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Applying Antitrust and Competition Law in the Digital Space (International)

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A Note discussing the key antitrust and competition issues in the rapidly changing digital landscape, focusing on global legislative and enforcement actions. It highlights investigations by regulators around the world and litigation relating to Big Tech companies, addressing abuse of dominance and monopolization concerns, as well as co-ordinated actions. The Note examines the exercise of merger control powers in the context of deals involving digital companies. Finally, it considers the efforts of governments to introduce legislation directly or indirectly targeting the application of competition law in digital markets.

Business practices have changed significantly as a result of the greater use of digital products, services, and technology. Many aspects of the world that we live in now would be virtually unrecognizable to an observer from 20 years ago. This trend was increased by the COVID-19 pandemic, which accelerated a shift to online transactions and activities.

Digitalization and the introduction of new technology has brought many benefits, including:

- New products.
- Access to new and different markets.
- The ability to tap into large quantities of information and content.
- Tools to help consumers compare and choose between products and services.

New digital platforms have also given rise to entire new business models. New suppliers can enter the market more easily and provide products and services to customers that would previously have been out of reach. The European Commission (EC) has acknowledged that digital technologies "considerably improve our lives, from better access to knowledge and content to how we do business, communicate or buy goods and services" (EC: Shaping Europe's digital future: Questions and Answers).

However, there are claims that the proliferation of digital technology has concentrated significant wealth and power in the hands of a few "Big Tech" companies, drawing increasing scrutiny from competition authorities worldwide. While authorities worry that entrenched market power could stifle new entry and innovation, digital technology can also help smaller, innovative companies enter markets and become important players quickly. Both *ex-post* enforcement and *ex-ante* regulation must balance the regulation of larger technology companies' activities, while allowing larger firms to innovate and new challengers to start up and thrive.

Though competition policy varies across jurisdictions, consumer welfare remains central to the application and interpretation of competition law. In digital markets, competition authorities have sought to strike a balance between:

- Promoting and allowing technical progress and innovation.
- Protecting users of digital products and services from harm where, as a result of network effects, those products and services may tip in favour of one provider.

This Note identifies and discusses the key antitrust and competition challenges arising in the rapidly changing digital landscape, focusing on global legislative and enforcement actions. It highlights regulatory investigation and litigation targeting Big Tech companies, addressing abuse of dominance and monopolization concerns, as well as co-ordinated actions. It also examines the application of merger control powers.

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The Note considers the increasing trend for *ex-ante* regulation and looks at governmental efforts across jurisdictions to introduce legislation tailored to competition law in digital markets.

Competition Law Reform at the Forefront of Policy

In recent years, policymakers and competition authorities have increased their focus on large technology companies in the digital space. This has led to many expert studies and advisory reports being commissioned.

In May 2019, the EC published its principal report (see EC: Competition Policy for the Digital Era). Additional insights into competition law enforcement are found in the reports following the E-commerce and Consumer Internet of Things sector inquiries (see EC: Final report on the E-Commerce Sector Inquiry and EC: Final report: sector inquiry into Consumer Internet of Things).

In March 2019, the UK published its most significant advisory report (see HM Treasury: Unlocking digital competition, Report of the Digital Competition Expert Panel). The report recommended updating competition law rules and proposed several measures to open up digital markets.

Though the US federal or state government antitrust enforcers have not published any reports, several important and influential reports have emerged from other sources. In September 2019, the Committee on Digital Platforms, set up at the George Stigler Center at the University of Chicago, published a report concluding that the current competition laws and their enforcement had failed to tackle competition concerns raised by digital platforms. The report recommended legislative and enforcement changes to address these issues. (See Chicago Booth: Stigler Committee on Digital Platforms: Final Report.)

The US House of Representatives Judiciary Subcommittee on Antitrust, Commercial and Administrative Law have published reports recommending a broad swathe of proposals to address competition in digital markets and to strengthen antitrust law and enforcement generally. In July 2022, the Subcommittee majority staff published a report that arguably encouraged the Department of Justice (DOJ) and Federal Trade Commission (FTC) to adopt their more aggressive enforcement approach in relation to digital markets (see US House of Representatives: Investigation of Competition in Digital Markets).

Influential reports have also been produced in other countries. For example:

- In Australia, the Australian Competition and Consumer Commission (ACCC) has published several documents, including policy advisory reports relating to its:
  - Digital Platforms Inquiry (see ACCC: Digital Platforms Inquiry 2017-2019);
  - Digital Advertising Services Inquiry (see ACCC: Digital Advertising Services Inquiry 2020-2021); and
  - Digital Platform Services Inquiry (see ACCC: Digital Platform Services Inquiry 2020-2025).
- In Germany, a committee of the Federal Ministry for Economic Affairs and Climate Action published a report including proposals for competition law changes in the EU and Germany and their enforcement (see FMEACA: A new competition framework for the digital economy (2019)). This report helped spur changes to the German Competition Act, making it possible to designate firms with "paramount significance for competition across markets" (section 19a, Act Against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (ARC)).

Many of these reports concluded that existing competition laws were inadequately equipped to address concerns about the growing digitization of the economy. They also found that competition authorities' enforcement activities under these laws had been insufficient.

Common questions raised by the reports included:

- In the context of behavioural competition enforcement, whether:
  - *ex-post* enforcement fell short or was too slow;
  - past interventions had been too little or had come too late;
  - there was a compelling case for *ex-ante* regulation; and
  - the consumer welfare standard should remain the ultimate goal of competition law or be amended or replaced.
- In the context of merger control, whether:
  - enforcers had been too lenient in reviewing certain transactions. For example, Meta's (then Facebook) acquisition of WhatsApp received unconditional clearance in all jurisdictions and is often cited as an example of a transaction that was approved without sufficient scrutiny; and

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  - anti-competitive deals had avoided review due to inadequate or inappropriately calibrated jurisdictional thresholds.

Digital Market Characteristics

The digital market is no longer a discrete sector of the economy. All sectors are becoming increasingly digitalized, with the impact being felt economy-wide.

Competition authorities have focused their recent enforcement activity on large technology companies. However, the new policies and rules introduced to counter these companies' powers are likely to have wider implications. Many companies across all sectors, as customers of these large technology firms, may be affected by these changes.

Common characteristics of digital markets include:

- Being more dynamic, with shorter innovation cycles compared to other more traditional products.
- Benefitting from extreme economies of scale. The greater the volume of customers or users, the more efficiently they can operate.
- Strong network effects, potentially across two-sided or multi-sided markets. Network effects describe how one user's use of a product or service can affect the product's value for other users. These effects can be:
  - direct, where the value of a product or service to a user increases with the number of other users; or
  - indirect, where the value of a product or services for users of one group increases as the number of users in another group increases.

  A multi-sided platform can connect many business users to many end-users and reinforce these network effects. This may be further bolstered by users deciding to use only one firm or platform.
- Making use of or benefitting from significant amounts of data. Access to data is often a key input for any firm wanting to enter the market or compete.
- Services being offered for free (in the monetary sense) but paid for with (personal) data or user attention.

Large technology firms and digital platforms can enjoy some advantages over rival firms. These include strong network effects and economies of scale where the firm or platform has millions (or tens or hundreds of millions) of users. The decision by users to "single-home" may be the result of a positive preference; or it may be the result of a lack of incentive to "multi-home" caused by customer inertia, or it may be because of high switching costs.

The competition concern is that a firm's growing market position may reach a point where competitors cannot present a competing alternative, causing the market to tip in favour of the large technology firm or platform. Once tipped, it becomes even harder for rival companies or new entrants to compete in or contest the market.

A digital company cannot necessarily be criticized if users prefer its products or services, unless it uses anti-competitive practices to accelerate the tipping process or maintain its position. However, markets that are about to tip or which have tipped will likely face greater scrutiny from competition authorities

Increased Enforcement

An increased focus on the application of competition law in the digital space, and growing scepticism that digitization always and inevitably benefits competition, has resulted in numerous investigations by competition authorities around the world. For examples of these investigations, see Abuse of Dominance and Monopolization Theories of Harm.

Past behavioural competition law enforcement in the digital space has tended to focus on rules against abuse of dominance or monopolization. However, competition authorities are increasingly exercising their merger control powers more actively in deals involving digital companies.

Several competition authorities have identified their merger control powers as a way to take relatively quick action to intervene, regulate, and potentially prohibit combinations that could have an adverse impact on competition (as compared to investigations under abuse of dominance rules which tend to take much longer).

Though the products and services involved in each deal are different and each market in which those products and services are supplied displays different characteristics, several common issues affect competition law enforcement in the digital space. These include:

- **Uncertainty about future developments.** Digital markets are often dynamic markets where innovation can take place quickly and new products and technologies can completely

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change the existing competitive landscape. This can be a challenge for competition authorities when predicting how the market and competition will develop as they tend to use backward-looking market shares but need to conduct forward-looking assessments and base their decisions on evidence.

- **Market definition.** Market definition typically starts by applying the small but significant and non-transitory increase in price (SSNIP) test (see Market Definition). However, the proliferation of zero-price digital products and services has highlighted a potential challenge with this test: what is the significant non-transitory increase in price of a product (or service) that is supplied for free? As a result, competition authorities have had to adapt their approach, usually by replacing the measure of an increase in price with a degradation in quality or innovation.
- **Network effects.** Digital markets are often markets where, the more users of a product or service there are, the more valuable those products or services become to those existing and potential users. This is particularly the case in the context of digital platforms. This can raise challenges in the substantive assessment, especially in multi-sided markets.
- **Vertical, conglomerate, or ecosystem-type issues, particularly in the context of merger control.** These issues tend to be more complex and harder to assess than straightforward horizontal overlaps between the activities of competitors. When concerns arise, they are also often harder to remedy, except through outright prohibition of the transaction.
- ***Ex-post* competition law enforcement tends to be slow outside of merger control.** Though some competition authorities have powers to impose interim measures, these are rarely used (France may be an exception to this, see Legal Update, Interim measures imposed by the French Competition Authority on Google for its Google Ads activities). This contrasts with the rate of change and progress in digital markets. As a result, by the time a competition authority completes its investigation, the market may already have moved on.

Frequent issues in competition law investigations in the digital space include:

- Leveraging.
- Self-preferencing.
- Tying.
- Interoperability.
- Lack of multi-homing.
- Accumulation of and access to data.
- Acquisition of nascent competition or killer acquisitions.

The EC was initially at the forefront of increased enforcement activities (having opened multiple cases investigating each of the Google, Apple, Facebook (now Meta), Amazon, and Microsoft (GAFAM) companies). In 2010, the EC began investigating Google's business practices in relation to Google Shopping. In 2017, Google was fined EUR2.42 billion for abuse of dominance. (Case AT.39740, Google Search (Shopping).) Further investigations against Google have seen the company face fines totaling around EUR8 billion.

When the EC opened its Google Shopping investigation, its focus on whether a large technology company's behaviour breached EU competition law was seen by many in the US as anti-American protectionism. However, the EC is now recognized as something of a pioneer in seeking to bring these cases.

Germany has also advocated for large technology companies to face stricter competition law enforcement. The German competition authority, the Federal Cartel Office (*Bundeskartellamt* (BKA)), was the first of the EU member state competition authorities to open an investigation against Meta on the basis of an (at least at the time) innovative abuse of dominance theory of harm based on privacy concerns (BKA: Bundeskartellamt prohibits Facebook from combining user data from different sources).

In January 2021, Germany updated its competition regime by introducing section 19(a) of the ARC. This new provision effectively establishes a form of *ex-ante* regulation for firms with "paramount significance for competition across markets". The change foreshadowed the EU Digital Markets Act ((EU) 2022/1925) (DMA), but at a national level rather than EU-wide (see Moving from Ex-Post Enforcement to Ex-Ante Regulation). The BKA has enthusiastically enforced the new provisions under section 19(a) and, within the first six months, has opened proceedings against some of the largest US technology companies.

The UK Competition and Markets Authority (CMA) has also come to be seen as one of the more interventionist competition authorities, a role that it has embraced even more enthusiastically since Brexit. The CMA has been pushing the boundaries of its existing powers following calls to strengthen

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UK competition laws. Some changes to its competition law enforcement powers have been introduced by the Digital Markets, Competition and Consumers Act 2024 (DMCCA) (see New and Proposed Legislation in Other Jurisdictions).

In behavioural enforcement cases in the digital space, the CMA has:

- Opened investigations into the business practices of Apple, Meta, Google and Amazon.
- Used its market study tool to examine areas where it suspects competition may not be working well (see Mobile browsers and cloud gaming and Cloud services market investigation).
- Significantly increased the level of scrutiny applied to mergers of digital companies, including:
  - being the first major competition authority to prohibit a Big Tech merger (Meta/Giphy); and
  - initially blocking Microsoft's acquisition of Activision Blizzard (but ultimately approving a subsequent version of the deal) (Microsoft/Activision Blizzard).

The CMA's Data, Technology and Analytics (DaTA) unit helps enforcers to understand data and algorithm-related issues. This unit contributed to the successful enforcement action following investigation into the online sales of posters and frames by two competing sellers on Amazon's UK website (see CMA: Online sales of posters and frames).

The DMCCA establishes the new Digital Markets Unit (DMU), which has existed in non-statutory form since April 2021, to oversee the new regulatory regime for the most powerful digital firms.

US antitrust agencies have been viewed as lagging behind their European counterparts in their efforts for more robust antitrust enforcement in the digital space. However, following the first Trump Administration, there has been a much more interventionist approach.

President Biden appointed Lina Khan and Jonathan Kanter to lead the two US federal competition authorities: the FTC and the Antitrust Division at the DOJ, respectively. This change in enforcement led to cases being brought against all the large US-based technology companies. This includes:

- Action by the DOJ and 11 states successfully suing Google in the US District Court for the District of Columbia for antitrust violations, arguing that Google unlawfully maintained monopolies in the markets for general search services and general search text advertising (see Legal Update, DOJ, States Sue Google for Antitrust Violations Based On Search Dominance).

  The court ruled that Google's *de facto* exclusive default and distribution agreements with browser developers, phone manufacturers, and mobile carriers enabled the company to unlawfully maintain monopolies in these two markets. An appeal of the decision is anticipated.
- Action by the DOJ and eight states suing Google in the US Eastern District of Virginia for allegedly monopolizing the digital advertising market.
- The FTC's challenge to Facebook's (now Meta) 2012 acquisition of Instagram and 2014 acquisition of WhatsApp (FTC v Facebook, Inc. (ongoing litigation)).
- The complaint by the FTC and attorneys general from 17 states in the US District Court for the Western District of Washington against Amazon, alleging that the company has maintained monopoly power through allegedly anti-competitive strategies (see Legal Update, Key Allegations: FTC and Seventeen States Sue Amazon, Alleging Illegal Maintenance of Monopoly Power).
- A suit by the DOJ and 16 states alleging that Apple unlawfully maintained a monopoly over smartphones through contractual restrictions, fees, APIs, and other conduct that insulates the company from competition (see Legal Update, Key Allegations: DOJ Sues Apple Over Alleged iPhone Monopoly).

The increase in US lawsuits has been joined by proposals for new legislation to address competition concerns in the digital space. However, these proposals have not gained enough support and seem to have stalled.

Market Definition

Market definition is a crucial element in competition law analysis and often serves as a necessary first step. It is essential for:

- Assessing an agreement's impact on a market.
- Determining whether a company holds a dominant position in a market (before considering whether it has abused that dominance).
- Deciding whether products from different parties compete in the same market.

Though some, including competition enforcers, may argue that rigidly adhering to market definition assessments can overlook key competitive

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constraints, it is still important to be able to define markets accurately in a competition assessment.

EC Market Definition Notice

In February 2024, the EC refreshed its Market Definition Notice. The previous version, published in 1997, made no specific mention of digital products or services. The new notice reflects changes in the way that companies compete, and customers and users behave. In particular, it acknowledges that the price of a product or service may not always be the key competition parameter for market definition. (See EC: Commission Notice on the definition of the relevant market for the purposes of Union.)

The EC (as well as many other competition authorities globally) starts its assessment of demand-side substitution in market definition with the hypothetical monopolist or SSNIP test.

This test defines a market by starting with a product or service, assumed to be controlled by a hypothetical monopolist. It then considers whether a small but non-transitory price increase would cause enough customers to switch to other products to make the hypothetical price increase unprofitable. If so, those other products are considered as being in the same market. This process is repeated with all other products until customers would no longer switch in sufficient numbers. At this point, the market is defined. The product's price is central to this test. For more information, see Practice Note, Economic Concepts and Evidence: UK and EU Market Definition: Hypothetical Monopolist Test.

Therefore, one of the key difficulties in defining a market for digital products is that the product or service provided to the customer (for example, an internet search engine or access to a social media site) is often provided for no fee so there is no price. The new Market Definition Notice accepts this situation and acknowledges that the EC can consider other parameters of competition, such as the level of innovation and quality (this could include durability, sustainability, the value and variety of uses offered by a given product, and availability).

For a detailed discussion of market definition in EU digital markets, see Practice Note, Economic Concepts and Evidence: UK and EU Market Definition: Market Definition in Digital markets.

US Merger Guidelines

In the US, the updated 2023 Merger Guidelines set out market definition changes for merger-related analysis (see DOJ and FTC: Merger Guidelines).

References to a hypothetical monopolist test remain. However, these have been tweaked so that they now also refer to a hypothetical monopsonist (that is, a party that has a monopoly as a buyer), depending on the circumstances.

Consistent with approaches in the EU, the guidelines acknowledge that products and services can be free in many digital markets. Therefore, in addition to the usual test of what happens when a hypothetical monopolist makes a SSNIP, there is now also a new formulation relating to a small but significant and non-transitory worsening of any other terms, such as quality, choice, or innovation.

While the guidelines reflect the DOJ's and FTC's current approach to assessing whether a merger may violate the antitrust laws, they are not legally binding. However, courts have historically relied on prior iterations of the guidelines as a persuasive authority when reviewing merger challenges.

Although the guidelines make mention of multi-sided platforms and the ways that agencies may examine competition involving those platforms, the guidance does not materially affect the agencies' ongoing civil enforcement actions (such as those against large technology firms).

Dynamic Nature of Digital Markets

Accurate market definition may be affected by the dynamic nature of digital markets, where high market shares may not necessarily be a good indicator of market power. This is because the innovation cycle tends to be much shorter for digital products and services, and each innovation has the ability to shift market shares. As such, where a company may have a high market share at a certain point (and even over a certain period), that share may be unsustainable and quickly be eroded by new technologies and products.

Equally, new disruptive business models may start off as being seen as part of a different market. However, over time, they may win customers and come to be seen as substitutes and part of the same expanded market.

Abuse of Dominance and Monopolization Theories of Harm

Leveraging

Leveraging refers to a company's attempts to try to use its market power in one market to push

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its position in another (often adjacent) market. Leveraging can be done through various practices, such as tying, bundling, or self-preferencing.

These practices were first explored in the digital space in the late 1990s to early 2000s when both the EC and US antitrust agencies brought cases against Microsoft.

The EC:

- In 2004, decided that Microsoft had abused its dominant position in the market for PC operating systems by tying operating system sales to its Windows Media Player product. The EC fined Microsoft and required it to provide a version of its operating system that did not include the media player. (Case AT.37792, Microsoft.)
- In 2009, found that Microsoft was tying its Internet Explorer browser to its dominant PC operating system (Case AT.39530, Microsoft (Tying)).

In the US, the DOJ brought a monopolization case against Microsoft on the same grounds. The court held that Microsoft had illegally maintained a monopoly position in PC operating systems through various exclusionary practices, including:

- Technical integration of Microsoft's browser into Windows.
- Commercial agreements with manufacturers and other parties to effectively exclude competing browsers.
- Threats to cut off customers that did not exclusively support Microsoft's browsers.
- Subverting competing technologies that were seen as rivals to Microsoft's operating system.

In recent years, European investigations into leveraging practices have increased. The Google Shopping case is a significant example and is arguably responsible for the recent wave of investigations against technology companies. In this case, the EC concluded that:

- Google held a dominant position in each of the national markets of the European Economic Area (EEA) for specialized product search services, with a share of more than 90% in most of these markets.
- Google abused its dominant position by placing the results of its own comparison-shopping services in a prominent position at the top of the search results page. This resulted in competing shopping services being much less likely to be selected by customers.

(Case AT.39740, Google Search (Shopping); Google and Alphabet v Commission (Google Shopping) (Case T-612/17) EU:T:2021:763.)

The EC said that this was an example of self-preferencing, establishing this practice as an independent head of abuse of dominance for the first time.

In the US, the DOJ and several states successfully sued Google for monopolizing the search market. The court ruled that Google held a monopoly in the markets for general search services and general search text advertising. Despite Google's continued innovation and positive reputation among partners and users as the best search engine, the company's *de facto* exclusive distribution agreements unlawfully maintained its monopoly in these two markets. The case is likely to be appealed. For more information, see Legal Update, DOJ, States Sue Google for Antitrust Violations Based On Search Dominance.

The EC brought another leveraging investigation against Google. The Google Android case involved Google's conduct in four different markets:

- The market for licensing mobile device operating systems (Android OS).
- The Android app store market (Play Store).
- The market for general search services (for example, Google).
- The non-operating system specific mobile web browser market (for example, Chrome).

(Case AT.40099, Google Android; Google and Alphabet v Commission (Case T-604/18) EU:T:2022:541.)

The EC fined Google EUR4.34 billion for abuse of dominance by imposing illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search.

On appeal, the General Court found that Google's requirement for mobile device manufacturers to pre-install Chrome and Google Search to offer the Google Play Store constituted abusive tying. As a result, Google was able to leverage its market power in the Android app store market into the markets for mobile browsers and search. Google apps were pre-installed on devices and users only rarely switched away from them.

In the US, a significant number of states filed a lawsuit against Google alleging that it had

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undertaken illegal exclusionary conduct that harmed app developers on its Google Play Store. The states argued that Google engaged in anti-competitive practices by:

- Entering into agreements with mobile phone manufacturers to prevent the preloading of other app stores on Android devices.
- Creating barriers to deter consumers from directly downloading apps to their devices.
- Hindering payment processing outside of Google Play billing.

In 2023, the states announced a USD700 million agreement with Google to settle the matter. The agreement required Google to make changes to the company's business practices, such as allowing the installation of third-party apps on Android phones from outside the Google Play Store. (In re Google Play Consumer Antitrust Litigation, Case No. 3:20-cv-05761-JD.)

US courts have also weighed in on private monopolization claims involving app stores. In *Epic Games, Inc. v. Google LLC, et al.*, (*No. 20-cv-05671, N.D. Cal.*), Epic brought a monopolization suit alleging that restrictions on distributing and monetizing apps were anti-competitive. A jury decided that Google's distribution agreements with app developers and revenue share agreements with mobile device manufacturers were both unlawful restraints of trade that facilitated the company's acquisition and maintenance of monopoly power.

After a jury ruled in favour of Epic for violations of the Sherman Act, the court issued a three-year permanent injunction meant to break Google's alleged monopoly power in the "Android app distribution" and "Android in-app billing services" markets. The injunction:

- Allows users to download apps outside of the Google Play Store.
- Allows developers to set up competing app stores for Android devices.
- Bans the exclusive use of Google Play Billing for purchases in the Google Play Store.
- Allows developers to charge users with their own billing systems.
- Allows developers to communicate directly with users about payment methods.

The injunction also prohibits Google from entering into revenue share agreements or making payments to developers for launching an app exclusively in the Google Play Store. The case is being appealed.

The EC has brought two other major investigations into Google for its

- AdSense for Search service (Case AT.40411, Google - Adsense).
- Allegedly abusive practices in online advertising technology (Case AT.40670, Google - Adtech and Data-related practices).

In *Adsense*, the EC alleged that Google unfairly restricted its rivals in the online search advertising market. Google required rivals to agree terms that limited their ability to display advertising for their services alongside Google's search results. These terms prevented Google's rivals from placing search adverts on the most commercially significant websites, which Google reserved for its own adverts.

Google successfully overturned this decision before the General Court. It is open to the EC to appeal the General Court's judgment. (Google LLC and Alphabet Inc v European Commission (Case T-334/19) EU:T:2024:634.)

In *Adtech*, the EC preliminarily found Google to be dominant in the EEA-wide markets for:

- Publisher ad servers, through its "DoubleClick for Publishers" service provided to publishers.
- Programmatic ad buying tools for the open web.

The EC has taken issue with the way that Google appears to favour its own online display advertising technology services to the detriment of rival providers of services, as well as advertisers and online publishers. In June 2023, Google received the statement of objections from the EC and this case is ongoing.

The EC has the unusual preliminary view that, if an abuse of dominance in this case is proven, the only appropriate remedy may be to breakup Google's ad tech stack through divestitures.

In August 2024, the EC published draft guidelines for consultation on applying Article 102 of the Treaty on the Functioning of the European Union (TFEU). These guidelines address abusive exclusionary conduct by dominant undertakings. (See Legal Update, European Commission consults on draft new guidelines on exclusionary abuses of dominance). The draft guidelines are set to replace the EC's previous guidance (see Guidance on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings).

The guidelines set out categories of conduct that will be presumed to lead to exclusionary effects,

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such as rebates conditional upon exclusivity and certain forms of tying. Once the EC has established that the conduct at issue falls within one of these categories, the burden of proof shifts to the dominant undertaking to try to rebut the presumption.

The guidelines provide specific guidance for different types of conduct. They explicitly recognize self-preferencing as a self-standing type of abuse. Self-preferencing is defined as conduct that consists of a dominant undertaking giving preferential treatment to its own products or services compared to those of competitors, mainly by means of non-pricing behaviour (for example, demotion of rival products or services in the ranking of search results).

App Store Investigations

Investigations have been brought against Apple for its app store practices.

In Case AT.40437, Apple App Store (music streaming), which was triggered by a complaint from Spotify, the EC raised concerns about:

- Apple forcing app developers to use its own in-app payment mechanism.
- Apple restricting developers (including Spotify) from informing iPhone and iPad users of alternative, cheaper purchasing mechanisms (an anti-steering provision).

In the press release accompanying its first statement of objections, the EC indicated that it was the combination of both practices that were abusive, as they resulted in Apple receiving a commission on all in-app purchases (see EC: Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers.)

On 28 February 2023, the EC sent a new statement of objections. This statement:

- Dropped the theory of harm concerning Apple forcing app developers to use its payment system on the App Store.
- Reframed the anti-steering theory of harm as an unfair trading condition, which was neither necessary nor proportionate to protect Apple's commercial App Store interests. This replaces the previous view that such conduct served to increase rivals' costs.

(See EC: Antitrust: Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers.)

In March 2024, the EC fined Apple EUR1.8 billion, which Apple has appealed (see EC: Commission fines Apple over EUR1.8 billion over abusive App store rules for music streaming providers).

The UK CMA has investigated Apple's exclusivity and tying terms and conditions that it imposed on iPhone and iPad developers. The investigation was triggered through the CMA's own work in the digital sector and complaints from app developers.

The CMA investigated:

- The requirement for apps on the App Store to be approved by Apple.
- Terms and conditions that imposed exclusivity provisions. This meant that developers could only distribute apps to iPhones and iPads via the App Store.
- The requirement for developers who offer in-app transactions to exclusively use Apple's payment system.
- Apple charging up to 30% for in-app transactions and app purchases.

However, in August 2024, the CMA closed the investigation on the basis of administrative priority. The CMA considers that its new powers under the DMCCA may enable it to address its identified concerns in a more timely, holistic and flexible manner. (See CMA: Investigation into Apple AppStore.)

For the same reasons, the CMA also closed its investigation into Google's Play Store rules for the same reasons. These rules require app developers offering digital content to use Google's own payment systems for in-app purchases. Although Google had put forward potential commitments to address the CMA's concerns, these were rejected. (See CMA: Investigation into suspected anti-competitive conduct by Google.)

The Dutch Consumer and Market Authority (*Autoriteit Consument & Markt* (ACM)) has investigated Apple's conduct regarding dating apps. The ACM found that app providers paid a yearly subscription fee to sell their products on the App Store. Apple also imposes additional conditions if an app provider wanted to offer paid services or subscriptions within its app. The ACM found that these additional considerations were not proportional to the additional payment service or necessary for running the App Store. As such, Apple had abused its dominant position. (See ACM: ACM obliges Apple to adjust unreasonable conditions for its App Store.)

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The French Competition Authority (*Autorité de la concurrence*) has fined Google EUR250 million for failing to comply with commitments made binding in 2022. The commitments required Google, which was found to have a significant share of advertising value being held by major digital platforms, to act in good faith when negotiating payment for the use of protected press agency and publisher content.

The French Competition Authority also found that Google's artificial intelligence (AI) service, launched in July 2023, used content from press agencies and publishers to train its foundation model without notifying either the content providers or the authority. Google subsequently linked its AI service's use of the content to the display of protected content. Google failed to propose a technical solution for press agencies and publishers to opt out of their content being used by the AI without affecting the display of content protected by related rights on other Google services. This prevented press agencies and publishers from being able to negotiate remuneration. (See French Competition Authority: Related rights: the Autorité fines Google EUR250 million for non-compliance with some of its commitments made in June 2022.)

In 2024, the US DOJ and several states filed a lawsuit against Apple for alleged exclusionary conduct in the smartphone market. The plaintiffs allege that Apple maintains a monopoly over smartphones by imposing contractual restrictions on developers through its App Store guidelines and developer agreements, making it harder for consumers to switch to competing smartphones. The complaint rejects the notion that the alleged harm can be justified on the basis of privacy or security, calling these arguments pretextual (see Legal Update, Key Allegations: DOJ Sues Apple Over Alleged iPhone Monopoly).

Investigations of Other Leveraging and Tying Practices

In December 2020, the BKA opened an investigation into alleged abusive tying related to Meta's Occulus virtual reality (VR) headsets. Although Meta was not dominant in the VR headset market, it was dominant in the social media network market.

Meta had required customers wanting to use the VR headsets to sign up for a Facebook account, thereby trying to leverage its market power with Facebook to combine two products and the resulting data collection. The BKA opened the investigation under both an abuse of dominance and an abuse of relative market power theory. Meta ultimately removed this condition and the investigation was dropped. (See BKA: Bundeskartellamt examines linkage between Oculus and the Facebook network.)

The EC has been investigating whether Microsoft has been tying certain product lines to its widely-used Office suite. The product lines of interest are:

- Teams. This investigation began following a complaint from Slack (a cloud-based team communication platform). (Case AT.4072, Microsoft Teams.)
- Onedrive. This investigation began following a complaint from Nextcloud (the Coalition for a level playing field). (Case AT.40873, Microsoft Teams II.)

This comes more than ten years after Microsoft ended its long-running competition law dispute with the EC about tying products to its operating system.

In June 2024, the EC issued a statement of objections against Microsoft regarding its Teams investigation (see EC: Commission sends Statement of Objections to Microsoft over possibly abusive tying practices regarding Teams.)

Cloud Infrastructure Services Providers in Europe (CISPE), a trade association whose members include Amazon, made an abuse of dominance complaint against Microsoft. CIPSE alleged that:

- Microsoft's new contract terms, effective 1 October 2022, damage the European cloud computing ecosystem.
- Microsoft leverages its dominance in productivity software, reduces choice and raises costs for European cloud customers, harming Europe's digital economy (see CISPE press release, CISPE Files Complaint Against Microsoft with European Commission, 9 November 2022).
- Microsoft uses its dominance in productivity software to direct European customers to its Azure cloud infrastructure, which disadvantages its European rivals.
- Microsoft's anti-competitive practices include discriminatory bundling and tying of products, self-preferencing, and locking in customers on both the technical and competitive level.

In July 2024, Microsoft reached an agreement with CISPE to address their concerns. As a result, CISPE agreed to withdraw its complaint.

There have also been several cases brought against Amazon for how it operates Amazon Marketplace.

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The EC investigated how Amazon:

- Uses marketplace seller data.
- Selects sellers to feature in the Buy Box and whether it favours third party sellers using its Prime logistics services.

(Case AT.40462, Amazon Marketplace; Case AT.40703, Amazon - Buy Box.) (See also EC press release, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices, 10 November 2020.)

For discussion of the EC's decision in *Amazon Marketplace*, see Big Data.

In *Amazon - Buy Box*, the EC considered whether Amazon's criteria for selecting Buy Box winners and Prime-eligible sellers led to preferential treatment of:

- Amazon's own retail business.
- "Fulfilment by Amazon" (FBA) sellers, that is, those using Amazon's logistics and delivery services.

The EC noted that winning the Buy Box or gaining effective access to Prime users can be crucial for sellers' commercial success.

The EC preliminarily found that Amazon held a dominant position in certain national markets for online marketplace services for third party sellers and that Amazon's conduct favoured its own business activities and those of sellers using its other services.

The investigations were closed after Amazon offered a series of commitments to address the practices identified by the EC. These commitments require Amazon to:

- Treat all sellers equally when ranking offers for selecting the Buy Box winner.
- Use non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime.

The CMA also launched an investigation into these same practices by Amazon with regard to the UK market. The CMA also concluded their investigation by accepting commitments to address their concerns (see CMA: Investigation into Amazon's Marketplace).

The Italian Competition Authority (*Autorità Garante Della Concorrenza e del Mercato*) (ICA) investigated Amazon's practice of withholding certain exclusive benefits from sellers unless they used FBA. The ICA concluded that Amazon's conduct amounted to an abuse of dominance in the Italian market (see ICA press release, A528 - Italian Competition Authority: Amazon fined over EUR1.128 billion for abusing its dominant position, 9 December 2021).

The ICA was able to investigate the same conduct as the EC because it initiated its national investigation first. On appeal by Amazon, the General Court confirmed that despite the general one-stop-shop principle (which precludes EU member states from starting parallel processes when the EC is investigating), the EC could exclude Italy from its investigation due to Italy's ongoing national investigation. This issue did not arise for the UK, as it was no longer part of the EU.

Amazon's conduct has also been the subject of investigations and litigation in the US (for more information, see Legal Updates, Key Allegations: FTC and Seventeen States Sue Amazon, Alleging Illegal Maintenance of Monopoly Power and District Court Denies Amazon's Motion to Dismiss Minimum Margin Agreement Allegations).

Privacy and Competition Law

One question that has arisen in the digital space is the extent to which competition law can, and should, be used as a tool to protect privacy concerns.

This issue was first considered in the German Facebook case, which questioned whether competition authorities were encroaching on the domain of data protection authorities. The BKA found that Meta was dominant in Germany's social media market. The theory of abuse was more innovative, however. The BKA argued that Meta abused its dominant position through its terms of service, which the BKA considered to be inappropriate and in breach of data protection rules. These terms allowed Meta to collect data from third-party websites and combine it with users' Facebook accounts, often without the user's explicit consent or awareness. (BKA: Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing.)

Meta appealed the decision to the Dusseldorf Higher Regional Court (*Oberlandesgericht*), arguing that the BKA had incorrectly mixed issues of competition law and data protection law. The court referred preliminary questions to the European Court of Justice (ECJ), which held that a national competition authority can take privacy and data protection issues into account in its competition law assessment. It found that access to and the

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possibility of processing data have become an important parameter of competition between companies in the digital sector. As such, not allowing competition authorities to take this into account would ignore the reality of the situation. (Meta Platforms Inc and others v Bundeskartellamt (Case C-252/21) EU:C:2023:537.)

The CMA examined privacy concerns in the Google Privacy Sandbox investigation. This investigation followed Google's announcement that it would remove third-party cookies (TPCs) from its Chrome browser and replace them with a series of privacy sandbox tools. TPCs play an important role in digital advertising, helping businesses to target advertising effectively and enable users to find free online content. However, their use also raises privacy and data collection concerns.

Google argued that its privacy sandbox tools were necessary to protect users' privacy. However, the CMA believed these proposals would have a distorting effect on competition. They argued that they would:

- Restrict user-tracking functionality for third parties while retaining this functionality for Google.
- Allow Google to self-preference its own advertising products and services.
- Allow Google to exploit its apparent dominant position by denying Chrome users' choices regarding the use of their personal data for targeting advertising.

Google put forward commitments to address these concerns, which were put in place following thorough consultation. However, Google has since proposed changes to its approach. (CMA: Investigation into Google's 'Privacy Sandbox' browser changes.)

In 2023, the French Competition Authority issued a statement of objections to Apple regarding its App Tracking Transparency (ATT) privacy feature. This feature asks iPhone users whether they want to allow third-party apps to gather data for targeted advertising.

The authority claims Apple abused its dominant position by implementing discriminatory, non-objective, and non-transparent conditions for using user data in advertising. Notably, Apple's own apps are not subject to these same restrictions. (French Competition Authority: Advertising on iOS mobile applications: the General Rapporteur confirms having notified the Apple group of an objection.)

Many of the theories of harm explored by various competition authorities have influenced the development of *ex-ante* regulation (see Moving from Ex-Post Enforcement to Ex-Ante Regulation).

Big Data

Data, and access to it, may be a relevant factor in determining market power and potential abuse. When data is difficult to replicate, it may create a barrier to entry and so lead to market power. In such cases, restricting access to data that is essential for competition could be considered abusive.

This issue was highlighted in the Google Privacy Sandbox investigation, where advertisers were concerned about reduced data availability after Google removed its TPCs (see Privacy and Competition Law).

In Case AT.40462, Amazon Marketplace, the EC investigated Amazon's use of data in relation to its Amazon Marketplace practices. In this investigation, Amazon was alleged to have had a dual role as a platform to:

- Provide a marketplace where sellers can sell products to buyers.
- Sell its own products as a retailer in that marketplace.

As a marketplace provider, it allegedly had access to significant amounts of non-public business data of third-party sellers. The EC argued that Amazon used this information to define its own retail offers and strategic business decisions, sometimes to the detriment of the other marketplace sellers.

The EC preliminarily found that Amazon held a dominant position in certain national markets for online marketplace services for third-party sellers. It also found that Amazon's use of non-public seller data in setting its own offers and strategy supposedly distorted competition on Amazon's platform.

In the US, there has been one prominent case involving access to data. In this case, a competing social network, hiQ, alleged that LinkedIn violated US antitrust law by blocking it from scraping public profiles for use in its product. LinkedIn said this was necessary to protect users' privacy. The court ruled in favour of hiQ, prohibiting LinkedIn from denying hiQ access to publicly available data on LinkedIn users' public profiles. (*hiQ Labs, Inc. v. LinkedIn Corp. (2022 WL 1132814 (9th Cir. Apr. 18, 2022).*) (See also Legal Update, On Remand, Ninth Circuit Affirms Web Scraping Public Website Unlikely To Be Unauthorized Access Violating CFAA.)

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Merger Reviews

Competition authorities have assessed the importance of data in merger reviews, considering the implications of two firms combining their individual data sets and whether this consolidation could lead to market power.

Past decisions of the EC include:

- Google/Doubleclick.
- Facebook/Whatsapp.
- Microsoft/Yahoo! Search.
- Apple/Shazam.
- Microsoft/LinkedIn.

Though none of these cases were seen to be a problematic concentration of market power, there are suggestions that the EC feels it should have scrutinised the Facebook/WhatsApp merger more closely.

In Case M.9660 Google/Fitbit, the EC considered the implications of Google acquiring Fitbit's existing database of users' health and fitness information, along with the technology to develop a similar database. The EC was concerned that this merger would increase Google's already vast amount of data for advertising personalization, making it more difficult for rivals to match Google's services in the markets for online search advertising, online display advertising, and the entire "ad tech" ecosystem.

To obtain merger approval, Google committed to:

- Not use health and wellness data collected from wrist-worn wearable devices and other Fitbit devices for Google Ads.
- Maintain a technical separation between Fitbit's user data and other Google data used for advertising.

In Nielsen/Arbitron, the FTC alleged that Nielsen and Arbitron were positioned to develop the best national syndicated audience measurement service across different platforms, including TV and online, due to significant data access. The FTC considered that the deal would reduce the incentives for others to compete to provide audience measurement services. (See FTC: Analysis of Agreement Containing Consent Order to Aid Public Comment: In the Matter of Nielsen Holdings N.V. and Arbitron Inc. File No. 131-0058.)

In IQVIA/Propel, the FTC alleged that if IQVIA acquired Propel, a downstream programmatic digital advertising platform, IQVIA would disadvantage its rivals by:

- Refusing to supply them with IQVIA's data.
- Providing them with lower-quality or less comprehensive data.

(See Legal update, FTC Seeks to Block Health Care Digital Advertising Merger.)

The merging parties abandoned the deal after a federal district court ruled in favour of the FTC to temporarily prevent the transaction. The court's decision was based on horizontal theory, without addressing the data-foreclosure theory.

Relative Market Power

One other area of law that is of relevance in the context of digital markets is abuse of relative market power (also known as abuse of economic dependence). Several EU member states have legislation that governs these types of abuses. These regulations may be particularly suitable for addressing conduct in digital markets due to certain characteristics.

In particular, these rules relate to bilateral relationships between two parties, often a supplier and a customer, and it is not necessary to show that a party has a dominant market position, or even to have defined a market at all, to argue relative market power. The test for economic independence is typically relative and subjective, considering whether the potentially dependent party has reasonable or sufficient equivalent alternatives.

While most dominant companies may have relative market power, some companies have relative market power without being dominant. Therefore, proving relative market power is likely to be less burdensome than proving dominance.

National competition authorities in jurisdictions with these rules may have more flexibility to intervene. Belgium, Germany, France, and Italy all have versions of abuse of economic dependence. For example, in 2020, the French Competition Authority fined Apple and two wholesalers for abusing their position of relative market power over premium independent resellers of Apple products. These resellers were economically dependent on Apple and the wholesalers. (French Competition Authority: Fines handed down to Apple, Tech Data and Ingram Micro.)

It may be difficult to argue that a dataset can confer market power such as to create a dominant position because it is inherently replicable. However, in a situation where smaller competing companies are reliant on datasets held by a larger competitor to

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compete in a market, it may be argued that refusal to grant data access is an abuse of relative market power.

Use of Pricing Algorithms

While enforcement activity has largely focused on abuse of dominance and merger control, the use of algorithms is raising questions about the regulation of anti-competitive agreements.

Businesses are increasingly using algorithms to monitor and set prices, particularly in e-commerce. Various competition authorities have published reports on the use of pricing algorithms and AI, and the risks of breaching competition law. These include reports from the French Competition Authority, the BKA, the Organisation for Economic Co-operation and Development, and the CMA.

The two principal areas where competition law applies to the use of algorithms are:

- **Resale price maintenance (RPM).** Pricing algorithms have made it easier for product suppliers to monitor compliance with illegal RPM schemes and detect non-compliance. This increases the anti-competitive effect of these schemes. As other retailers legally use algorithms to monitor and adjust prices, the negative impact of illegal RPM schemes on price competition is further amplified.
- **Collusion.** An ongoing academic debate questions whether price-setting algorithms could lead to enhanced tacit collusion that competition authorities cannot tackle with existing tools, particularly without evidence of contact between competitors. (See Sustainable and Unchallenged Algorithmic Tacit Collusion, Ezrachi and Stucke, University of Tennessee Legal Studies Research Paper No. 366.)

Competition authorities have identified three scenarios for collusion using algorithms. These are:

- **Explicit collusion.** Collusion instigated by competitors and facilitated by pricing algorithms that detect and respond to deviations. There is widespread agreement that this would be a clear breach of competition rules.
- **Hub-and-spoke collusion.** Collusion where competitors use the same pricing algorithm for pricing recommendations and decisions. This could breach competition law, depending on the facts.
- **Tacit collusion.** Collusion where unilaterally selected and operated pricing algorithms decide to align market behaviour with competitors' algorithms, without human intervention. This scenario has become more concerning as AI-powered pricing algorithms show greater levels of autonomy. However, there is still considerable uncertainty about how to address this type of situation legally.

The UK has brought a couple of cases regarding algorithmic pricing (see CMA: Online sales of posters and frames and Ofgem: Infringement by Economy Energy, E (Gas and Electricity) and Dyball Associates of Chapter I of the Competition Act 1998 with respect to an anti-competitive agreement).

The ECJ addressed a similar issue in a case referred by the Lithuanian court. The case involved an online booking platform used by competing travel agents. The platform sent messages proposing the use of an algorithm to limit discounts. The ECJ considered that there would be collusion if it were shown that the agencies were aware of the terms of the message containing this proposal. (Eturas and Others (Case C-74/14) EU:C:2016:42.)

However, the US has seen the most activity in this area. For example, the DOJ brought charges against poster sellers using an algorithm to fix the price of posters on an online marketplace (*United States v. Topkins, Case 3:15-cr000201-WHO (N.D. Cal. 2015)*) (see DOJ press release, Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution, 6 April 2015).

More recently, the DOJ opened a criminal investigation into the use of rental recommendation pricing software provided by RealPage and used by residential property landlords and management companies. The DOJ and several states later filed a civil lawsuit against RealPage, alleging that its pricing algorithm software and business practices violated Sections 1 and 2 of the Sherman Act.

The government plaintiffs claimed that:

- Competing landlords and property managers violated Section 1 by sharing non-public, competitively sensitive data with RealPage.
- The agreement to use RealPage's software violated Section 1 by aligning users' pricing.
- RealPage violated Section 2 by monopolising, and attempting to monopolise, the commercial revenue management software market through exclusionary conduct. This conduct took the form of amassing a large amount of competitively sensitive data from competing landlords. Due to scale advantages and self-reinforcing feedback effects, competitors could not replicate this

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without engaging in similar practices of sharing sensitive information and enforcing compliance with pricing recommendations

(See Legal Update, Key Allegations: DOJ Sues RealPage Over Rental Pricing Software.)

The attorneys general for the District of Columbia and State of Arizona have also filed suits against RealPage.

Private suits alleging algorithmic price fixing are also flourishing, but so far with limited, or at least mixed, success. For example:

- In *In re: RealPage, Inc., Rental Software Antitrust Litig.*, 2023 WL 9004806 (M.D. Tenn. Dec. 28, 2023), a class action filed by a group of multi-family housing renters against RealPage survived a motion to dismiss. However, similar claims filed by a group of student housing renters against RealPage were dismissed.
- In two private class actions brought against hotel operators in Las Vegas and Atlantic City, respectively, plaintiffs alleged that the use of common pricing-recommendation software constituted hub-and-spoke conspiracies to fix prices. However, both cases were dismissed in the defendants' favour. The courts' dismissals were largely based on the conclusion that the hotels adopted the pricing software years apart and not collusively, nor did they agree to fix prices with one another. The plaintiffs also failed to allege that the pricing software pooled confidential competitor data for use in the algorithm's pricing recommendations.

Nevertheless, federal and state government, as well as private plaintiffs, are unlikely to be deterred.

The DOJ and FTC have filed multiple statements of interest in various civil actions involving algorithmic pricing, offering useful insights into their thinking. The agencies position is that competitors could be found to have taken part in concerted action (that is, collusion) when they knowingly delegate authority to make pricing decisions to a common entity, where that common entity feeds non-public and competitively sensitive information into a common pricing algorithm that then generates pricing recommendations.

In the government's view, there may be actionable price-fixing even if competitors do not follow the recommendations and this may be unlawful even where there is no direct communication between the competitors. In United States v. Agri Stats, Inc., No. 0:23-cv-03009 (D. Minn. Sept. 28, 2023), the DOJ filed a statement of interest claiming that "information sharing alone can violate Section 1 [of the Sherman Act], even without proof of an agreement to fix prices." They also argued that sharing aggregated data can still violate antitrust laws, even if not linked to individual competitors, where the information exchange harms competition. (See Legal update, Key Allegations: DOJ Sues Agri Stats for Facilitating Meat Processor Information Exchange.)

Notably, cases have so far followed a traditional pattern of using algorithms to implement classic cartels or using third-party software suppliers to facilitate cartels. Competition authorities are yet to identify collusion based solely on pricing algorithms maintaining prices at a certain level without human intervention. However, experimental evidence suggests that AI could enable self-learning algorithms to collude autonomously (see SSRN: Artificial Intelligence, Algorithmic Pricing and Collusion).

This is an area that is developing quickly, particularly with the increasing use and power of AI. In the meantime, the EC published guidelines setting out their approach:

- If a pricing practice is illegal when implemented offline, it is likely it will also be illegal when implemented online.
- Firms taking part in illegal pricing activities will not be able to avoid liability by claiming that an algorithm is to blame.

(See Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreement.)

For a discussion of the key legal issues raised by generative AI (GenAI) tools in the area of competition law, see Article, Expert Q&A on the competition law issues raised by generative AI.

Merger Control

Higher Levels of Intervention

Competition authorities have recently adopted a more interventionist approach when exercising their merger control powers, particularly in the digital space.

Authorities that feel there has been historical under-enforcement may see the merger control regime as a powerful tool where they can immediately increase their impact. Merger control rules do not allow for enforcement across the entire economy as authorities can only intervene where there is a transaction and, in most cases, the transaction must fall within their jurisdictional thresholds. However,

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the merger rules do present an opportunity for relatively quick and potentially high-profile results.

In addition, the public outcome of a merger review affects both the merging parties and other market participants considering transactional activity. This impact is particularly significant where a competition authority heavily scrutinizes a deal or prohibits it.

Competition authorities have also sought to claim jurisdiction over a wider set of transactions, reflecting this more interventionist approach. This change may be due to concerns that they:

- Have not been able to review past deals that may have resulted in reduced competition.
- Believe prior unchallenged transactions have resulted in too much concentration or an otherwise uncompetitive market.

Historically, technology and digital sector deals have received relatively little scrutiny, with few challenged or blocked. However, there is growing scepticism that all mergers between technology companies are good (or, at worst, neutral) for competition.

The US agencies (especially under the Biden administration), the CMA, and the EC have led this shift, though other jurisdictions have also shown more interventionist and aggressive enforcement. This has resulted in:

- More recent transactions being prohibited.
- An increasing number of deals requiring remedies to be approved.
- Greater scrutiny of all deals.

There has also been more deals being abandoned before competition authorities issue a final decision.

Attempts to Expand Jurisdictional Reach

EU Merger Regulation

One of the clearest examples of a competition authority seeking to expand the scope of its jurisdictional reach, without actually introducing new law or changing the merger control thresholds, was the European Commission's 2021 policy approach to Article 22 of the EU Merger Regulation (*139/2004*).

Article 22 allows national competition authorities of EU member states to refer transactions to the EC, even where the deal does not meet jurisdictional thresholds under the EU Merger Regulation. Though not required under Article 22, the EC's historic practice was to only accept referrals from authorities with jurisdiction over the deal.

However, on 26 March 2021, the EC published new guidance on the application of the referral mechanism set out in Article 22 for certain categories of cases (Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases 2021/C 113/01). The new guidance allowed referrals even where the national competition authority lacked jurisdiction to review the transaction. This change followed the EC's concerns that important strategic transactions were not being scrutinized on competition grounds because the target businesses were too small to register on jurisdictional thresholds.

The guidance also stated that the EC would focus on deals where at least one party's turnover "does not reflect its actual or future competitive potential." This was said to particularly apply to situations where one of the companies was an important innovator or has significant competitive potential. The EC would also consider the deal's value (that is, the price that the buyer was willing to pay) when deciding whether to accept a referral, as this often reflects the target company's competitive significance.

The EC indicated that this mechanism primarily targeted acquisitions of early-stage companies in technology and pharmaceutical sectors, and would only be used rarely. However, this change introduced uncertainty into what was previously a clear-cut process of determining whether the EU Merger Regulation applied to a deal or not. When the EC announced the new policy, several member state competition authorities, including the BKA, indicated that they would only refer a deal under Article 22 if they had jurisdiction themselves.

Illumina's attempted acquisition of Grail became something of a test case for the revised approach to Article 22. This transaction was not notified in any jurisdiction as it did not meet any merger control thresholds. However, it was referred to the EC by several member state competition authorities.

Following substantive review, the EC prohibited the transaction, despite the parties having already completed the deal (which triggered parallel proceedings for gun-jumping). The General Court upheld the EC's prohibition decision, which the parties then appealed to the ECJ. The ECJ found that the EC's interpretation of Article 22 went too far and resulted in unjustified legal uncertainty. (Joined cases C-611/22 P - Illumina v Commission and C-625/22 P - Grail v Commission and Illumina, EU:C:2024:677.)

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As a result, the EC withdrew its decisions in *Illumina/Grail* and stopped its investigation of most other transactions notified to it following an Article 22 referral. On 29 November 2024, the EC withdrew the 2021 guidance.

Following the ECJ's judgment, several EU member states announced that they would consider introducing or strengthening call-in powers enabling their national competition authorities to call-in below thresholds transactions.

In 2023, Italy introduced a mechanism allowing the ICA to call in deals below the regular turnover thresholds. The ICA's guidance suggests this is more likely for targets such as:

- Start-ups with significant potential market power.
- Important innovators.
- Companies with access to competitively significant assets (for example, data, infrastructure, or IP rights).

These criteria echo themes in the EC's 2021 guidance for Article 22.

Jurisdictional Thresholds

Several countries have introduced new value-based limbs to their jurisdictional thresholds. These are designed to catch deals where the target company may not generate material revenue, but the purchase price suggests that the buyer considers it strategically important.

For example:

- Germany, Austria, and South Korea have introduced mandatory notification for deals that meet the value thresholds.
- The Common Market for Eastern and Southern Africa (COMESA) has introduced an equivalent new threshold for deals involving digital platforms.
- Turkey has applied reduced thresholds for technology undertakings.
- Japan has introduced a new voluntary threshold for deals where the target is small, but the deal value is high.
- China has introduced the Anti-Monopoly Law 2022. This grants the regulator power to call in below-threshold concentrations and provides the parties with an opportunity to file before being investigated.
- India has introduced a new deal value limb to its jurisdictional test.

A market share or share of supply test can assess a target's respective weight despite a lack of significant turnover. Such tests exist in Spain, Portugal, the UK, and Australia. These tests tend to allow competition authorities some flexibility in exerting jurisdiction.

For example, while the UK has not yet changed its jurisdictional thresholds (this will happen when the DMCCA comes into force on 1 January 2025), it has been broadening the application of its existing share of supply test. By exploring the boundaries of this test, it aims to catch transactions which may not otherwise be caught. The Competition Appeal Tribunal has confirmed the CMA's broad discretion in applying the share of supply test and establishing a UK nexus, even where one party has no sales or direct presence in the UK. The CMA has taken an expansive interpretation of this test in several cases, including Meta/Giphy, Sabre/Farelogix, and Roche Holdings/Spark Therapeutics.

US agencies have always had powers to review deals that fall below jurisdictional thresholds, even if these deals have been closed for some time or have previously been notified and approved. Recently, they appear to be more keen to litigate and address these issues through monopolization cases. For example, the FTC is seeking to unwind Meta's past acquisitions of:

- Instagram, in 2012.
- WhatsApp, in 2014.

US agencies have also increased their focused on killer acquisitions and transactions that potentially eliminate future competition between merging firms. Jonathan Kanter prioritized these transactions, referring to monopolists' simple strategy to "buy up any firm that shows even a modest potential to develop into a competitive threat".

The FTC and DOJ have challenged several transactions, including:

- CDK Global's attempted acquisition of Auto/Mate, on the grounds that the target company was an "innovative, disruptive challenger."
- Visa's attempted acquisition of Plaid on the grounds that the target company was a "nascent competitive threat."

In both cases, the parties abandoned the deal in the face of this opposition.

The DOJ challenged the Sabre's acquisition of Farelogix, arguing that Farelogix had introduced much-needed innovation and competition into

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booking services markets. Though the appeals court later overturned the district court's decision to block the deal, the parties had already abandoned it. This was partly due to the CMA's prohibition decision.

The FTC challenged Meta's acquisition of Within, alleging that the transaction threatened to eliminate "both present and future competition" in the VR dedicated fitness apps market and the broader market for VR fitness apps. However, the district court denied the FTC's request for a preliminary injunction. The FTC's monopolization case against Meta regarding its completed acquisitions of Instagram and WhatsApp alleged that they extinguished nascent competition.

Other jurisdictions are upgrading their merger control regimes from voluntary to mandatory systems. For example:

- In June 2024, Egypt introduced a new mandatory regime in place of its previous voluntary regime.
- In early 2026, Australia will replace its long-standing share-of-supply-based voluntary regime with a turnover-based mandatory system.

Companies designated under new *ex-ante* regimes for large platforms and digital companies may have additional requirements to inform competition authorities about any deals that they undertake (see Moving from Ex-Post Enforcement to Ex-Ante Regulation). For example, Article 14 of the DMA requires companies designated as gatekeepers to inform the EC about proposed transactions, regardless of size.

Greater Scrutiny in Substantive Review of Mergers

Many competition authorities have been applying greater scrutiny to transactions under review, while also seeking to expand their jurisdictional scope.

The CMA commissioned a report to review its past merger decisions, particularly in the digital space (see Lear: Ex-post Assessment of Merger Control Decisions in Digital Markets: Final Report). This review led the CMA to acknowledge that some of its previous decisions may have overlooked relevant evidence and cleared transactions without sufficient scrutiny. For example, Facebook's (now Meta) acquisition of Instagram.

Many competition authorities in Europe, the US, and beyond, also believe merger control has been under-enforced.

In April 2021, the CMA, BKA and ACCC issued a joint statement calling for rigorous merger control across all economic sectors, paying particular attention to technology transactions. The statement addressed potential killer acquisitions, noting that future uncertainty should not be used as a reason for clearing anti-competitive deals. It stated "an acquisition of a small start-up could in reality be the acquisition of what would have been a major competitive threat to the purchaser in the long-term." (See CMA: Joint Statement on Merger Control Enforcement.)

China has sped up its merger review process for straightforward deals, while increasing scrutiny of more complex transactions. The Chinese State Administration for Market Regulation's lengthy review of the Intel/Tower transaction caused the parties to abandon it 18 months after announcement.

While most reviewed deals still receive unconditional clearance, more transactions have been prohibited on competition law grounds or required remedies for approval. Parties to transactions may find it harder to convince competition agencies to accept remedies to address identified concerns.

The effects of this more aggressive enforcement extend beyond the number of deals requiring remedies or being blocked. Some deals will be abandoned due to regulatory headwinds, while others may never leave the boardroom. As Jonathan Kanter noted:

> "As boardrooms take notice, the effects of those victories are reverberating across the economy, driving abandonments of anticompetitive deals and helping deter unlawful mergers and conduct in the first place. As my predecessor, the great Bill Baer, said, some deals should never leave the boardroom. We have seen more than 20 mergers abandoned in response to division concerns in just the last two and a half years and we are seeing fewer problematic deals come to us in the first place." (See DOJ: Assistant Attorney General Jonathan Kanter Delivers Remarks at the 2024 Georgetown Law Global Antitrust Enforcement Symposium.)

Increased scrutiny of remedies has led to inconsistent outcomes across different agencies for the same deals. For example:

- Google/Fitbit was unconditionally approved in the US and conditionally approved by the EC, South Africa, and Japan. The CMA's then Chief Executive, Andrea Coscelli, commented that the CMA, which did not have jurisdiction over the

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deal, would not have accepted the remedies agreed with the EC.

- Konecranes/Cargotec was conditionally approved by the EC, but prohibited by the CMA.
- Microsoft/Activision was conditionally approved by the EC. It was initially prohibited in the UK, but later cleared on the basis of a fix-it-first remedy (which differs from the EC remedy).
- Booking/Etraveli was unconditionally approved by the CMA, but prohibited by the EC.
- Amazon/iRobot was unconditionally approved by the CMA, but abandoned by the parties after the EC raised concerns.
- Broadcom/VMWare was unconditionally approved by the CMA and in the US, but required conditions for approval from the EC.

These examples represent a departure from global competition authorities' past efforts to ensure consistent outcomes in merger reviews of cross-border deals.

Some divergent outcomes will stem from local differences in the competitive landscape. However, an increasing number arise from differing approaches in what may be considered appropriate types of remedies to address competition concerns.

The EC has shown itself to be willing to accept behavioural remedies in suitable cases (for example, in Microsoft/Activision and Broadcom/VMWare). This is particularly true where remedies relate to ensuring access or interoperability. However, the CMA has traditionally maintained a strict position, insisting that behavioural remedies will rarely be appropriate. Although not a new position, this may lead to further inconsistencies as behavioural remedies are often better suited to resolving competition issues in the digital space, particularly where transactions raise vertical or conglomerate-type issues. (At the end of 2024, the CMA did potentially signal a greater tolerance for behavioural undertakings in Vodafone/CK Hutchison.)

US agencies are unlikely to accept any remedies, raising doubts about whether behavioural or structural commitments can effectively address competition concerns. Since Jonathan Kanter's appointment as Assistant Attorney General of the DOJ's Antitrust Division in 2021, the DOJ has only agreed to one consent decree. This was only accepted post-complaint when it appeared the DOJ would likely lose the case. The FTC's leadership has been similarly sceptical of merger remedies, preferring to challenge deals rather than settling them.

In 2023, the US updated its Merger Guidelines, following several court losses for US agencies, including in technology deals. Though not binding, the guidelines contain several updates relevant for digital deals, such as how to address multi-sided digital markets. (See DOJ and FTC: Merger Guidelines.) In addition, the agencies have proposed changes to the procedural filing process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. If enacted, parties would be required to provide significantly more data and information when notifying deals. This change would align the US process more closely with the EC or CMA, moving away from its previous lighter-touch approach.

Novel Theories of Harm

Competition authorities have increasingly pursued concerns in non-horizontal deals in the digital sector, often exploring expanded or novel theories of harm that reflect new digital business models and the ways that firms compete. This signals a shift from the historic view that vertical and conglomerate transactions were typically neutral or beneficial to competition.

In 2001, the EC's prohibition of the GE/Honeywell merger, partly due to conglomerate concerns, was a rare divergence from US agencies at the time. While the EU General Court upheld the decision, it did so based on horizontal overlaps between the parties, rather than any vertical or conglomerate effects.

However, vertical and conglomerate theories of harm are being increasingly considered. Greater international co-operation and dialogue between competition authorities means that these new theories of harm are being applied and evaluated in different jurisdictions and even across the same cross-border transactions.

Some of the novel or expanded theories of harm applied to deals in the digital space include:

- **Dynamic potential competition.** The CMA's updated Merger Assessment Guidelines, published in 2021, describe dynamic competition as involving an assessment of future competition between firms not currently competing. The guidelines allow the CMA to take a flexible, forward-looking approach to assessing potential market entry or future competition. (See CMA: Merger Assessment Guidelines (CMA129).) Under this theory of harm, the CMA prohibited Meta's acquisition of Giphy, despite Giphy never generating any revenue from UK customers in the relevant service.

  In the US, the FTC challenged Meta's proposed acquisition of Within, a virtual reality fitness app

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developer. The FTC's complaint argued that Meta, as a key player in the VR sector, was a potential entrant into the VR fitness app market and had likely had an influence on competition. Rather than entering the market, Meta had acquired Within and removed itself as a potential entrant. Though the court validated the FTC's theory of harm, it found that it was unsupported by the evidence, as Meta lacked certain unique and critical elements which would be required to enter the market (see Legal Update, Key Findings from the Meta/Within N.D. Cal. Decision). The FTC dropped the case.

- **Ecosystem.** The EC, for the first time based on ecosystem concerns, prohibited Booking's attempted acquisition of Etraveli. It found that Booking had a strong position in the hotel online travel agency market and that the deal would enable Booking to expand its travel services. But, the starting point was Etraveli's relatively modest position in flight online travel agency services. Flight bookings are one of the main acquisition channels for hotel booking customers and the EC felt that the deal would make it harder for competitors to contest Booking's position.

  The EC noted that flights often lead to cross-sales of accommodation, and Booking would likely benefit from customer inertia, particularly as (given its size) many customers would already be familiar with its platform.

  Although looking ostensibly like a conglomerate effects case, the EC's concern differed from typical conglomerate effects cases. Rather than focusing on Booking leveraging market power into new adjacent markets, it considered how adding elements would strengthen its core market position.

  It is arguable that many might see an integrated hotel and flight booking service as a better product that users would want. Booking has appealed the EC's decision to the General Court. Notably, the CMA cleared the transaction unconditionally at Phase 1.

- **Innovation markets.** The importance of innovation as a competitive differentiator in digital markets means that competition authorities have become more focused on how deals affect the development of new products. This was a key issue in Adobe's attempted acquisition of Figma, which was abandoned by the parties following concerns raised by the EC and CMA. Authorities increasingly consider competition in innovation in merger reviews, particularly in sectors that rely heavily on R&D.

These theories of harm are not necessarily new, but they are finding new applications in deals between parties in the digital sector.

In some instances, competition authorities have found that digital market characteristics have allayed potential concerns identified in a transaction. For example:

- The CMA unconditionally cleared the acquisition of Avast by NortonLifeLock. It concluded that, among the other rivals that the merged entity would still face in the markets for the supply of anti-virus and privacy software, Microsoft's security applications offered an increasingly important alternative for consumers, given Microsoft's unique position in the market as owner of the Windows operating system (NortonLifeLock Inc/Avast plc).
- The French Competition Authority cleared transactions in the advertising space where Google and Facebook would continue to have a strong market position in online advertising (Axel Springer/Concept Multimedia and TFI/Aufeminin).
- The Portuguese *Autoridade da Concorrencia* approved a joint venture to create a new e-commerce platform, also considering that Google and Facebook would continue to have a strong market position for online advertising (Sonae/CTT-Correois de Portugal JV).
- The Spanish *Comision Nacional de los Mercados y la Competencia* approved a merger between two competitors in the supply of anti-plagiarism software. It considered that Google and Microsoft's recent entry into the market for plagiarism software solutions led to increased competitive pressure on the merged entity (Turintin/Ouriginal Group).

Moving from Ex-Post Enforcement to Ex-Ante Regulation

Many countries and competition law experts debate whether existing legislative frameworks and rules can effectively address the challenges of the digital economy.

There is a fairly widespread view that competition laws enforced *ex-post* (that is, only after a suspected breach has taken place) are not an effective way to deal with fast-paced and dynamically evolving technology markets. Instead, *ex-ante* regulation is considered more appropriate.

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This requires companies to operate within a more detailed legislative framework, with clear and quick repercussions for those that do not follow the rules.

Ex-post enforcement can allow for more flexibility and prevent over-regulation. However, there are doubts as to its effectiveness in curbing large technology companies' power. For example, investigations typically take too long, remedies may be ineffective or too late, and fines levied may not have had the intended deterrent effect.

Introducing new laws requires more time and political capital than adapting existing rules. Therefore, while several new legislative proposals exist, competition authorities are also reviewing current laws and seeking to:

- Revise these laws to be more relevant to the digital economy. For example:
  - the EC and CMA have revised the vertical agreements block exemptions and guidelines and the block exemptions and guidelines in relation to horizontal agreements (see Legal Updates, Commission adopts new vertical agreements block exemption regulation and Guidelines on vertical restraints and The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 published);
  - the EC updated its Market Definition Notice (see EC Market Definition Notice); and
  - the US updated its Merger Guidelines (see US Merger Guidelines).
- Reinterpret policies to allow for broader intervention. For example, the FTC, DOJ, CMA, and EC have all adopted more aggressive merger control enforcement. Notably, the EC failed to expand the application of Article 22 of the EU Merger Regulation (see Attempts to Expand Jurisdictional Reach).

Nevertheless, a growing number of jurisdictions are introducing new legislation to target the application of competition law in digital markets.

EU Digital Markets Act

A key example of this is the DMA, which entered into force on 1 November 2022 and applied from 2 May 2023. The DMA is intended to provide the EC with a framework for regulating so-called "gatekeepers", that is, large technology companies which have an entrenched and durable position in relation to certain specified "core platform services". These firms often serve as unavoidable gateways for companies to reach end-users.

The DMA is an example of *ex-ante* regulation. It provides a prescriptive set of specific rules and obligations that designated companies must follow, with sanctions for non-compliance, rather than providing rules that can only be applied after the event (and typically after a lengthy investigation). The DMA applies alongside existing EU competition law, and its obligations and prohibitions are clearly based on previous competition law cases.

Much of the DMA addresses concerns raised by recent investigations into technology companies (for example, interoperability, unbundling of data and software and hardware, leveraging, self-preferencing, FRAND and other terms of access, and rules relating to data). However, some of these investigations are not yet completed or have only been completed recently and may still be subject to appeal.

The DMA sets out qualitative and quantitative criteria to identify gatekeepers. Qualitative criteria include:

- Having a significant impact on the internal market.
- Providing a core platform service that is an important gateway for business users to reach customers.
- Having an entrenched and durable position in the market.

When quantitative criteria (in terms of turnover or value and volume of EU business and end-users for the last three financial years) are met, this creates a rebuttable presumption that a company is a gatekeeper. Companies can use qualitative factors to argue against this presumption. Conversely, the EC can designate a gatekeeper following investigation, even if the quantitative criteria are not met.

Companies that use economics-based arguments against gatekeeper designation, such as those based on market definition or attempts to demonstrate efficiencies, will be disregarded. These arguments are not considered relevant to the designation of a gatekeeper under the DMA.

Once a company is designated as a gatekeeper, the relevant obligations and prohibitions begin to apply after a six-month period. These are set out in the DMA and include:

- Use, access to, and portability of data.
- Self-preferencing.
- Tying and bundling.
- Allowing sideloading of apps and app stores.
- Promoting switching and multi-homing.

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- Interoperability.
- Prohibiting unfair contracts terms, such as price parity clauses.

The underlying goal of these obligations and prohibitions is to ensure contestability and fairness.

Firms designated as gatekeepers must comply with all the prohibitions and obligations listed in the DMA in relation to their core platform service, regardless of specific characteristics or market context. Unlike the regular competition law regime, the EC does not need to undertake market definition exercises or show behaviour to be anti-competitive. Efficiency arguments brought by parties seeking to justify anti-competitive behaviour are not accepted.

The DMA can be viewed as overly prescriptive in its obligations and prohibitions for designated gatekeepers. However, once identified as gatekeepers, the obligations that companies must follow are immediately clear, meaning that they can be implemented more quickly. Companies can also immediately understand and adapt their practices for compliance.

For more information on the DMA, see Practice Note, Digital Markets Act (EU): overview.

New and Proposed Legislation in Other Jurisdictions

Though the DMA is arguably the most important piece of standalone legislation regulating the behaviour of gatekeepers, it was not the first to come into force.

In Germany, section 19a of the ARC introduced enhanced regulation over the market activities of certain large technology companies, designated as having paramount significance for competition across markets (which may or may not mean that they are also dominant). The rationale for this *ex-ante* legislation is that earlier antitrust intervention may be justified in certain digital markets. The new law imposes obligations on these firms to prevent them from taking certain actions.

The UK is also introducing legislation to address large technology companies with entrenched market power, though its approach differs from the DMA. The DMCCA, which enters into force on 1 January 2025, will take a more individualized approach to tailoring a company's obligations. Where a company satisfies certain quantitative criteria, the CMA will undertake a formal investigation to identify if the company carries out digital activity linked to the UK. It will then assess if the company meets the conditions for "strategic market status", namely, if the company has both:

- Substantial and entrenched market power.
- A position of strategic significance regarding its digital activities.

Unlike the DMA's presumptive approach, a company can only be designated as having strategic market status in the UK if it meets the quantitative criteria. The CMA will impose certain tailored conduct requirements where a company is designated as having strategic market status, arguably avoiding situations of over-regulation. The DMCCA also gives the CMA the power to make pro-competitive interventions if, following investigation, it considers that there would be an adverse effect on competition in digital activities. The CMA will have powers to impose behavioural and structural remedies. See Legal Update, Digital Markets, Competition and Consumers Act: CMA final guidance on digital markets competition regime.

In the US, there have been several efforts to introduce new legislation addressing digital market practices. The previously proposed Open App Markets Act and American Innovation and Choice Online Act aimed to prohibit conduct similar to the DMA. Though several proposals have been put forward, federal legislation is unlikely due to the current lack of political consensus in the US House and Senate. Various US states have also considered adopting more robust competition laws.

This trend of seeking to control Big Tech companies' perceived market power through *ex-ante* regulation extends beyond Europe, the UK, and the US. Other regulatory and enforcement initiatives around the world include:

- Japan's Act on Improving Transparency and Fairness of Digital Platforms (Act No. 38 of 2020). This law aims to promote greater transparency and fair dealing by digital platforms. It relies on the voluntary initiatives of platforms, rather than being enforced by the government. (Ministry of Economy, Trade and Industry: Digital Platforms.)
- South Korea's proposed Act of Promotion of Platform Competition. This bill aims to regulate large platforms, imposing obligations preventing them from certain practices (similar to the DMA). This follows the previous amendment to Korea's Telecommunications Business Act in 2022, which prevented large platforms from requiring developers to use their in-app payment systems.
- India's investigation into WhatsApp and Facebook (see Suo Moto Case No. 01 of 2021). India has also

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proposed introducing its own *ex-ante* regulatory regime through the Digital Competition Act.

- Thailand's Royal Decree on Regulating the Digital Platforms requires digital platform services to notify the Electronic Transactions Development Agency of their business operations and comply with relevant obligations. Digital platform services are defined as any service that facilitates or mediates transactions between users through a digital platform.
- Brazil looking to introduce an *ex-ante* regime to regulate digital platforms, similar to the DMA. This approach is intended to complement Brazil's telecommunications legislation and will be enforced by the National Telecommunications Agency.
- Turkey's consideration of new *ex-ante* regulatory legislation, largely based on the DMA. In the meantime, the Turkish Competition Authority has been looking into issues related to digital markets and completed a Digital Markets Study in mid-2023.
- The ACCC's Digital Platforms Branch, which is conducting a five-year inquiry into Australia's digital platform services market and its impact on competition and consumers. The inquiry began in 2020, providing the government with a report every six months. The final report is due by 31 March 2025.
- The ACCC has already noted high levels of market concentration and some anti-competitive conduct among digital platform service providers. It has recommended introducing targeted and up-front obligations to complement existing competition laws. The government has provided in-principle support for the ACCC's recommendations and has agreed to consult publicly on an appropriate legislative framework.

These new legislative measures aim to address some of the substantive concerns identified in digital markets. They seek to identify significant companies and impose obligations on them. While designation criteria vary, the aim is to identify a small number of companies that will be subject to upfront obligations in certain business activities. It is likely that all the GAFAM companies may be designated for at least some of their activities. But, they will not be the only companies designated, as can be seen already under the DMA, with Bytedance and Booking also having been identified as gatekeepers. Additionally, companies may be designated for different activities across the various *ex-ante* regimes.

Obligations for designated companies will also differ based on jurisdictional laws. Due to varying regulations and approaches, companies may need tailored or separate service models for different jurisdictions. Alternatively, they may seek to identify the lowest common denominator for compliance across regimes.

In some cases, the obligations imposed by these *ex-ante* regimes go beyond what is required by traditional competition law. For example, the DMA prohibits gatekeepers from imposing any type of most-favoured nation (MFN) clause, also known as price parity clauses, whether wide or narrow. However, under the EC's Vertical Block Exemption Regulation (2022/720):

- Wide MFN clauses are listed as "excluded restrictions" that cannot benefit from the block exemption (though they are not considered hardcore restrictions).
- Narrow MFN clauses can benefit from the block exemption as long as the parties' market shares are below the 30% threshold.

Despite the introduction of *ex-ante* regimes, competition authorities continue to use their existing *ex-post* powers in certain cases. Many technologies fall outside the scope of these regimes, including fast-developing fields such as GenAI. These technologies may not qualify as core platform services or have strategic market status. In addition, *ex-ante* regimes may not address all anti-competitive practices. For example:

- Companies may lack designation under the relevant regime.
- Companies' behaviour may fall outside the DMA's scope of ensuring contestable and fair markets.

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