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EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2022

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's *Europe, Middle East and Africa Antitrust Review* 2022 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, we have added a specific focus on the digital economy and vertical agreements in the European Union, as well as private litigation in France and merger control in Russia, alongside updates from the European Commission, Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Sweden, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel and Mauritius.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

Global Competition Review
London
June 2021

European Union: EC puts the Focus on the Digital Economy

Stavroula Vryna, Richard Blewett, Nelson Jung and Thomas Vinje*
Clifford Chance

IN SUMMARY

The pace and intensity of competition law enforcement continues to accelerate even as additional tools to tackle digital markets are introduced.

DISCUSSION POINTS

- Proposals to introduce new legislation specifically targeting the digital economy
- Updates to existing guidelines aimed at strengthening enforcement
- Recent developments in the application of competition law in the digital sector

REFERENCED IN THIS ARTICLE

- European Commission
- Proposed Digital Markets Act
- Proposed Digital Services Act
- EC investigations into Apple Inc
- EC investigation into Amazon Inc
- EC investigation into Google
- *Google/Fitbit* merger
- Vertical Block Exemption Regulation
- EU Merger Regulation

Legislation

On 15 December 2020, the European Commission (EC) published a draft legislative package (the Digital Services Act package) comprising proposals for two new EU Regulations to govern the digital economy: the Digital Markets Act (DMA) and the Digital Services Act (DSA).[1, 2] The DMA and the DSA must be approved by the European Parliament and the Council of the European Union (the Council) (representing the member states) for adoption under the ordinary legislative process – a process that may take 18 to 24 months. The final texts of the DMA and the DSA are likely to be hotly contested and may undergo substantial change before they come into force.

The DMA

The DMA represents the first attempt by the European Union to enact ex ante regulation to promote contestability and fairness in the digital economy that (if adopted in its current form) will fundamentally change the way in which competition rules are applied in the digital sector.

In recent years, antitrust experts have consistently expressed concerns about the economic power exercised by large digital players as well as the critical position that certain digital companies occupy as intermediaries between other businesses and their customers, and the dependency that this creates.[3]

What does the DMA seek to achieve?

Investigations into anticompetitive conduct typically take several years to complete, followed by several years of litigation before the EU courts. In the digital economy, which evolves incredibly rapidly, this has often resulted in prolonged uncertainty and irreversible harm to competition and consumers. The DMA enables the EC to act more quickly and without needing to establish an infringement of EU competition rules.

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1 The Digital Services Act package can be accessed from the website of the European Commission on the 'The Digital Services Act package' page.

2 The announcement had been preceded by an open public consultation that took place between 2 June and 8 September 2020). The consultation and the contributions of consultation participants can be accessed from the website of the European Commission on the 'Consultation on the Digital Services Act package' page.

3 For example, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (4 April 2019) and Report of the Digital Competition Expert Panel, 'Unlocking digital competition', (13 March 2019).

At the heart of the DMA is a list of 18 proposed prohibitions and obligations, regulating the conduct of digital companies designated as gatekeepers.[4] Those 'dos and don'ts' are one-size-fits-all – for the most part, they apply to all gatekeepers irrespective of their business model.[5] The EC has based the list of dos and don'ts on real examples of conduct by known large digital companies that the EC is formally investigating or about which it has previously expressed concerns.

An earlier, far-reaching proposal to introduce a power to investigate markets and impose remedies where those markets were at risk of tipping into monopoly was dropped from the Digital Services Act package, although aspects of this proposal were subsumed into the DMA.[6]

To which companies will the DMA apply?

The DMA will apply to companies that the EC will designate as gatekeepers. Gatekeepers, are providers of one or more core platform services (CPSs)[7] on the following exhaustive list:

- online intermediation services, including, among other things, app stores and online marketplaces;[8]
- online search engines, including not just display online search but also search through any other means (eg, voice);
- online social networking services;
- video-sharing platform services;
- number-independent interpersonal communication services (eg, email and other messaging services);
- operating systems;

4 Articles 5 and 6, Digital Markets Act (DMA).

5 There are, however, some provisions specifically addressed to specific types of services, such as online intermediation services (article 5(b), DMA), advertising services (article 5(g), DMA) and app stores (article 6(k), DMA).

6 For example, articles 14-17, DMA regarding market investigations.

7 The EC may, however, conduct a market investigation with the purpose of examining whether additional services within the digital sector should be added to the list of CPS (article 17, DMA).

8 The DMA defines 'online intermediation services' by referring to the definition in point 2 of article 2 of the Platform-to-Business Regulation (Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services).

- cloud computing services; and
- advertising services provided by a provider of any of the foregoing CPSs.[9]

In the EC's view, CPSs feature several characteristics that service providers can exploit, including extreme economies of scale, very strong network effects, multi-sidedness, lock-in effects and an absence of significant multi-homing.

A provider of a CPS will be designated as a gatekeeper if all the following three conditions met:

- it has a significant impact on the internal market;
- it operates a CPS that serves as an important gateway for business users to reach end users; and
- it enjoys an entrenched and durable position in its operations, or it is foreseeable that it will do so in the near future.[10]

To make it relatively straightforward to designate gatekeepers, the EC relies on rebuttable presumptions. A company is presumed to satisfy the gatekeeper conditions in respect of a specific CPS if three cumulative quantitative thresholds are met, relating to (1) turnover, market capitalisation or fair market value, (2) number of users and (3) stability of market presence. Each of the three quantitative thresholds reflects one of the three gatekeeper conditions.[11]

Companies that meet the quantitative criteria can seek to avoid the gatekeeper designation by providing 'sufficiently substantiated' arguments that they do not satisfy the three gatekeeper conditions.[12] If they do so, the EC will open a market investigation to determine whether designation is appropriate.[13]

9 Article 2, DMA.
10 Article 3(1), DMA.
11 Article 3(2), DMA.
12 For instance, taking into account the characteristics of its CPS and the market structure in which it operates.
13 Article 3(4) and 3(6), DMA.

Companies that do not meet the quantitative thresholds can still be designated as gatekeepers if the EC so determines following a market investigation.[14] As part of the market investigation, the EC will make a qualitative (rather than quantitative) assessment of the (potential) gatekeeper's market presence as well as structural characteristics of the market.[15]

Finally, the DMA gives the EC the power to designate not only existing gatekeepers but also emerging ones.[16, 17] A company designated as an emerging gatekeeper will only be subject to a sub-set of the 18 dos and don'ts deemed appropriate and necessary to prevent the emerging gatekeeper from achieving an entrenched and durable position through unfair means.[18]

The gatekeeper criteria are low enough to capture not just big tech but also a few other players active in Europe. In December 2020, the EC expressed the expectation that approximately ten European companies would be caught.

What restrictions will the DMA apply to gatekeepers?

The dos and don'ts of the DMA are based on the EC's real-world experience of enforcing antitrust rules in digital markets and primarily cover data-related practices, some forms of tying, interoperability with gatekeeping CPSs, transparency obligations when providing advertising services, and non-discrimination. Some key prohibitions and obligations that could have a significant impact are highlighted below.

- Article 5(a) prohibits gatekeepers from (1) combining personal data sourced from a gatekeeping CPS with data from other services offered by the gatekeeper or third-party services and (2) signing in end users to other services of the gatekeeper, unless the end user has been presented with the specific choice and provided meaningful consent in the sense of the EU General Data Protection Regulation.

14 Article 3(6), DMA.

15 Articles 3(6) and 15, DMA.

16 Companies that do not yet enjoy an entrenched and durable market position, but it is foreseeable that they will do so in the near future.

17 Articles 3(1)(c) and 15(4), DMA.

18 Article 15(4), DMA.

This will primarily affect companies active in digital advertising, which combine data to gain an advantage in targeted advertising.[19] As currently drafted, however, article 5(a) would still allow data combination if end users consent to it.

- Article 5(c), among other things, obliges gatekeepers to allow business users of their gatekeeping CPS freely to advertise offers to customers acquired via the gatekeeping CPS and transact with consumers without needing to use gatekeepers' mechanisms (eg, its payment mechanism) to carry out those transactions. This provision seems to be inspired by the EC's current investigations into Apple's App Store (the App Store) practices.[20] In practice, it would oblige app store owners, such as Apple, to allow app developers to promote offers to consumers acquired via the App Store and conclude contracts with them without necessarily using Apple's in-app purchase mechanism.[21]
- Article 6(j) obliges search engine gatekeepers to provide rivals with access on fair, reasonable and non-discriminatory terms to user-generated search data. Search engine gatekeepers would be required to share virtually all data generated by users, including the data about users' long-tail searches (ie, less common searches). This could have a dramatic impact on search engine competition.
- Article 6(k) is specific to app stores and obliges app store gatekeepers to apply fair, reasonable and non-discriminatory general conditions for app developers' access to the app store. Comparators that the DMA proposes using to determine the fairness of an app store's conditions of access are the prices charged and conditions imposed by other app stores, or by the same app store for different services to different types of end-users for the same service in different geographic regions in respect of the same service the gatekeeper offers to itself.[22] The DMA clarifies that this provision should not be equated to a general access right to app stores.[23]

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19 Facebook's data combination across its services (leading to the creation of user 'super profiles') was sanctioned by the German Federal Cartel Office (FCO) in 2019. See the FCO press release, 'Bundeskartellamt prohibits Facebook from combining user data from different sources' (7 February 2019).

20 European Commission (EC) press release, 'Antitrust: Commission opens investigations into Apple's App Store rules' (16 June 2020).

21 See below section on the EC's ongoing investigations into Apple's App Store practices.

22 Preamble 57, Proposed DMA.

23 ibid.

The EC has purposefully avoided using the DMA as a vehicle to make amendments to merger control rules.[24] Nevertheless, merger control is not unaffected: article 12 obliges gatekeepers to report to the EC any intended M&A transaction involving another digital service provider. Reporting the transaction discharges the gatekeeper's obligation, and there is no clearance process involved. This obligation is expected to put more transactions under the EC's radar, especially viewed in conjunction with the EC's recently amended interpretation of article 22 of the EU Merger Regulation (EUMR).[25]

The DSA

The DSA is the first major overhaul of the EU rules for the internet and online businesses since the introduction of the E-Commerce Directive 20 years ago. The DSA seeks to regulate the way that providers of online services interact with their customers and users and sets out obligations in respect of harmful or illegal content.

Updating the E-Commerce Directive

The Proposed DSA aimed to equip the European Union with a modernised and harmonised rulebook that will facilitate the free provision of digital services within the Union and create enhanced responsibilities for online intermediaries and platforms.

The DSA will not repeal the E-Commerce Directive but will instead replace certain provisions and coexist with other unrepealed provisions. The core principles under the E-Commerce Directive (ie, the liability regime, the prohibition of general monitoring and the internal market clause that safeguards the freedom to provide digital services across the European Union) have been maintained and, in some instances, built upon in the DSA proposal.

New obligations

The DSA introduces a series of new requirements that increase in their obligations depending on the type of service provider. They are divided into four layers, best visualised as concentric circles.

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24 Changing the existing merger control rules would have required the EC would need to rely on a different legal basis in the EU Treaties, which requires the unanimous approval of the EU member states.

25 On 26 March 2021, the EC issued guidance explaining its new approach to the interpretation of Article 22 of the EU Merger Regulation (EC Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 26 March 2021).

- Layer 1, the core, applies to all providers of digital services that connect EU consumers to goods, services or content, and includes an obligation on service providers established outside the European Union to designate a point of contact and legal representative within the Union for communications with regulators.
- Layer 2 creates additional obligations for providers of hosting services (eg, cloud or webhosting) and includes the implementation of a mechanism to allow third parties to notify them of illegal content.
- Layer 3 creates additional obligations for hosting service providers that disseminate their customers' information to the public (eg, app stores, marketplaces and social media). The obligations include a requirement to assign priority to notifications made by 'trusted flaggers', which are designated by national authorities, when dealing with notifications of illegal content.
- Layer 4 creates additional obligations for very large online platforms (VLOP), which are platforms with 45 million or more average monthly active users in the European Union. The obligations include higher standards on transparency, content moderation, advertising and reporting, owing to their impact on the economy and society, by carrying out risk assessments to mitigate any identified systemic risks.

Harmonisation

The E-Commerce Directive will remain the cornerstone of digital regulation. The DSA will complement it to ensure harmonisation across the European Union rather than introducing a range of targeted, sector-specific interventions. For example, it introduces:

1 measures to counter illegal content online, including goods and services, such as a mechanism for users to flag this content and for platforms to cooperate with trusted flaggers;
2 new rules on the traceability of business users in online marketplaces to help identify sellers of illegal goods;
3 wide-ranging transparency measures for online platforms, including on the algorithms used for recommending products and services to users;
4 obligations for VLOPs to prevent abuse of their systems by taking risk-based action, including oversight through independent audits of their risk management measures; and
5 an oversight structure to address the complexity of the online space.

In respect of point (5), member states will have the primary role, supported by a new European Board for Digital Services. For VLOPs, the EC will provide enhanced supervision and enforcement.

To become law, the DMA and the DSA proposals must be adopted jointly by the European Parliament and the Council, which can amend the EC's proposals.

The expectation is that the DMA and the DSA will enter into force in late 2022 or early 2023. France has the presidency of the Council from January to June 2022 and has expressed the desire to finalise the discussions under its Presidency.

Cases

Antitrust

Apple investigations

In 2020, Apple became subject to four formal EC antitrust investigations, three of which focus on the conditions Apple imposes on app developers in its App Store[26] and the fourth on Apple's practices regarding Apple Pay.[27]

The App Store investigations

On 16 June 2020, the EC announced[28] the opening of three formal investigations to assess whether Apple's rules for app developers seeking to distribute apps via the App Store violate competition law. All three investigations focus on rules imposed on app developers that directly compete with Apple's apps and services. Two of those investigations were prompted by complaints to the EC from competitors of Apple – audio streaming service Spotify and eBook and audiobook provider[29] Kobo; hence, they are limited to music streaming and eBooks and audiobooks respectively. The third investigation is a 'catch-all' that does not have a thematic focus.

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26 Case AT.40437, *Apple – App Store Practices* (music streaming); Case AT.40652, *App Store Practices* (e-books and audiobooks); and Case AT.40716, *Apple – App Store Practices*.

27 Case AT.40452, *Apple – Mobile Payments*.

28 EC press release, 'Antitrust: Commission opens investigations into Apple's App Store rules' (16 June 2020).

29 Spotify provided details to consumers and market participants about its complaint submitted to the EC in March 2019 in a dedicated microsite: www.timetoplayfair.com.

It is understood that at least two other Apple competitors – game developer Epic Games[30] and tracking device manufacturer Tile – have also submitted complaints to the EC regarding the App Store rules.[31]

The EC's investigations focus on the following two App Store terms:

- Apple obliges developers who want to sell digital content within their iOS apps (in-app sales) exclusively to use Apple's own payment mechanism, In-App Purchase (IAP).[32] For every in-app sale a developer makes via IAP, Apple takes a 30 per cent commission.[33] Apple gets full control over the billing relationship with users who purchase content via IAP, disintermediating developers from critical customer data; and
- Apple imposes anti-steering rules, restricting developers' ability to inform users of alternative purchasing possibilities outside apps. For instance, developers may not mention in their iOS app that their digital content is available for purchase (often cheaper) on the developer's own website.

On 30 April 2021, the EC announced that it had issued a statement of objections (SO) in the music streaming investigation (AT.40437), provisionally finding that Apple has distorted competition in music streaming services by abusing its dominance in the distribution of music streaming apps on iOS.

30 'Epic Game Files EU Antitrust Complaint Against Apple', Epic Games (17 February 2021).

31 In parallel, Epic Games is pursuing litigation against Apple before the US District Court for the Northern District of California, which does not focus on competition between Epic's and Apple's apps in the App Store, but rather on competition between Epic's own app store, the Epic Games Store, and the App Store, as well as competition between Apple's In-App Purchase and rival in-app purchase mechanisms. Epic's main claim is that Apple is monopolising those two markets.

32 See point 3.1.1 in Apple's App Store Review guidelines.

33 Apple's commission is reduced to 15 per cent of the transaction value for subscriptions having lasted for more than a year.

Several jurisdictions globally are also pursuing investigations or market studies regarding Apple's App Store practices. Notable examples include the United Kingdom,[34] Australia,[35] Japan,[36] the Netherlands[37] and the United States (both at the federal and state level).[38]

The Apple Pay investigation

On 16 June 2020, the EC opened a formal investigation into Apple's practices related to Apple Pay. Not to be confused with Apple's IAP, Apple Pay is Apple's proprietary mobile payment solution on iPhones and iPads used to enable payments in merchant apps and websites, as well as in physical stores.

The EC is particularly concerned that Apple distorts competition for mobile payment solutions and reduces choice and innovation for consumers through:

- its terms, conditions and other measures for integrating Apple Pay for the purchase of goods and services on merchant apps and websites on iOS and iPadOS devices;
- its limitation of access to the near field communication (NFC) functionality ('tap and go') on iPhones for payments in stores, as Apple Pay is currently the only mobile payment solution that can access the NFC technology embedded on iOS mobile devices for payments in stores; and
- alleged refusals of access to Apple Pay.

Amazon investigations

EC investigation into Amazon's marketplace practices

In November 2020, the EC issued an SO to Amazon, provisionally finding that some of its marketplace practices are anticompetitive. Amazon's marketplace enables both its retail business and third-party sellers to offer products to consumers. The EC's

34 UK Competition and Markets Authority press release, 'CMA investigates Apple over suspected anti-competitive behaviour' (4 March 2021).

35 Australian Competition and Consumer Commission Digital Platform Services Inquiry 2020–2025.

36 Japan Fair Trade Commission press release, 'Report regarding trade practices on digital platforms (Business-to-Business transactions on online retail platform and app store)' (31 October 2019).

37 The Netherlands Authority for Consumers and Markets (ACM) news, 'ACM launches investigation into abuse of dominance by Apple in its App Store' (11 April 2019); and ACM, 'Market study into mobile app stores'.

38 For example, the hearing that the US Senate House Judiciary Committee (Subcommittee on Competition Policy, Antitrust, and Consumer Rights) held regarding 'Antitrust Applied: Examining Competition in App Stores'.

main concern relates to Amazon's alleged access and use of non-public business data of independent sellers who sell on its marketplace, allegedly to the benefit of Amazon's own retail business.

EC investigation into Amazon's buy box practices

In November 2020, the EC opened[39] a formal antitrust investigation to determine whether Amazon preferentially treats its own retail offers and those of marketplace sellers that use Amazon's logistics and delivery services.[40] The investigation covers the entire European Economic Area (EEA), except Italy, on the grounds that similar issues were already being investigated by the Italian competition authority.

Amazon's featured offer is displayed on Amazon's single product detail page, and it allows customers to easily identify the offer they would likely have chosen had they compared all offers for the same product. The EC is investigating whether the criteria considered by the algorithm identifying the featured offer (referred to as the 'buy box' by the EC) confers an advantage on Amazon's own retail business or on third-party sellers using Amazon's logistics and delivery services.

Amazon has appealed against the EC's decision to initiate proceedings before the General Court of the European Union[41] on the basis that the EC carved Italy out of the scope of the investigation unlawfully, as article 11(6) of Council Regulation (EC) No 1/2003 relieves national competition authorities of their competence to apply articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) to a matter under investigation by the EC.

Investigation of Facebook's Marketplace and data-related practices

Since 2019, the EC has been informally investigating Facebook's practices related to Marketplace (Facebook's classified ads service), as well as data-related practices. Limited information is publicly available on the two investigations. Nevertheless, in the former, the EC appears to be investigating whether Facebook has abused a

39 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).

40 Case AT.40703, *Amazon – Buy Box*.

41 These proceedings are referenced under T-19/21. Action brought on 19 January 2021 (OJ 2021 C72/34).

dominant position by tying Marketplace with the Facebook social network, thereby foreclosing rival classifieds providers. In the latter, the EC appears to have concerns regarding Facebook's collection, processing, use and monetisation of data.

Investigation into Google's data and ad tech practices

On 23 April 2021 the EC confirmed that it is investigating Google's methods of gathering, processing and monetising user data[42] as well as its practices in 'ad tech', where it intermediates between advertisers and online publishers. The investigation also extends to Google's deprecation of third-party cookies.

The EC is examining a 'really complex ecosystem', where Google is both a publisher of online display advertising (eg, YouTube) and provides ad tech services. The ad tech probe looks at whether Google's practices harm competition in the ad-stack (ie, the digital advertising supply chain) to the detriment of publishers, advertisers and consumers.[43]

Mergers

Google/FitBit

On 17 December 2020, following a Phase 2 investigation, the EC conditionally cleared Google's acquisition of Fitbit, a US provider of wearable devices (smartwatches and fitness trackers) and related software.[44]

The EC's concerns related to the supply of online search and display advertising as well as 'ad tech' services. In particular, it considered that, by acquiring the data collected via Fitbit's wrist-worn devices, Google would increase its data advantage in ad personalisation, raising barriers for its online advertising rivals. This would result in higher prices and less choice for advertisers and publishers.

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42 European Parliament, parliamentary questions (E-000274/2021), answer given by Executive Vice President Margrethe Vestager on behalf of the Commission, 23 April 2021.

43 Intervention of the EC's Executive Vice President Margrethe Vestager at the American Bar Association Antitrust Virtual Spring Meeting, 26 March 2021.

44 The deal was notified on 15 June 2020. See EC press release, 'Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions' (17 December 2020).

At Phase I, Google offered a data silo remedy (ie, separation of data collected through wearable devices from other Google databases and restricting it from use for advertising purposes).[45] The EC found this remedy insufficient and opened an in-depth investigation on 4 August 2020.

In addition to advertising markets, the EC also expressed concerns regarding post-transaction access to Fitbit's web application programming interface (API) by rivals in the digital healthcare market. Moreover, it considered that Google could degrade the interoperability of competing wearable device manufacturers with Android smartphones.

Google proposed three types of commitments:

- Ads commitment: Google will not use EEA user data collected via Fitbit devices in search advertising, online advertising and advertising intermediation. That data will be kept in a data silo, technically separated from Google's advertising data. Moreover, EEA users will have an effective choice to allow or limit the use of their health and wellness data by other Google services.
- Web API access commitment: subject to user consent, Google will maintain software applications' access to their health and fitness data through Fitbit web API at no charge.
- Android APIs commitment: Google will continue to license for free to the Android original equipment manufacturers core interoperability APIs, as well as future improvements to their functionalities.

The EC made those commitments binding on Google for 10 years, with a possibility to extend the ads commitment for up to additional 10 years.

Other

Internet of things sector inquiry

In July 2020, the EC launched an antitrust inquiry into the internet of things (IoT) sector, focusing on consumer-related products and services that are connected to a network and can be controlled at a distance (eg, controlled via a voice assistant).[46]

45 EC press release, 'Mergers: Commission opens in-depth investigation into the proposed acquisition of Fitbit by Google' (4 August 2020).

46 EC press release, 'Antitrust: Commission launches sector inquiry into the consumer Internet of Things (IoT)' (16 July 2020).

Consumer IoT is characterised by access to large amounts of user data, strong network effects and economies of scale, which might contribute to markets tipping to monopoly. By engaging with a range of market players through the sector inquiry, the EC hopes to understand the competitive dynamics in the sector and the prevalence of potential competition issues.

As with previous sector inquiries (eg, e-commerce), the EC may use the findings from this sector inquiry to open antitrust investigations against specific companies under articles 101 and 102 of the TFEU.

The EC expressed that it expects to publish its preliminary report in spring 2021, followed by the final report in the summer of 2022.

VBER

The EC is currently considering potential revisions to the Vertical Block Exemption Regulation (VBER), which will expire on 31 May 2022. Drafts of the revised VBER and guidelines are expected to be published in May 2021, with a view to them being finalised by the time the current VBER expires.

The EC consulted stakeholders on the following possible revisions with relevance to the digital economy:

- Indirect restrictions of online sales: restrictions of online sales by distributors are generally considered to be a prohibited 'hardcore' restriction of passive (ie, unsolicited) sales. As online sales channels gain prominence, putting pressure on physical stores, the EC is considering no longer treating the following restrictions as hardcore: dual pricing[47] and the imposition of criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical stores.
- Parity obligations: the VBER currently exempts all types of 'parity clauses', provided that the conditions under the VBER are met.[48] National competition authorities and courts have identified anticompetitive effects of obligations that require parity with other indirect sales or marketing channels (eg, other platforms or other online or offline intermediaries). The EC is, therefore, consulting on removing the benefit of:

47 Charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline.

48 Clauses that require a company to offer the same or better conditions to its contract party (eg, an online platform) as it offers on certain other sales channels.

  - the VBER for obligations that require parity relative to specific types of sales channels so that, for example, parity obligations that relate to direct sales and marketing channels, including own websites (narrow parity clauses), would continue to be covered; and
  - removing the benefit of the block exemption for wide parity clauses.
- Resale price maintenance (RPM): the EC is considering providing additional guidance on the circumstances in which RPM is permissible.

Change in the interpretation of Article 22 EUMR

On 26 March 2021, the EC published guidance on its revised approach to the use of the referral mechanism in article 22 of the EUMR (the Guidance).[49] Article 22 of the EUMR enables one or more member states' national competition authorities (NCAs) to request the EC to review a transaction where the transaction affects trade between member states and significantly threatens to affect competition within the territory of the member states making the request. Any change to the EUMR itself would have required unanimous approval by all member states.

Prior to the issuance of the Guidance, the EC's informal policy was to discourage NCAs from requesting referrals for transactions that did not meet the national merger control thresholds. Under the new Guidance, the EC encourages referrals initiated by NCAs even when those NCAs themselves lack jurisdiction. This shift in policy is driven by a perceived 'enforcement gap', which allowed potentially problematic transactions (especially 'killer acquisitions' of nascent competitors) to escape merger control review.

The Guidance cites the digital economy and the pharmaceutical sectors as examples where those transactions are most likely to occur as in those industries, a target company's importance on the market may not be reflected in its (low) turnover.[50] The Guidance provides a non-exhaustive list of transaction types where a referral to the EC may be appropriate, including cases where one of the parties:

- is a start-up or recent entrant with significant competitive potential that has yet to develop or is in the initial stages of development or implements a business model generating significant revenues (or is still in the initial phase of implementing that business model);

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49 Communication from the EC, EC Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 26 March 2021.

50 Guidance, paragraphs 9 to 10 and Margrethe Vestager, 'The Future of EU Merger Control', 11 September 2020.

- is an important innovator or is conducting potentially important research;
- is an actual or potential important competitive force;
- has access to competitively significant assets (eg, raw materials, infrastructure, data or intellectual property rights); or
- provides products or services that are key inputs or components for other industries.

In addition, the EC may consider whether the value of the consideration is particularly high compared to the turnover of the target.

The Guidance expands the EC's merger control remit and is expected to reduce legal certainty for transactions, especially as the EC will accept referrals submitted after a transaction has closed.[51]

* *The authors wish to thank Helga Gudmundsdottir, Ketevan Zukakishvili, Maria Sowinska and Dan Harrison for their assistance in the preparation of this article.*

51 The EC has clarified in its Guidance that it will accept referrals even if these are submitted after the transaction has closed and that, while it would generally consider that a referral is no longer appropriate if more than six months have elapsed since closing, this six-month period would only start from the moment material facts about the transaction have been made public in the EU.

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Stavroula Vryna is a senior associate in Clifford Chance's antitrust practice. She specialises in European antitrust law and has a broad range of experience advising clients in the digital economy and technology markets on antitrust investigations and multi-jurisdictional merger control. She holds an LLM in Competition Law from University College London and an LLM in Public Law from the University of Athens.

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Nelson Jung is a partner in Clifford Chance's antitrust practice. He specialises in EU and UK antitrust law across a wide range of industry sectors. In 2016, he rejoined Clifford Chance from the UK Competition and Markets Authority (CMA) where he was the director of the mergers group. He previously held a number of senior positions at the CMA's predecessor, the Office of Fair Trading, including director of competition enforcement and head of mergers.

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Thomas Vinje is partner and chair of the global antitrust group at Clifford Chance, as well as the co-chair of the firm's public policy practice and head of its technology sector group. He is specialised in EU antitrust and intellectual property law, especially in technology matters.

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Thomas was designated Lawyer of the Year in 2018 by *Global Competition Review*. He has also been recognised as a leading competition expert by *Chambers*, *The Legal 500* and *Expert Guides*.

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