulation’s provisions also capture general “online search engines”.

Platforms or search engines falling within these definitions will come under the scope of the Regulation regardless of their place of establishment, provided they offer their services to businesses that: (i) are established EU; and (ii) offer goods or services (via the relevant platform or search engine) to consumers located in the EU.

The Regulation covers three key elements: transparency; redress and monitoring.

(i) *Transparency*

The Regulation aims to increase transparency around terms and conditions applicable to business users, including by requiring online platform intermediaries to:

- ensure their terms and conditions, including the reasons why a business user may be delisted or suspended from the platform, are easy to access and understand;
- if a user is subject to delisting or suspension, provide with a statement of reasons for delisting without undue delay;
- comply with a notice period of at least 15 days prior to implementing any change to terms and conditions applicable to business users;
- set out the general criteria determining search results rankings and, to the extent ranking can be influenced by payments, explain the nature and effects of such payments;
- formulate and publish general policies on business users' access to data (including consumer data) generated through the platform;
- describe in their terms and conditions any differentiated treatment given to the platform's own goods and services compared to those offered by business users; and
- to the extent most-favoured-nation (MFN) clauses are included in terms and conditions applicable to business users, publish a publicly available description of the economic, commercial or legal grounds for using MFNs.

The Regulation's transparency requirements in respect of preferential treatment of platforms' own goods and services or MFNs will not affect the EU competition law position on these practices (most recently at play in the Google Shopping and online hotel booking cases). However, companies falling within the scope of the Regulation should be aware that these requirements will certainly facilitate European competition authorities' ongoing monitoring of these issues.

(ii) *Effective redress*

Under the current Regulation proposal, platforms (other than those with under 50 employees) will be required to set up internal complaint handling systems and nominate at least one mediator with whom they are willing to engage in out of court settlements. In addition, the Regulation envisages the right for industry associations to bring court proceedings on behalf of businesses.

(iii) *Ongoing monitoring*

Finally, in order to monitor and ensure the continued effective functioning of online platforms, the Regulation proposes to establish an "EU Observatory", made up of independent experts.

The deadline to submit feedback to the Commission on the proposal is 23 June 2018. A Regulation will require joint approval by the European Parliament and Council.

## EUROPEAN COURT OF JUSTICE CLARIFIES THAT PRICE DISCRIMINATION BY DOMINANT COMPANIES IS NOT ALWAYS ABUSIVE

The European Court of Justice (CJ) has clarified that price discrimination by a dominant company can be problematic only if this conduct tends to distort the competitive position of some of the company's trading partners in relation to others. By decision of 19 April 2018 (case [C-525/16](#) - MEO) the CJ replied to a preliminary question referred to it by a Portuguese court arising out of a national judicial proceedings between MEO and the Portuguese Competition Authority. In its ruling, the CJ has further defined the standard of proof required in order to establish the existence of an abuse of dominant position under Art. 102 TFEU, particularly subparagraph (c) of the second paragraph.

Art. 102(2)(c) TFEU states that an abuse of a dominant position (prohibited by paragraph) "may, in particular, consist in: [...] applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a **competitive disadvantage**".

MEO is a provider of paid television signal transmission service and television content. It claimed that GDA - the sole body in Portugal which manages the rights of artists and performers and collects the royalties which arise from the use of the related rights and to pay them over to the rights holders - abused its dominant position by charging excessive prices for the rights related to copyright and that GDA had also been applying to MEO different terms and conditions from those which it had applied to another entity providing the paid television signal service and television content, NOS Comunicações SA.

As the CJ has neatly summarised, the Portuguese referring court asked "*whether the concept of 'competitive disadvantage', for the purposes of subparagraph (c) of the second paragraph of Article 102 TFEU, must be interpreted to the effect that it requires an analysis of the specific effects of differentiated prices being applied by an undertaking in a dominant position on the competitive situation of the undertaking affected and, as the case may be, whether the seriousness of those effects should be taken into account*".

The CJ answered by saying that:

- the concept of 'competitive disadvantage' for the purposes of Art. 102(2)(c) covers a situation in which discriminatory pricing is capable of distorting competition between trade partners;
- the finding of such a 'competitive disadvantage' "*does not require proof of actual quantifiable deterioration in the competitive situation, but must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that that conduct is such as to affect that situation*".

The standard of proof for establishing the existence of an abuse of dominant position, therefore, has been set by the CJ at a lower level than foreseen by the Portuguese Competition Authority. Indeed, every time the evidence allows a competition authority to conclude that a discriminatory pricing is capable of affecting costs, profits or any other relevant interest of the claimant. On the basis of this answer, the Portuguese referring court will have now to rule on the dispute between MEO and the national competition authority.

## CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

### Online sales bans:

restriction on selling products/services online

- (EU) [Google](#)  
(July 2016, ongoing investigation)
  - - UPDATE: (EU) [Google](#)  
(June 2017, Infringement decision)
- NEW: (EU) [Guess](#)  
(June 2017, Opening of proceedings)
- NEW: (EU) [Licensed merchandise](#)  
(Opening of proceedings)
  - - (EU) [Sanrio](#)  
(June 2017, Opening of proceedings)
  - - (EU) [Universal Studios](#)  
(June 2017, Opening of proceedings)
  - - (EU) [Nike](#)  
(June 2017, Opening of proceedings)
- (EU) [Consumer electronics](#)  
(December 2013 Inspections)
  - - (EU) [Asus](#)  
(February 2017, Opening of proceedings)
  - - (EU) [Pioneer](#)  
(February 2017, Opening of proceedings)
  - - (EU) [Philips](#)  
(February 2017, Opening of proceedings)
  - - (EU) [Denon & Marantz](#)  
(February 2017, Opening of proceedings)
- (F) [Bang & Olufsen](#)  
(March 2014 Paris Court of Appeal judgment)
- (PL) [Roland Polska](#)  
(May-June 2016, Poland Court of Appeal judgment)
- (UK) [Sports & entertainment merchandise](#)  
(August 2016 Infringement decision)
  - - (UK) [Trod / GB eye](#)
  - - (UK) [Trod / GB eye](#)  
(December 2016, Director disqualification)

- (UK) [Ping Europe Limited](#)  
(August 2016, Statement of objections)
  - - (UK) [Ping Europe Limited](#)  
(August 2017, Infringement decision)
  - - (UK) [Ping Europe Limited](#)  
(December 2017, Non-confidential decision)
  - - UPDATE: (UK) [Ping Europe Limited](#)  
(October 2017, Appeal)
  - - UPDATE: (UK) [Ping Europe Limited](#)  
(March 2017, Interlocutory decision)

### Resale price maintenance:

obligation to use fixed or minimum resale prices

- (D) [Portable navigation devices](#)  
(May 2015, Infringement decision)
- (D) [CIBA Vision](#)  
(December 2009, Infringement decision)
- (I) [Enervit](#)  
(July 2014, Commitments)
- (UK) [Ultra Finishing](#)  
(May 2016, Infringement decision)
- (UK) [ITW](#)  
(May 2016, Infringement decision)
- (UK) [Mobility Scooters](#)  
(October 2014, Infringement decision)

### MFNs/Price Parity Clauses:

guarantee to an online platform that supplier will treat the platform as favourably as the supplier's most-favoured-customer

- (EU) [Amazon e-books](#)  
(June 2015 Opening of proceedings)
  - - (EU) [Amazon e-books](#)  
(December 2016, Opening of proceedings)
  - - EU) [Amazon e-books](#)  
(January 2017, Market Test Notice Art. 27(4))
  - - (EU) [Amazon e-books](#)  
(January 2017, Proposed Commitments)
  - - (EU) [Amazon e-books](#)  
(May 2017, Commitments accepted)

## CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

● - (EU) [Amazon e-books](#)  
(August 2017, Decision concerning the Trustees)

[booking sector](#)  
(April 2017)

● (EU) [E-books](#)  
(July 2013 Commitments)

Hotel bookings:

● (D) [HRS](#)  
(January 2015 Düsseldorf Higher Regional Court judgment)

● (D) [booking.com](#)  
(Dec 2015 Infringement decision)

● (F) [booking.com](#)  
(Apr 2015 Commitments)

● - (F) [booking.com](#)  
(October 2015, Decision Court of Appeal Paris)

● - (F) [booking.com](#)  
(November 2016, Decision Business Court Paris)

● - (F) [booking.com](#)  
(February 2017, Assessment of commitments  
made by booking.com)

● (I) [booking.com](#)  
(Apr 2015 Commitments)

● (SE) [booking.com](#)  
(Apr 2015 Commitments)

● (EU) [Holiday Pricing](#)  
(February 2017, Opening of proceedings)

● - (EU) [REWE/DER](#)  
(August 2017, Opening of proceedings)

● - (EU) [TUI](#)  
(August 2017, Opening of proceedings)

● - (EU) [Thomas Cook](#)  
(August 2017, Opening of proceedings)

● - (EU) [Kuoni](#)  
(August 2017, Opening of proceedings)

● - (EU) [Melia](#)  
(August 2017, Opening of proceedings)

● (EU) [Report on ECN monitoring exercise in the online hotel](#)

### Geo-blocking:

preventing online cross-border shoppers from purchasing  
consumer goods or accessing digital content services

● (EU) [Pay-TV](#)  
(April 2016, Commitments)

● - (EU) [Cross-border access to pay-TV](#)  
(July 2017, Commitments)

● - (EU) [Cross-border access to pay-TV](#)  
(July 2017, Decision concerning the Trustees)

● - UPDATE: (EU) [Cross-border access to pay-TV](#)  
(January 2018, Opening of proceedings)

● (EU) [Video games](#)  
(March 2016, Investigation)

● - (EU) [Capcom](#)  
(February 2017, Opening of proceedings)

● - (EU) [Bandai Namco](#)  
(February 2017, Opening of proceedings)

● - (EU) [Focus Home](#)  
(February 2017, Opening of proceedings)

● - (EU) [Koch Media](#)  
(February 2017, Opening of proceedings)

● - (EU) [Zenimax](#)  
(February 2017, Opening of proceedings)

### Dual pricing:






















charging different prices for the same product/service  
when sold online.

● (D) [LEGO](#)  
(July 2016, Commitments)

● (D) [Gardena](#)  
(November 2013, Commitments)

● (D) [Bosch Siemens Hausgeräte](#)

## CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

-  (D) [Bathroom fittings](#)  
(December 2013, Commitments)
-  (UK) [Fridge and bathroom suppliers](#)  
(May 2016, Infringement decision)
- Third party platform ban:**  
restriction on using third-party online market places
-  (D) [Adidas](#)  
(July 2015, Commitments)
-  (D) [Sennheiser](#)  
(December 2013, Commitments)
-  (D) [Asics](#)  
(August 2015, Infringement decision)
-  - (D) [Asics](#)  
(April 2017, Higher Regional Court of Düsseldorf)
-  - (D) [Asics](#) (December 2017, Federal  
Court of Justice ruling)
-  (D) [Deuter](#)  
(December 2015, Frankfurt Higher Regional Court, appeal  
pending)
-  (D) [Coty](#)  
(April 2016, request for a preliminary ruling)
- (EU) [Coty](#)  
(March 2017, Hearing)
-  - (EU) [Coty](#)  
(July 2017, Opinion)
-  - UPDATE: (EU) [Coty](#)  
(December 2017, Judgment)
-  (F) [Caudalie](#)  
(February 2016, Paris Court of Appeal judgment)
-  - (F) [Caudalie](#)  
(September 2017, French Supreme Court judgment)
-  - UPDATE: (F) [Caudalie](#)  
(March 2018, dawn raid)
-  (F) [Adidas](#)  
(November 2015, Commitments)
-  (F) [Samsung & Amazon](#)  
(November 2015, request for a preliminary ruling)
-  - (EU) [Samsung & Amazon](#)  
(December 2016, preliminary ruling)
-  (NL) [Shure Distribution Benelux](#)  
(May 2016, Gelderland district court ruling)
-  (UK) [BMW](#)  
(January 2017, BMW changes policy)
-  UPDATE: (UK) [L'Oréal](#)  
(March 2018, High Court London)
-  (NL) [Nike](#)  
(October 2017, Amsterdam Court Judgment)



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JUNE 2018

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