COMPETITION LAW IN THE DIGITAL AGE

MARCH 2021

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THE EC'S PROPOSAL FOR A DMA

On 15 December 2020 the EC adopted a proposal for a regulation on contestable and fair markets in the digital sector (the "**DMA**"). This proposal consists of a comprehensive set of ex ante rules that intend to ensure "a contestable and fair digital sector" within the internal market. It further addresses the EC's concern that existing enforcement powers (mainly under Article 102 TFEU) are neither sufficient to tackle anticompetitive behaviour in fast-moving digital markets nor have sufficient deterrent effect on the largest digital players.

Ex ante rules addressed to digital "gatekeepers"

The DMA sets out rules for platforms that act as "gatekeepers" in the digital sector, which are defined through two cumulative requirements. First, gatekeepers shall provide "core platform services", which include inter alia online intermediation, social networking, search engines, advertising, video-sharing, and cloud-computing services. Second, core platform services providers shall only qualify as gatekeepers if they have a significant impact on the internal market, serve as an important gateway for business users to reach their customers, and enjoy, or will foreseeably enjoy, an entrenched and durable position in their operations. Article 3(2) of the DMA provides for a set of clear quantitative thresholds which create a rebuttable presumption that a core platform service is a gatekeeper. If not all these thresholds are met, the EC may evaluate, in the context of a market investigation, the specific situation of a given company and decide to identify it as a gatekeeper on the basis of a qualitative assessment.

The EC considers that gatekeepers meeting the definition above may benefit from the power to act as private rule-makers and to function as bottlenecks between businesses and consumers. To that end, the DMA imposes certain behavioral obligations in Articles 5 and 6, including: prohibitions on self-preferencing (whereby gatekeepers rank their own products more favourably than similar third-party products), tying and the imposition of exclusivity requirements; obligations to ensure interoperability with the gatekeeper's platform; and obligations to share, in compliance with privacy rules, data that is provided or generated through business users' and their customers' interactions on the gatekeepers' platform.

Notably, Article 12 of the DMA requires a gatekeeper to inform the EC of "any intended concentration" involving another provider of core platform services or a provider of any other services in the digital sector. Combined with the EC's intention to start using Article 22 of the EU Merger Regulation to review transactions falling below European and national merger review thresholds, this suggests that transactions in the digital sector will receive even greater scrutiny from the EC in the future.

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Consequences of non-compliance

To ensure observance of the new rules, the DMA envisages the possibility of sanctions for non-compliance of up to 10% of the company's total worldwide annual turnover and periodic penalty payments of up to 5% of the company's total worldwide annual turnover. Behavioural remedies may be imposed to the extent that these are proportionate to the infringement committed and necessary to ensure compliance with the DMA. Structural remedies may be considered exceptionally, following a market investigation that shows that a gatekeeper has systematically infringed the DMA and to the extent that there are no equally effective behavioural remedies.

Future steps

The European Parliament and Member States will discuss the EC's proposal according to the ordinary legislative procedure. However, it is likely that a long and intense debate on such an ambitious proposal may delay and significantly shape the final regulation to be adopted. Once adopted, the Regulation will be directly applicable across the EU.

Changes to Germany's competition act aiming to curb tech abuses

On 19 January 2021 the tenth amendment to the German Act Against Restraints of Competition ("GWB") entered into force. The changes principally tighten the control of abusive behaviour in the context of digital markets (see press release here). As a result, the German Bundeskartellamt estimates that there will be an increase in the number of proceedings with regard to abusive behaviour.

Introduction of the Concept of Intermediation Power

The amendments introduce the concept of "*intermediation power*", meaning that a dominant position can also result from the intermediation services carried out by a company on multi-sided markets. This addition is primarily aimed at hybrid platforms where the platform operator competes with its customers through its own offerings.

Easier Access to Data

The amendments also soften the conditions under which a refusal to grant access to data by a dominant company, a company with a strong position on the market or a company of paramount cross-market significance for competition, may be prohibited or considered abusive[1].

New Type of Intervention

The revised GWB creates a new type of intervention tool, which targets certain types of conduct by large platforms and similar companies whose "*paramount cross-market significance for competition*" has been established by the Bundeskartellamt. In order to accelerate the implementation of the new tool, a Bundeskartellamt decision under this provision can only be appealed directly to the German Federal Supreme Court (rather than going first to the Düsseldorf Higher Regional Court, as would normally be the case with Bundeskartellamt decisions). The new intervention tool is targeted at companies that operate to a significant extent on multi-sided markets and networks. The Bundeskartellamt will now be able to intervene at an early stage in cases where competition is threatened by certain large digital companies, as a preventive measure. The Bundeskartellamt determines "*paramount cross-market significance for competition*" by taking into account a range of factors, including a company holding a dominant position, access to certain resources and data, vertical integration, etc. This will entail a cross-market analysis taking into account the role played by digital platforms on all relevant markets, without having to establish dominance on each of these markets.

In the future, companies with paramount cross-market significance for competition will therefore be subject to stricter rules than companies that hold a "classic" dominant or strong position on the market. The legislator expects that there will be up to three proceedings to determine paramount cross-market significance for competition within the first five years following entry into force of the revised law.

While Germany has enacted new competition rules for the digital markets, the EU is still debating the Digital Markets Act. However, the new GWB provisions are expected to complement the future Digital Markets Act package.

1 Under the new conditions, a refusal is considered abusive if access is objectively necessary to operate on a market and the refusal threatens to eliminate effective competition on that market, unless the refusal is objectively justified.

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First proceeding based on the new rules for digital companies

In December 2020, the Bundeskartellamt initiated abuse of dominance proceedings against Facebook related to Facebook's Oculus platform (see press release here). In light of the latest changes to the GWB, the Bundeskartellamt extended the scope of its proceedings, also examining whether Facebook is subject to the new rules applying to undertakings of paramount significance for competition across markets and whether its linkage with Oculus should be assessed on this basis.

CMA's probe into Google's Privacy Sandbox project

On 8 January 2021 the UK Competition and Markets Authority ("CMA") announced its probe into Google's proposed 'Privacy Sandbox' project (i.e. Google's proposed removal of third-party cookies and other functionalities from Google's Chrome and Chromium browser engines and replacement with a new set of tools by the end of 2022). The formal investigation was prompted by complaints of alleged anticompetitive behaviour and user data privacy concerns. Complainants include Marketers for an Open Web Limited, a group of newspaper publishers and technology companies, which allege that Google is abusing its dominant position. The investigation will cover both competition law and implications for data privacy. In its announcement, the CMA emphasised that it has an "open mind" and has not concluded at this stage as to whether competition law has been infringed.

Third-party cookies play an important role in online and digital advertising, for instance by helping businesses target advertising effectively and funding free online content for consumers. However, recently there have been growing data privacy concerns over their legality and use, including over how they enable consumers' behaviour to be tracked across the internet (a practice known as 'fingerprinting').

The Privacy Sandbox project is already underway, although the final proposals have not been yet confirmed or implemented. Google states that the removal of third-party cookies, and their replacement with a new set of tools for targeted advertising and other functionality, will protect consumers' privacy to a greater extent whilst also helping content remain freely accessible on the web. However, the CMA has already highlighted concerns about the project's potential impact in its 'Online platforms and digital advertising' market study report published on 1 July 2020, including by potentially entrenching Google's market power by undermining the ability of publishers to generate revenue and undermining competition in the digital advertising market.

As part of the investigation, the CMA is engaging with a range of market participants to ensure that both privacy and competition concerns are addressed as the proposals develop. The CMA's initial investigatory phase will continue until July 2021, according to the CMA's published timetable.

European Commission investigation into Google's practices

Google's online advertising business has also recently attracted EU attention. In December 2020, the Commission reportedly sent wide-ranging questionnaires seeking views on the rollout of AMP (a standardised webpage template for sites to load quicker) and on Google's plans to block cookies from its Chrome browser. The Commission's questionnaires will feed into two preliminary antitrust inquiries focused on Google's data gathering and online advertising technology. Recipients had until the end of January 2021 to respond.

Sweating it out: Google/Fitbit left waiting on the DOJ and ACCC despite EC's conditional clearance

Over a year after announcing the deal, Google's parent company, Alphabet Inc., secured conditional clearance from the European Commission ("**Commission**") in December 2020 after an in-depth Phase 2 investigation. The Commission's decision was followed swiftly by conditional clearance decisions in South Africa and Japan. Notwithstanding Google's decision to close the transaction on 14 January 2021, the deal still remains subject to review by the US Department of Justice ("**DOJ**") and the Australian Competition and Consumer Commission ("**ACCC**"), with the latter rejecting behavioural commitments similar to those accepted by the Commission. The case thus goes to the heart of the debate over how regulators should seek to protect and foster competition in digital markets, and how to secure global regulatory alignment.

European Commission accepts behavioural commitments

Fitbit produces smartwatches which record a user's activity, health and fitness. Following an in-depth investigation, the Commission expressed three particular concerns about the transaction, each of which it concluded could be addressed through behavioural commitments offered by Google.

First, the Commission found that by combining Fitbit users' data with Google's existing data sets, "*it would be more difficult for* [Google's] *rivals to match Google's services in the markets for online search advertising, online display advertising, and the entire 'ad tech' ecosystem*". To address these concerns, Google promised not to use data from Fitbit users in the EEA for online advertisement services and to store Fitbit data in a "data silo", separated from other personal data used by Google to offer online advertising services. In addition, Google will offer Fitbit users in the EEA an effective choice over whether to approve or deny the use of their Fitbit data by other Google services.

Second, the Commission was concerned that Google could disadvantage competing manufacturers of wearable devices by degrading the interoperability of such devices with Android smartphones. Many wearable devices are designed to work effectively with the user's smart phone, and thus rely on being able to connect to Google's Android operating system through Android's application programming interface ("**APIs**"). To address this issue, Google promised to grant other wearable producers access to its current and future core interoperability APIs.

Finally, the Commission expressed concern that the transaction might harm start-ups in the nascent digital healthcare sector. These businesses use health and fitness data provided by Fitbit users (accessed through Fitbit's Web API) to offer digital healthcare services. According to the Commission, Google might have an incentive to restrict access to the Fitbit Web API; Google therefore committed to maintain access through the Web API, without charge and subject to the consent of the Fitbit user.

Each of the commitments will remain in place for ten years, and the first commitment (relating to online advertising services) can be extended by an additional ten years.

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ACCC and DOJ reviews ongoing

It has now been over a year since the ACCC opened its review of the transaction. In a statement of issues published in June 2020, the ACCC articulated similar concerns to those expressed by the Commission regarding the aggregation of user data and degradation of interoperability between rival wearable devices and Android smartphones. However, the ACCC was not satisfied that the behavioural commitments offered by Google, which are substantively similar to those accepted by the Commission in Europe, could be effectively monitored and enforced in Australia in the long-term. The ACCC will continue its investigation and will shortly issue a new decision date.

The outcome of the US review is not yet known: in response to the news that Google had closed the acquisition in January the DOJ confirmed that it had not yet reached a final decision as to whether it will pursue enforcement action.

Reigniting policy debates – digital markets and data privacy

The potential divergence between the ACCC, on the one hand, and the Commission and the Japanese and South African authorities, on the other, illuminates the ongoing debate as to how best to foster competition in fast-moving digital markets within a coherent, global regulatory framework (see also: [*cross-reference to DMA article*]), with interested parties quick to weigh in on the perceived merits and deficiencies of the authorities' approaches. The CMA's Chief Executive, Andrea Coscelli, endorsed the ACCC's stance, voicing scepticism over the practicality of long-term behavioural remedies in merger cases. In the European Parliament's Economic and Monetary Affairs Committee, a group of MEPs tabled a motion criticising the Commission's decision to clear the acquisition subject to remedies. On the other hand, the South African Competition Commission and Japanese Fair Trade Commission have been comfortable following the Commission's lead by accepting similar behavioural remedies, and Commission Executive Vice-President Margrethe Vestager has expressed her view that the Google/Fitbit case is not the "poster child" for killer acquisitions in digital markets.

The case has also reignited the debate around the intersection of competition policy and privacy laws. Despite there being no official role for data protection authorities in EU merger control matters, the European data protection authorities, united in the European Data Protection Board ("**EDPB**"), took the opportunity to make a public statement on the proposed takeover of Fitbit by Google in February 2020. The EDPB indicated that it would react positively to a request for advice by the Commission. It is not clear whether the Commission took up the EDPB's offer in this regard. Furthermore, the EDPB urged the parties to assess the privacy implications of the transaction, but could not do more than stress compliance with the General Data Protection Regulation ("**GDPR**").

While the protection of personal data is not the competence of the Commission within its merger control responsibilities, the data silo and the commitments concerning consent from Fitbit users for both Google's additional services and access through the Web API, appear to be "privacy friendly" (although some have questioned whether some provisions, such as the consent requirements, really go beyond existing legislative obligations under GDPR). And while the DOJ has not yet reached a decision on the case, assistant attorney general Makan Delrahim has previously signalled that the agency will not shy away from privacy concerns, stating that "*it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis*".

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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) UPDATE: Lego
(January 2021, Commitments decision)

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)
(PL) Yamaha
(November 2020, Settlement 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

Hotel bookings:
(SE) booking.com
(July 2018, Stockholm Patent andMarkets Court ruling)
(EU) UPDATE: Holiday Pricing
(February 2020, Settlement)
(UK) CompareTheMarket
(November 2020, Final decision)

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Exclusivity clauses:
preventing access to platforms by competitors

(IT) 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
(December 2020, Annulment commitment decision)
(EU) UPDATE: Video games
(March 2016, Investigation)

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) Amazon (November 2020, Statement of objections)
(D) Amazon (July 2019, Commitment decision)
(AT) Amazon (July 2019, Commitment decision)
(D) UPDATE: Facebook (March 2021, Referral to CJEU)
(IT) Amazon (April 2019, Opening of proceedings)
(NL) Apple (December 2020, Commitment)
(PL) Allegro (September 2020, Opening of proceedings)
(IT) Google (October 2020, Opening of proceedings)
(UK) NEW: Google - stricter privacy policy (January 2021, Opening of proceedings)
(FR) NEW: Apple - stricter privacy policy (March 2021, Opening of proceedings)
(UK) NEW: Google - Epic (Fortnite game) (January 2021, Opening of litigation)
(EU) NEW: Apple - Epic (Fortnite game) (February 2021, Complaint)
(UK) NEW: Apple - app developers (March 2021, Opening of proceedings)

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