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COMMISSION'S PROPOSALS FOR EX ANTE REGULATORY INSTRUMENT FOR DIGITAL GATEKEEPERS AND NEW MARKET INVESTIGATION TOOL

On 2 June 2020, the European Commission started public consultations on proposals to develop an [ex ante instrument](#) for large online platforms as well as a [new competition tool](#). The ex ante instrument would regulate 'gatekeeper' platforms, while the competition tool would allow the Commission to launch detailed market investigations and impose behavioural or structural remedies.¹

Both proposals are game changers which, if implemented, will have a radical impact on the Commission's ability to regulate and shape the digital markets. We outline some key elements below.

Ex ante regulatory instrument

The proposal for an ex ante regulatory instrument aims to ensure that markets with significant network effects characterised by the presence of very large online platforms acting as 'gatekeepers' operate fairly. This new instrument could be introduced through revisions to the [Platform-to-Business Regulation](#) which applies as of 12 July 2020 to all online intermediation services, but would only apply to a more limited subset of large platforms. These would be identified on the basis of criteria such as significant network effects, the size of the user base and/or an ability to leverage data across markets. Other options such as a completely new regulatory framework are also being considered.

By substituting ex post enforcement with ex ante regulation, the instrument would permit the collection of information from 'gatekeeper' platforms and would allow the Commission to introduce 'blacklisted' practices through broad principle-based rules, as well as more specific rules targeted at certain platforms.. Examples of such practices could include self-preferencing, unfair supplementary contractual provisions, interoperability and access, algorithmic transparency, and online advertising. The instrument would also enable the imposition of tailor-made remedies for such behaviour, such as data access obligations or data portability requirements.

What would the competition tool look like?

In addition to the ex ante instrument, the Commission is exploring a new market investigation tool that has clear parallels to the market investigation powers of the UK Competition and Markets Authority (CMA). This tool extends beyond the digital markets and could be used to deal with structural competition problems in markets that cannot be addressed effectively on the basis of the current competition rules, such as 'tipping' markets.

¹ These measures are part of the Commission's Digital Services Act (DSA) legislative package to be introduced in late 2020. For completeness, the DSA also includes a [consultation](#) for the introduction of new rules to clarify the responsibilities of all online platforms.

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The Commission's proposal outlines various options for implementing this tool. The most wide-ranging option would enable the Commission to review a whole market or sector, regardless of whether a 'gatekeeper' or dominant undertaking has been identified. In contrast to the Commission's existing power to conduct sector enquiries, this new competition tool would also enable the Commission to impose behavioural and/or structural remedies. However, under the proposed framework, it appears that the Commission would not have the power to make any findings of an infringement of the EU competition rules or impose fines, such that the Commission's actions could not serve as a basis for follow-on damages claims.

While it is difficult to ascertain without further details exactly how far-ranging the Commission's market investigation powers will be as important questions still remain about the nature and the scope of the new tool, the proposal no doubt represents a significant shift in the Commission's approach to competition law enforcement .

Next steps

The consultation for both initiatives was open until 8 September 2020. Legislative proposals are scheduled for the fourth quarter of this year.

COMMISSION'S RECENT INVESTIGATION INTO CONSUMER IOT APPLICATIONS

On 16 July 2020, the European Commission launched an inquiry into Internet of Things ("IoT") for consumer-related products and services in the EU.

Scope of the Inquiry

The inquiry will focus on consumer-related products and services that are connected to a network and can be controlled at a distance (e.g. via a voice assistant or mobile device). These include:

- wearable devices (e.g. smart watches or fitness trackers)
- smart home appliances (e.g. fridges, washing machines, smart TVs, smart speakers and lighting systems)
- other smart devices (e.g. music and video streaming services and about the voice assistants used to access them)

Areas of potential concern

The Commission is concerned that aspects of the IoT, including how data is collected and used to influence consumer behaviour, may be distortive of competition. In particular, the Commission's press release cites the following areas of potential concern and focus:

- **Market tipping.** The Commission considers that IoT ecosystems are often characterised by strong network effects and economies of scale "which might lead to 'markets tipping' and the fast emergence of dominant digital ecosystems and gatekeepers in the IoT sector".
- **Restrictions regarding data access.** The Commission views access to large amounts of user data as the key for success in the digital sector. It has concerns that market players use their control over such data to distort competition, or otherwise close off these markets for competitors.
- **Restriction of data interoperability.** The Commission considers interoperability as a key prerequisite to maintain open and competitive markets in the digital age. The Commission has concerns that "if the devices from different companies don't work together, then consumers may be locked in to just one provider. And be limited to what that provider has to offer."
- **Self-preferencing.** The Commission has concerns that some players could become gatekeepers of the IoT and direct users towards their own products or services.
- **Exclusivity deals.** The Commission has concerns that, if some players became gatekeepers of the IoT, they could enter into exclusive deals with other companies and send users to certain, "preferred" providers of products or services.
- **Practices linked to the use of proprietary standards.** The Commission has not provided further details about this concern, although we expect it will collect information on IoT technology standards and standard essential patents (SEPs), their relevance, the process to create standards and access them and to join standard setting organizations, as well as royalties applied to licensees.

Next steps and timing

Requests for information have already been sent out to a range of players. Recipient companies include smart device manufacturers, software developers and related service providers. A preliminary report on the replies will be published for consultation in Spring 2021 and the Commission's final report will follow in the Summer of 2022.

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Potential outcomes

The Commission has no power to adopt measures aimed at remedying a situation under investigation in a sector inquiry. However, the information gathered can be used by the Commission to assess whether it should open specific investigations into practices which may infringe the prohibitions on anti-competitive agreements and abuse of a dominant position (Articles 101 and 102 TFEU). This happened for example after the Commission's e-commerce sector inquiry. In addition, knowledge about the market gained through the inquiry may lead to proposals for specific regulation of the sector.

The inquiry into the IoT complements other actions launched within the framework of the Commission's digital strategy, in particular regulatory initiatives related to artificial intelligence, data and digital platforms.

SURPRISE FROM KARLSRUHE: GERMANY'S FEDERAL COURT OF JUSTICE SIDES WITH FEDERAL CARTEL OFFICE IN LANDMARK DISPUTE AGAINST FACEBOOK OVER USE OF DATA

On 29 June 2020 the Federal Court of Justice ("FCJ"; Bundesgerichtshof) ruled in favour of the Federal Cartel Office ("FCO"; Bundeskartellamt) in the latter's dispute with Facebook. The FCO previously found that Facebook abused its dominant position with respect to its collection and use of users' personal data and ordered Facebook to cease the practice absent additional consent from its users. The FCJ now declined Facebook's motion to stay the enforcement of the FCO's order pending a binding decision on the merits.

Background

The case centers on Facebook's practice of collecting, aggregating and linking its users' personal data not only on Facebook's main social network platform but also on affiliated services (e.g., In-stagram) and third-party websites using certain programme interfaces (e.g., social plug-ins such as "like buttons"). Users have to consent to this practice through Facebook's terms of use as a condition to using the social network. The FCO found this to constitute an abuse of a dominant position pursuant to Sec. 19 of the German Act Against Restrictions of Competition. According to the FCO, Facebook dominates the national market for the provision of social network services (and potentially also the market for online advertising outside of search services) and abuses this position by violating the requirements of the GDPR (Art. 6, 7). Consequently, the FCO ordered Facebook to cease this practice. The FCO's approach of relying on an alleged breach of data protection law to find a competition law infringement was a particularly controversial aspect of its decision.

Following Facebook's appeal, the Higher Regional Court of Dusseldorf's cartel senate first had to decide whether to stay the enforcement of the FCO's order (it has yet to decide the appeal on the merits). The cartel senate sided with Facebook and stayed the FCO's order based on "strong legal concerns". The cartel senate argued that a ratio of 32 million German Facebook users vs. 50 million non-users shows that users have full autonomy vis-à-vis Facebook. Further, according to the Dusseldorf court, the FCO failed to establish behavioral causality, i.e. that Facebook used its alleged market power to allegedly infringe data protection law.

The FCJ's decision

Following the FCO's appeal, the FCJ's cartel senate reversed the Dusseldorf court's decision and dismissed Facebook's motion to stay the proceedings. In an official [press release](#) (German) that preceded its recently published decision, the FCJ stated that "there are neither serious doubts about Facebook's dominant position on the German market for social networks nor that Facebook is abusing this dominant position with the terms of use prohibited by the Cartel Office".

In its decision, the FCJ upheld the FCO's order (and its enforcement) but employed a partly different rationale. Specifically, the FCJ relied more heavily on genuine competition law arguments than the FCO to decide that Facebook abused its dominant position. The FCJ found that Facebook's practices limit users' choice of how to enjoy Facebook's social media services. In addition, Facebook's use of user data was found likely to affect competition by intensifying user lock-in effects. On this basis, the FCJ did not think it is necessary to show behavioural causality (overruling the Dusseldorf court). The FCO's focal point of Facebook violating the GDPR is only one consideration among others for the FCJ to conclude that Facebook's behaviour is in fact abusive.

The FCJ's decision is both remarkably long and heavy on substance for a preliminary proceeding in which only a limited legal review applies. This may be a signal to the Dusseldorf court which will next decide Facebook's appeal on the merits (i.e. applying a full legal review) and which has previously shown a certain level of resilience towards following FCJ precedents. Given the FCJ's reasoning in this case, it remains to be seen the extent to which the Dusseldorf court will deviate.

CMA'S MARKET STUDY FINAL REPORT ON ONLINE PLATFORMS AND DIGITAL ADVERTISING

On 1 July 2020 the UK Competition and Markets Authority ("CMA") published a final Report which concludes its year-long market study into online platforms and digital advertising in the UK (see full report [here](#)). The market study focused, among other things, on how advertising revenue drives the business model of major online platforms. The CMA confirmed the recommendation from its Interim Report not to refer this to a market investigation (a more in-depth investigation into market concerns). As previously reported in [this Newsletter](#), the CMA also formally launched a new Digital Markets Taskforce ("DMT") which will work in conjunction with the Information Commissioner's Office ("ICO") and the Office of Communications ("Ofcom") to advise the UK government on how a new regulatory regime for digital markets should be structured.

The CMA's concerns

The CMA estimates that around £14 billion was spent on digital advertising in 2019. The CMA has previously emphasised that despite the strong position held by some platforms in digital advertising, 'big' is not necessarily 'bad', as these platforms have brought innovative products and services to the market. However, the CMA is concerned that there is a lack of competition in these markets, resulting in potential barriers to entry and expansion for rival companies. Although the Report has a UK-domestic focus, the CMA says that the problems identified are international in scope, and has confirmed that it wants to take a leading global role as part of its overall digital strategy.

Andrea Coscelli, Chief Executive of the CMA, said: *"what we have found is concerning – if the market power of these firms goes unchecked, people and businesses will lose out. People will carry on handing over more of their personal data than necessary, a lack of competition could mean higher prices for goods and services bought online and we could all miss out on the benefits of the next innovative digital platform"*.

Pro-competitive regulatory regime

The Report suggests tackling concerns around digital markets through a pro-competitive regulatory regime, to ensure that: (i) consumers continue to benefit from innovative services; (ii) rival businesses can compete on an even playing field; and (iii) publishers do not face undue pressure on their revenues. The CMA's proposals are in line with the recommendations made in the final report by the Digital Competition Expert Panel (the Furman Report), published in March 2019 (see full report [here](#)).

The CMA envisages two parts to the new regime.

Code of Conduct

First, there will be a mandatory code of conduct, whereby platforms deemed to have strategic market status ("SMS") will need to comply with principles of fair trading, trust and transparency, and open choices. It will require that SMS platforms do not engage in exploitative or exclusionary practices. The new regulator will have the power to impose fines for non-compliance.

Interventions

Second, the Report outlines a host of new powers to implement additional “transformational” interventions to tackle market power. Further work needs to be carried out to determine which interventions are required, but the CMA suggests that the new regulator should have the power to:

- restrict platforms’ ability to acquire default search positions and/or impose choice screen requirements;
- require sharing of click-and-query data with rival platforms, to allow them to improve their algorithms (ensuring there is no transfer of personal data);
- require platforms to allow consumers to use at least a basic version of their service without personalised advertising;
- mandate interoperability (for example, of contacts and cross-posting functionalities) on social media platforms, ensuring that consumer consent is obtained for the use of their personal data;
- order structural or operational separation of ad tech functions and/or inventory for vertically integrated players;
- introduce a “fairness-by-design” duty on the platforms to ensure that they are making it as easy as possible for users to make meaningful choices; and
- take measures to increase transparency of fee and transactions data in ad tech.







Next steps

The CMA will lead the DMT in formulating recommendations to the government, building on their findings in the Report. The DMT has already started this process with a call for stakeholder submissions on the proposed regulation by 30 July 2020. The DMT will deliver its recommendations by the end of the year: the CMA warns that if the government does not take these recommendations forward in “good time”, the CMA stands ready to take action on its own through a market investigation.

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


Online sales bans:

restriction on selling products/services online

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







Dual pricing:

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

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

Resale price maintenance:

obligation to use fixed or minimum resale prices

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

MFNs/Price Parity Clauses:

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





Hotel bookings:

-  (SE) [booking.com](#)
(July 2018, Stockholm Patent and Markets Court ruling)
-  (EU) [Holiday Pricing](#)
(February 2017, Opening of proceedings)
 -  (EU) [REWE/DER](#)
August 2017, Opening of proceedings)
 -  (EU) [TUI](#)
(August 2017, Opening of proceedings)
 -  (EU) [Thomas Cook](#)
(August 2017, Opening of proceedings)
 -  (EU) [Kuoni](#)
(August 2017, Opening of proceedings)
 -  (EU) [Melia](#)
(August 2017, Opening of proceedings)
-  (UK) [CompareTheMarket](#)
(November 2018, Statement of objections)

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

Exclusivity clauses:

preventing access to platforms by competitors

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




Geo-blocking:

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

-  (EU) [Pay-TV](#)
 -  (EU) [Cross-border access to pay-TV](#)
(March 2019, Press Release)
 -  (EU) [Cross-border access to pay-TV](#)
(March 2019, Commitment decision)
-  (EU) [Video games](#)
(March 2016, Investigation)
 -  (EU) [Capcom](#)
(February 2017, Opening of proceedings)
 -  (EU) [Bandai Namco](#)
(February 2017, Opening of proceedings)
 -  (EU) [Focus Home](#)
(February 2017, Opening of proceedings)
 -  (EU) [Koch Media](#)
(February 2017, Opening of proceedings)
 -  (EU) [Zenimax](#)
(February 2017, Opening of proceedings)
 -  (EU) [Video Games](#)
(April 2019, Statement of Objections)




Third party platform ban:

restriction on using third-party online market places

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

Unfair trading practices by online platform:

Use-of-platform clauses which are anticompetitive

-  (FR) [Google](#) (interim measures to negotiate with publishers)
-  (FR) [Google](#) (December 2019, final decision on search advertising)
-  (EU) [Amazon](#) (July 2019, opening of proceedings)
-  (D) [Amazon](#) (July 2019, Commitment decision)
-  (AT) [Amazon](#) (July 2019, Commitment decision)
-  (D) [Facebook](#) (February 2019, final decision)
-  (D) [Facebook](#) (August 2019, OLG Düsseldorf judgment)
-  (D) **NEW:** [Facebook](#) (June 2020, BGH judgment)
-  (IT) [Amazon](#) (April 2019, opening of proceedings)
-  (NL) [Apple](#) (April 2019, Opening of Proceedings)

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