COMPETITION LAW IN THE DIGITAL AGE

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BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

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G7 COMPETITION AUTHORITIES ADOPT JOINT STATEMENT ON THE IMPORTANCE OF COMPETITION IN THE DIGITAL SECTOR

G7 competition authorities and policymakers met in Tokyo in November 2023 to discuss competition in digital markets. Highlighting specific competition concerns arising from the digital economy – including the risk that network effects, economies of scale, digital ecosystems and the accumulation of large amounts of data may increase barriers to entry and make such markets more prone to dominance and to tipping - and sharing their recent enforcement experience, the G7 competition authorities and policymakers issued a **Digital Competition Communique**, stating their shared commitment to enforce competition laws and to develop policies necessary to promote and protect competition in this space.

Emerging technologies: focus on Generative AI

The Communiqué addresses competition issues arising from emerging technologies, including generative AI, blockchain and the metaverse – with the concern that, while new transformative technologies can encourage more competitive markets, anticompetitive mergers or exclusionary conduct can quickly tip emerging digital markets and give one or a few dominant firms control over developing technologies.

Focusing on AI specifically, the Communiqué for the first time expresses the G7's common position on the competitive risks in this area. These include potential competition concerns relating to, e.g.

- the control by incumbent tech firms of key AI inputs or of adjacent markets - such as large amounts of data necessary to train generative AI models and significant computational resources such as cloud computing services – and the related risk of competitive harm through practices such as bundling, tying, exclusive dealing, or self-preferencing;
- further consolidation and entrenchment of market positions through acquisitions or partnerships – thereby potentially limiting the ability of startups and new entrants to compete; and
- the risk of algorithmic collusion as firms increasingly rely on AI to set prices to consumers.

Enhanced institutional capabilities and horizon scanning

As part of the G7 competition authorities' effort to understand emerging technologies and their impacts on competition, they intend to enhance their institutional capabilities – including the creation of new tech-focused taskforces and the undertaking of market research and enquiries as well as stakeholder engagement. Their aim is to enable the authorities to follow the evolution of existing technologies and to scan the horizon for early warning signs of conduct or market factors that might make markets tip or reduce contestability as well as to identify key technologies and issues that may raise competition concerns in the future.

Use of existing tools, development of new policies and national and international cooperation

The Communiqué emphasizes that current competition law applies to AI and its uses, which new AI-specific laws and policies may further complement.

Finally, the Communiqué also emphasizes the need for national and international cooperation among government departments, authorities, and regulators, as business activities in the digital economy often cross borders and affect not only competition law, but a range of other regulatory and policy areas – such as consumer protection, data privacy and cyber security.

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G7 & EMERGING TECH/AI

AI REGULATORY SANDBOX

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BOOKING/ETRAVELI PROHIBITION

SPAIN TO LAUNCH A REGULATORY SANDBOX FOR ARTIFICIAL INTELLIGENCE DEVELOPERS

On 8 November 2023, the Spanish government passed Royal Decree 817/2023 to set up a pilot program to test the future EU Regulation on Artificial Intelligence ("AI"). This is a unique sandbox initiative as there have been no other sandboxes launched before the regulation was formally adopted or entered into force. The aim is to provide an isolated testing environment where authorities and companies developing AI projects can work together and create soft law that will guide the implementation of the future regulation.

The Spanish Competition Authority issued a report during the legislative process. The report identifies the three main competition concerns that the rollout of the AI regulatory sandbox raises and suggests some amendments, most of which are reflected in the final text of the Royal Decree.

First, it underscores the competitive advantage that participants in the AI sandbox may gain. The OECD explained in a paper published in July 2023 that regulatory sandboxes are selective because of resource constraints, and therefore eligibility requirements must be objective, transparent and non-discriminatory. The final text of the Royal Decree therefore excludes most of the requirements found in earlier versions, but still contains some limitations, such as the requirement that the participant have a permanent establishment in Spain, or restrictions on the number of projects that can be included in the regulatory sandbox.

Second, the Spanish Competition Authority focused on information exchanges. It notes that appropriate safeguards would be required to ensure that no commercially sensitive information is exchanged during the testing phase. The report also highlights the importance of making the results of the sandbox available to the public as soon as practicable, in order to limit the possibility of participants distorting the competitive process.

Finally, the report refers to the neutral drafting of the resulting guidelines. The fact that participants may make suggestions throughout the sandbox should not alter the unbiased language finally used by the authority responsible for publishing the guidelines.

In the coming weeks the Spanish government is expected to announce the first call for proposals to be tested in the sandbox.

Close scrutiny of AI

Several competition authorities are considering the potential for competition concerns arising from the use of AI. For example, on 18 September 2023, the UK Competition and Markets Authority published a report on the substantive competition concerns which foundation models may raise and has proposed a list of principles that aim at ensuring competitive markets and protecting consumers. These principles refer to the importance that accountability, accessibility, diversity, choice, flexibility, fair dealing and transparency have in ensuring consumers and businesses can make informed choices and gain the full benefits of innovation.

The Portuguese Competition Authority issued a report on 5 November 2023 and noted it remains vigilant against generative AI unduly distorting competition or jeopardising the full innovative potential of this technology. The report considers that the main drivers for competition in the context of generative AI relate to open access to data, cloud computing or specialised hardware, and access to their base models.

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THE DMA IN NUMBERS: SIX GATEKEEPERS, TWENTY-TWO CORE PLATFORM SERVICES, FIVE MARKET INVESTIGATIONS, AND THREE APPEALS (SO FAR…)

On 6 September 2023, the European Commission **designated** six tech companies as gatekeepers under its **Digital Markets Act** (DMA). As a result, Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft have to comply with the DMA's obligations. However, not all of these companies agree that their services should be counted among the 22 core platform services **identified** by the Commission. Apple, Meta and ByteDance have all taken issue with the Commission's findings, signalling an early hiccup in the Commission's efforts to regulate the digital landscape. Meanwhile, the Commission still has to contend with four open market investigations assessing whether Microsoft's Bing, Edge, and Advertising services and Apple's iMessage should be excluded from the scope of the new rules, despite meeting the quantitative thresholds for designation under the DMA. A fifth market investigation looks at the very opposite, whether Apple's iPadOS should be a core platform service despite not meeting the same quantitative thresholds.

The European General Court reveals Apple's arguments

On 8 January 2024, Apple's arguments in two appeals filed on November 16 2023 at the European General Court were **disclosed**, revealing the company's grounds for contesting specific aspects of the Commission's decision to target Apple under the new rules. In that decision, the Commission held that Apple's Safari web browser, iOS operating system and App Store services are in scope. According to the appeal, however, the Commission was incorrect in finding that Apple's five App Stores amount to a single core platform service, citing factual errors and errors in the interpretation of the DMA. Separately, while the Commission's investigation with respect to the potential designation of iMessage under the quantitative thresholds is still ongoing, Apple is challenging the Commission's decision to consider iMessage as a number-independent interpersonal communications service within the meaning of the DMA. Lastly, but perhaps most likely to have consequences for other cases, the company argues that the DMA's interoperability obligations for its iOS operating system, which demand effective interoperability with hardware and software free of charge, are unlawful, disproportionate and contravening the European Charter of Fundamental Rights.

Meta and ByteDance not far behind

First to lodge an appeal before the General Court, Meta disputes the fact that its Messenger and Marketplace services come within the scope of the DMA. It argues Messenger is simply a part of its social network Facebook which allows users of the Facebook platforms to chat with each other. Facebook is already designated as a core platform service – a designation Meta accepts. In relation to Marketplace, Meta argues that the service, which allows users to advertise and sell products to other users, is a consumer-to-consumer service and, as such, should not be in scope of the DMA.

On a different note, ByteDance **disagrees** that its service, TikTok, which allows users to share and view short videos, is a core platform service at all. It also argues that ByteDance doesn't meet other quantitative thresholds under the DMA, such as the market capitalization threshold. Unlike other appealing parties, in December 2023, ByteDance **asked** EU Courts to suspend its obligations under the DMA pending the outcome of its challenge.

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Next steps

The appeals brought against the Commission's designation decisions showcase the challenges involved in enforcing the DMA and the difficulty the Commission faces when trying to draw bright lines in a notoriously complex industry. While their appeals are pending, the three challengers, alongside the other three gatekeepers who haven't challenged their designation decisions, have until 6 March 2024 to comply with their obligations under the DMA.

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BOOKING/ETRAVELI AND ECOSYSTEM THEORIES OF HARM

On 25 September 2023, the European Commission adopted a decision **prohibiting** the proposed acquisition of Swedish online travel agent ("OTA"), eTraveli Group, by Booking Holdings. In doing so, the Commission argued that the acquisition would have strengthened Booking's dominant position in the hotel OTA market, largely by enabling it to expand its travel services ecosystem.

The proposed merger

In November 2021, Booking announced its intention to acquire eTraveli for €1.63 billion. The transaction was a typical conglomerate merger, with no horizontal overlaps between the parties: Booking is mainly active in the provision of accommodation OTA services (as well as, to a limited extent, in the provision of flight OTA services which it sources from eTraveli), whilst eTraveli is primarily active as a flight OTA.

The Commission's decision

According to the Commission, the transaction would allow Booking to strengthen its (alleged) dominant position in the hotel OTA market. The Commission argued that Booking would do so by acquiring a main customer acquisition channel - a "*best-in-class [flights] OTA*". The Commission believed that this would likely result in a significant share of Booking's flight customers remaining on its platform to shop for other services due to the alleged 'inertia' or 'stickiness' of those customers. As a result, the Commission concluded that Booking would be able to expand its "*travel services ecosystem […] making its market position in the hotel OTA market more difficult to contest*". According to the Commission, the strengthening of Booking's dominant position would have further increased its bargaining position vis-à-vis hotels and could result in higher costs for hotels and ultimately, for consumers.

The Commission also found that the resulting increase in sales traffic (which, according to press reports, was de *minimis* even according to the Commission's own calculations) would reinforce the 'network effects' from which Booking already allegedly benefits, allowing it to increase traffic to its platforms as well as the barriers to entry and expansion facing rival OTAs.

Remedies

Booking put forward remedies to address the Commission's concerns. Booking proposed to show to its flight customers a choice screen on the flight check-out page displaying multiple offers from competing hotel OTAs. However, the Commission took issue with the transparency and monitoring of the remedy, which was not seen as sufficiently comprehensive and effective to address its concerns.

Implications

The decision signifies the Commission's increasing willingness to pursue novel theories of harm in the digital sector, in particular with respect to non-horizontal mergers. Indeed, conglomerate mergers are often seen as unproblematic, given the many customer benefits and efficiencies that may arise from a 'one-stop shop' that could result in better prices and products for consumers, as indicated in the Commission's own non-horizontal merger guidelines. Such cases have typically turned on whether the merged entity would be incentivised or able to foreclose competitors by trying or bundling practices. However, in *Booking/eTraveli*, the Commission departed from its own guidelines and precedents, in particular by failing to establish foreclosure.

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Another notable aspect of this case is that the Commission's prohibition was preceded by a Phase I unconditional clearance decision from the UK's Competition and Markets Authority (the "**CMA**") in September 2022, in which the CMA found that a growth in Booking post-merger would not lead to a substantial lessening in competition. Despite very similar facts, the CMA concluded that eTraveli was not a particularly important customer acquisition channel for hotel OTAs, and that the transaction would ultimately not have altered the behaviour of consumers who rarely book flights and hotels at the same time.

In the meantime, the legal battle continues: Booking lodged an appeal to the General Court on 5 December 2023. Undoubtably, deal makers in the digital sector will be anxious to hear the Court's verdict.

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