

---

## QUICK LINKS

**DIGITAL MARKETS  
REGIME**

GOOGLE CASES

AMAZON CASES

CASE TRACKER

---

## CMA'S NEW PRO-COMPETITION REGIME FOR DIGITAL MARKETS

On 8 December 2020 the UK Competition and Markets Authority (“CMA”) issued advice to the UK Government on the design and implementation of the UK’s new pro-competition regime for digital markets (“Digital Markets Regime”) produced by the Digital Markets Taskforce (see full report [here](#)). The Digital Markets Regime builds on the CMA’s year-long market study report into online platforms and digital advertising in the UK published on 1 July 2020 (see full report [here](#)). The CMA’s advice supports the Government’s [announcement](#) on 27 November 2020 to set up a Digital Markets Unit (“DMU”) within the CMA from April 2021 to oversee the implementation and enforcement of the Digital Markets Regime. The CMA’s proposals are based on principles, rather than on rules or outcomes, so as to adapt to any future changes in the tech sectors and industries.

---

Andrea Coscelli, Chief Executive of the CMA, said: “*the UK needs new powers and a new approach. In short, we need a modern regulatory regime that can enable innovation to thrive, while taking swift action to prevent problems.*”

The CMA proposes two parts to the new regime.

### The SMS regime

The CMA recommends an *ex ante* regime, focusing on proactively shaping the behaviour of tech companies to prevent harm whilst also taking action where harm occurs. The new regime will apply **only to SMS firms** (i.e. firms with “strategic market status”) and will be limited to **designated activities** rather than to a firm as a whole. It will be based on three pillars:

1. A legally binding **Code of Conduct**, consisting of high-level principles tailored to individual firms where appropriate, accompanied by detailed guidance on how to apply these principles. The Code will focus on achieving the objectives of trust and transparency, fair trading and open choices, and will address the relationships between publishers and platforms. The DMU will have powers to enforce the Code of Conduct.
2. **Pro-competitive interventions** by the DMU to address sources of market power. Such interventions can include measures that the Code does not tackle, such as imposing interoperability requirements.
3. **Enhanced merger rules** enabling the CMA to scrutinise transactions involving SMS firms more closely. Notably, the DMU is proposing that it should be mandatory for transactions involving such firms to be notified (instead of the current voluntary regime) and the threshold for prohibition will be lower.

---

## COMPETITION LAW IN THE DIGITAL AGE

DECEMBER 2020

QUICK LINKS

**DIGITAL MARKETS  
REGIME**

GOOGLE CASES

AMAZON CASES

CASE TRACKER

In terms of **enforcement**, the Taskforce has suggested a light touch approach of resolving concerns through a participative approach. To achieve this, SMS firms can expect requirements around building a proactive “compliance culture” to prevent harms occurring (e.g. by appointing senior staff members as compliance officers), as well as ongoing monitoring by the DMU. Where the DMU investigates a Code breach, the DMU should focus on “*remedying the conduct rather than punishing the firm*” (¶4.90). As a last resort (“*we do not propose that breaching the Code should automatically lead to a penalty*”, ¶4.95), fines could be imposed (of up to 10% of worldwide turnover, if the breach was committed intentionally or negligently). The DMU may also have interim measures powers.

### A modern competition and consumer regime for digital markets

The Digital Markets Regime also provides recommendations in a few key areas where the CMA believes action is necessary across digital markets more widely:

1. Action to address **unlawful or illegal content**, such as scam adverts, which could result in economic detriment to consumers and businesses.
2. Action to enable **effective consumer choice** in digital markets, including by addressing instances where choice architecture leads to consumer harm.
3. Stronger enforcement of the **Platform to Business Regulation**, which came into force in July 2019, containing rules to create a fair, transparent and predictable business environment for small businesses and traders on online platforms.

### What will happen next?

The Digital Markets Regime is advisory and will only take effect if implemented by the UK Government. The Government has committed to launch consultations on the Taskforce’s recommendations in early 2021 as well as to give the DMU statutory footing as soon as parliamentary time allows. The Taskforce urges the Government to move quickly in taking the legislation forward.

## THE ITALIAN COMPETITION AUTHORITY INVESTIGATION ON GOOGLE

On 20 October 2020, the Italian Competition Authority (“ICA”) opened antitrust proceedings against Google in relation to the national market for the online display advertising.

Online display advertising is the space that publishers and website owners make available for the display of advertising content. The matching between demand and supply for online display advertising occurs within fractions of a second and is based on algorithms using data supplied by both publishers and businesses.

The ICA’s preliminary view is that Google has a dominant position in the online advertising markets due to the amount of data it owns, and its role as an intermediary.

It is alleged that Google could have used data collected through its various applications in a discriminatory manner, preventing rivals from competing effectively in the online display advertising market. According to the ICA, in some cases Google could have refused to grant access to competitors to users’ behavioural data collected through its apps. Google’s competitors could therefore have been precluded from comparing users’ data collected from the general web with the data of those same users while they interact with Google’s services and platforms, and therefore have been potentially unable to profile consumers and target them appropriately with ads. By doing so, Google could have favoured its own online ad intermediation services.

The ICA has highlighted the importance for market operators of having access to data, since through the use of cookies, banners, pop-ups and any other kinds of advertising it is possible for publishers and brokers to acquire all the relevant information related to consumers’ choices and areas of interests, and then customise future campaigns on the basis of consumer preference.

In August 2020, the ICA opened proceedings against Google for unfair commercial practices, focusing instead on the methods used to collect data from consumers. In a nutshell, the ICA is assessing the legitimacy of presenting Google’s services as “free” to users without warning them about the economic value of the data which they provide to use such services.

Notably, at the same time as the ICA was opening its own investigation into Google’s practices in the online advertising space, the US Department of Justice filed a civil antitrust lawsuit against Google for alleged exclusionary practices – such as entering into exclusivity agreements that forbid the pre-installation of competing search services on mobile devices – in order to maintain its existing position in the search market and in the search advertising market. A few months earlier, in December 2019, the French Competition Authority fined Google €150 million for having abused its power over the treatment of online advertisers.

Clearly the attention paid by antitrust authorities to the acquisition and use of Big Data, and other related practices of the big tech platforms, is rising and we can expect this trend to continue. At the same time, there is still significant uncertainty as to the precise assessment and outcome of the ICA’s and other similar investigations given the novelty and relative lack of decisional practice on these issues.

## COMMISSION SENDS STATEMENT OF OBJECTIONS TO AMAZON FOR THE USE OF NON-PUBLIC INDEPENDENT SELLER DATA AND OPENS A SECOND INVESTIGATION INTO ITS E-COMMERCE BUSINESS PRACTICES

On 10 November 2020, the European Commission (“EC”) issued a Statement of Objections to Amazon informing it of its preliminary view that Amazon has breached EU antitrust rules by distorting competition in the online retail markets. The EC launched its in-depth investigation into Amazon’s use of marketplace seller data in July 2019.

Amazon provides a marketplace where independent sellers can sell products directly to consumers. It also sells products as a retailer on the same marketplace, in competition with those sellers. As a marketplace service provider, Amazon has access to non-public business data of third party sellers – which includes the number of ordered and shipped units of products, the sellers’ revenues on the marketplace, the number of visits to sellers’ offers, data relating to shipping, to sellers’ past performance as well as other consumer claims on products, including activated guarantees.

The EC’s preliminary findings show that large quantities of non-public seller data are available to employees of Amazon’s retail business and flow directly into the automated systems of that business. It is alleged that Amazon uses this data to calibrate its own retail offers and strategic business decisions to the detriment of the independent sellers. For example, it allows Amazon to focus its offers in the best-selling products across product categories and to adjust its offers in view of non-public data of competing sellers.

The EC considers in its Statement of Objections that the use of non-public marketplace seller data allows Amazon to avoid the normal risks of retail competition and to leverage its dominance in the market for the provision of marketplace services in France and Germany - the biggest markets for Amazon in the EU.

Defending itself, Amazon issued a statement in which it sought to emphasise the lack of a dominant position in the retail market. “Online and offline retailers would compete on an equal footing for consumers’ custom”, [said](#) Amazon referring to large established brick-and-mortar retailers. With this statement it seems to contest its dominance because it experiences competition from offline retail as well and therefore the market is not limited to online retail.

### Second investigation into Amazon’s practices

The EC also opened a second antitrust investigation into Amazon’s business practices that might artificially favour Amazon’s own retail offers and offers to marketplace sellers that use Amazon’s logistics and delivery services. The EC will investigate whether the criteria that Amazon sets to select the winner of the “Buy Box” lead to preferential treatment of Amazon’s retail business or of the sellers that use Amazon’s logistics and delivery services.

The “Buy Box” is displayed prominently on Amazon’s websites and allows customers to add items from a specific retailer directly into their shopping carts. This investigation also focuses on the possibility for marketplace sellers to effectively reach Prime users, which is important to sellers because the number of Prime users is continuously growing and they tend to generate more sales than non-Prime users.

In both cases, if proven, the practices would constitute infringements of Article 102 of the Treaty on the Functioning of the European Union that prohibits the abuse of a dominant position. This investigation will cover the EEA, with the exception of Italy.

**Separate Italian investigation into Amazon's practices**

The Italian Competition Authority ("ICA") started to investigate partially similar concerns last year, with a particular focus on the Italian market.

The ICA's preliminary view is that Amazon may be offering some commercial advantages exclusively to sellers using Amazon's services, for example by classifying their products as 'Prime', giving them positive feedback or ensuring access to the one-click buying app (i.e., the Buy Box). At the same time, the ICA considers that sellers that do not use Amazon's services might suffer reduced visibility on the platform and lower search rankings.











In a nutshell, the ICA suggests that Amazon – because of its dominant position in online marketplaces – might be discriminating among marketplace retailers based on whether they choose to use Amazon's logistics and delivery services, in order to gain advantages in the logistics market.

The EC will continue the close cooperation with the ICA throughout the investigation.

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

### Online sales bans:

restriction on selling products/services online

-  (EU) [Google](#)  
(June 2017, Infringement decision)
-  (EU) [Guess](#)  
(March 2019, Closure of proceedings)
-  (EU) [Licensed merchandise](#)  
(Opening of proceedings)  
[Nike](#)  
(March 2019, Press Release)
-  (EU) [Consumer electronics](#)  
(December 2013, Inspections)
-  (EU) [Pioneer](#)  
(October 2018, Closure of proceedings)
-  (EU) [Philips](#)  
(October 2018, Closure of proceedings)
-  (EU) [Denon & Marantz](#)  
(October 2018, Closure of proceedings)
-  (ES) [Adidas](#)  
(February 2020, Commitment decision)
-  (HU) [Paradox Security](#)  
(December 2019, Final decision)
-  (IT) [Apple and Amazon](#)  
(July 2020, Opening of proceedings)







### Dual pricing:

charging higher prices to online distributors and lower prices to brick-and-mortar retailers

-  (FR) [Lego](#)  
(July 2020, Commitments proposed)

### Resale price maintenance:

obligation to use fixed or minimum resale prices

-  (SL) [Chicco toys](#)  
(July 2019, Closure of proceedings)
-  (UK) [Fender](#)  
(October 2019, Statement of Objections)
-  (AT) [Specialized](#)  
(October 2019, Closure of proceedings)
-  (UK) [Fender](#)  
(January 2020, Final decision)
-  (PL) [Brother](#)  
(February 2020, Final decision)
-  (PL) [Fellowes](#)  
(March 2020, Opening of proceedings)

### MFNs/Price Parity Clauses:

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

Hotel bookings:

-  (SE) [booking.com](#)  
(July 2018, Stockholm Patent and Markets Court ruling)
-  (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)
-  (UK) **UPDATE:** [CompareTheMarket](#)  
(November 2020, Final decision)

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

### Exclusivity clauses:

preventing access to platforms by competitors

-  (I) [TicketOne](#) (September 2018, Press release)
-  (EU) [Amadeus & Sabre](#)  
(November 2018, Press release)
  -  (EU) [Amadeus](#) (November 2018, Opening of proceedings)
  -  (EU) [Sabre](#) (November 2018, Opening of proceedings)
-  (SE) [Bruce](#)  
(December 2019, Interim decision)




### Geo-blocking:

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

-  (EU) [Pay-TV](#)
  -  (EU) [Cross-border access to pay-TV](#)  
(March 2019, Press Release)
  -  (EU) [Cross-border access to pay-TV](#)  
(March 2019, Commitment decision)
-  (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)
  -  (EU) [Video Games](#)  
(April 2019, Statement of objections)

### Third party platform ban:

restriction on using third-party online market places

-  (NL) [Size Zero](#)  
(October 2018, Amsterdam Court Judgment)
-  (FR) [Stihl](#)  
(October 2018, Infringement decision)
-  (UK) [OnTheMarket](#)  
(January 2019, Court of Appeal Judgment)

### Unfair trading practices by online platform:

Use-of-platform clauses which are anticompetitive

-  (FR) [Google](#) (April 2020, Interim measures to negotiate with publishers)
-  (FR) [Google](#) (December 2019, Final decision on search advertising)
-  (EU) **UPDATE:** [Amazon](#) (November 2020, Statement of objections)
-  (D) [Amazon](#) (July 2019, Commitment decision)
-  (AT) [Amazon](#) (July 2019, Commitment decision)
-  (D) [Facebook](#) (June 2020, BGH judgment)
-  (IT) [Amazon](#) (April 2019, Opening of proceedings)
-  (NL) **UPDATE:** [Apple](#) (December 2020, Commitment)
-  (PL) **NEW:** [Allegro](#) (September 2020, Opening of proceedings)
-  (IT) **NEW:** [Google](#) (October 2020, Opening of proceedings)

---

## COMPETITION LAW IN THE DIGITAL AGE

DECEMBER 2020

---

### **BONELLIEREDE**

*www.belex.com*

Milan, Genoa, Rome, Addis Ababa\*, Brussels, Cairo\*,  
Dubai, Frankfurt\*, London

*\*: in cooperation with local law firm*

### **BREDIN PRAT**

*www.bredinprat.com*

Paris, Brussels

### **DE BRAUW**

*www.debrauw.com*

Amsterdam, Brussels, London, Shanghai, Singapore

---

### **HENGELER MUELLER**

*www.hengeler.com*

Frankfurt, Berlin, Dusseldorf, Munich, Brussels, London

### **SLAUGHTER AND MAY**

*www.slaughterandmay.com*

London, Beijing, Brussels, Hong Kong

### **URÍA MENÉNDEZ**

*www.uria.com*

Madrid, Barcelona, Bilbao, Bogotá, Brussels,  
Frankfurt, Lima, Lisbon, London, New York, Porto,  
Santiago, Valencia

---