# COMPETITION LAW IN THE DIGITAL AGE

FEBRUARY 2025

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

QUICK LINKS



## THE FUTURE OF EU COMPETITION POLICY UNDER COMPETITION COMMISSIONER RIBERA

On 1 December 2024, the new European Commission took office under President Ursula von der Leyen's second mandate for five years until 2029. Former Spanish Environment Minister, Teresa Ribera, was appointed the Commissioner for a Clean, Just and Competitive Transition, responsible for managing both competition and the EU's green transition. The new Commissioner's competition mandate faces several challenges.

**Merger control reform**

Commissioner Ribera has been tasked by President von der Leyen with modernising the EU's competition policy, to better reflect market realities. This reflects, in particular, pressure from Mario Draghi's high-profile report on the future of European competitiveness, including calls to take a new approach to European champions and better align merger policy with the bloc's industrial goals. Key proposals include the introduction of an "innovation defence", allowing transactions to be cleared on the basis that they would lead to increased innovation - in return for a commitment by the parties to invest and subject to strict monitoring by the Commission.

In her mission letter to Teresa Ribera, President von der Leyen similarly called for a "new approach" to competition enforcement that helps European companies "innovate, compete and lead worldwide". However, both officials have rejected any suggestion that this means they support a "softer" European competition policy. In her inaugural speech, Commissioner Ribera cautioned against relaxing competition policy to allow European companies to scale up.

In terms of practical steps, the move to modernise will include a review of the EU's Horizontal Merger Control Guidelines to give adequate weight to the European economy's needs in respect of resilience, efficiency and innovation, as well as "the changed defence and security environment". It may also consider the Commission's ability to review below-threshold mergers and police killer acquisitions, following the landmark *Illumina/Grail* ruling by the Court of Justice of the European Union (CJEU) in September 2024 on the use of Article 22 of the EU Merger Regulation for deals that do not meet any national merger control thresholds (see a previous edition of this newsletter here that covers *Illumina/Grail*). Although the Commission has emphasized its ability to rely on an increasing number of national authorities' call-in powers, it is also assessing whether a more structural solution at EU level may be needed to solve the perceived enforcement gap, such as a potential new deal value threshold or a targeted revision of Article 22 itself.

**Digital Markets Act (DMA)**

Continued DMA enforcement has been set as a priority for the new European Commission. Von der Leyen's statement in her Political Guidelines that the Commission would "ramp up and intensify our enforcement in the coming mandate" was echoed by Teresa Ribera in her confirmation hearing before the Parliament, in which she identified the need for the number of people dealing with the DMA at the Commission to be significantly reinforced. Moreover, the Competitive Compass for the EU, published on 29 January 2025, highlights the enforcement of the DMA as important for opening up closed ecosystems and enabling innovative businesses to propose new digital services to customers.

QUICK LINKS

EU HORIZON SCANNING

P2B REG ENFORCEMENT

UK DMCC ACT

ITALIAN UNFAIR COMP

SPANISH AI TOOL

COMP LAW & GDPR

In a wider international context, however, questions have been raised about the Commission's willingness and ability to enforce its new legislation. Amidst growing transatlantic tensions over competition policy, there have been calls for President Trump to intervene against what is perceived as over-zealous EU enforcement. There have been suggestions that the Commission may be reassessing several probes into tech companies, though the Commission has insisted that technical work on these investigations is continuing.

**Additional reforms**

In other areas of competition law, the priorities for the Commission's modernisation initiative include: (i) strengthening and speeding up enforcement of competition rules in cooperation with national competition authorities; (ii) simplifying the State aid framework, prioritizing work on the most distortive aids while accelerating authorization of compatible aids and transactions in strategic fields, in particular with respect to the roll-out of renewable energy; (iii) further enforcing the Foreign Subsidies Regulation; and (iv) reviewing the Technology Transfer framework to ensure that companies have clear, simple and up-to-date rules for pro-competitive technology licensing agreements.

QUICK LINKS

EU HORIZON SCANNING

P2B REG ENFORCEMENT

UK DMCC ACT

ITALIAN UNFAIR COMP

SPANISH AI TOOL

COMP LAW & GDPR

# EU MEMBER STATES EMPOWER PUBLIC AUTHORITIES TO ENFORCE THE P2B REGULATION

Even before the Digital Services Act (DSA) and Digital Markets Act (DMA) came into force, the EU had already introduced legislation to provide business users certain safeguards and effective redressal possibilities in their commercial dealings with platforms, namely, Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, also known as the platform-to-business (P2B) regulation. Online intermediation services consist of allowing business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between them. Such services provided by electronic means and at a distance include e-commerce marketplaces, online app stores and social media. Platforms offer these services to business users based on contractual relationships. In addition to online intermediation services, the P2B regulation also applies to online search engines.

The P2B regulation establishes a targeted set of mandatory rules to ensure a fair, predictable, and trusted online business environment. For example, the general terms and conditions of platforms must: (i) include the main parameters and their relative importance in determining rankings; (ii) indicate the differences in treatment, if any, between goods and services offered by the platform and those offered by third parties; (iii) allow access to personal data or other consumer data, that third party business users will have through the platform; and (iv) an explanation of why the platform uses price parity/MFN clauses with third party business users that prohibit them from selling their goods/services at lower prices through other distribution channels, either through other platforms or their website. Many of these obligations are reflected in the DSA, and some are even strengthened and reinforced in the DMA.

The provisions of the P2B regulation have been in force since 2020, but several EU Member States opted to leave enforcement to private parties without introducing enforcement powers for public authorities. If a platform failed to comply with its obligations under the P2B regulation, it was incumbent on the business user to take the platform to court by initiating commercial litigation. However, article 15 of the P2B regulation obliges Member States to enforce the regulation effectively. In this context, the European Commission carried out a preliminary EU-wide review of the implementation of the P2B regulation. The Commission concluded that business users' awareness of their rights under the P2B regulation is generally low, and even lower in Member States where there is no public enforcement. Notably, the Commission identified cases of private enforcement of the P2B regulation in only four Member States. According to the Commission, the possibility of only private enforcement was not enough to effectively enforce the P2B regulation, mainly due to a lack of actual cases and overall awareness amongst business users, despite public awareness campaigns. As a result, the Commission launched infringement procedures against eight Member States that did not introduce a public enforcement mechanism for the P2B regulation in their national law.

All of these Member States have now introduced legislation enabling public authorities to enforce the P2B regulation, for example, quite recently, the Dutch Authority for Consumers and Markets has been authorised in the Netherlands. However, the type of authority designated varies from one Member State to another. While some Member States have conferred enforcement powers on their telecoms regulators, others have opted for their competition authorities or media regulators. As a result, there is a disparate ensemble of enforcement authorities for the P2B regulation across Member States. Moreover, the P2B regulation only imposes an enforcement obligation and does not provide for either coordination and cooperation amongst the public authorities or a one-stop-shop mechanism. It does, therefore, neither provide for a lead authority as is the case for the GDPR, nor a division of competences such as for EU competition law and the DSA/DMA between the European Commission and the national authorities. It also lacks an official form of coordination, such as the Consumer Protection Cooperation Network. Nevertheless, Member States have set up an informal P2B network. Within this network, authorities exchange information and coordinate enforcement activities, such as EU-wide sweeps

These developments further entangle the already complex web of different enforcement authorities in the digital economy. In addition to overlapping obligations under the P2B regulation, DMA and the DSA, a platform may, for the same commercial conduct, also face enforcement proceedings initiated by different types of authorities in different member states empowered to enforce the P2B regulation. This regulatory setup is quite a maze to navigate for platforms, their business users and enforcers.

QUICK LINKS

EU HORIZON SCANNING

P2B REG ENFORCEMENT

UK DMCC ACT

ITALIAN UNFAIR COMP

SPANISH AI TOOL

COMP LAW & GDPR

# MAJOR CHANGES TO UK DIGITAL REGULATION AND COMPETITION LAW NOW IN FORCE

On 1 January 2025, key provisions of the Digital Markets, Competition and Consumers (DMCC) Act came into force. These provisions have established a new regulatory regime aimed at increasing competition in digital markets and introduced sweeping changes to the UK's competition law framework and the investigative and enforcement powers of the UK Competition and Markets Authority (CMA).

**Digital markets**

*Designation criteria*

The DMCC Act's new digital markets regime applies to large undertakings designated by the CMA as having strategic market status (SMS) in respect of a digital activity. The regime is overseen by the Digital Markets Unit within the CMA. For an undertaking to be designated as having SMS, the CMA needs to establish, through an investigation, that the following criteria are met:

- The digital activity carried out by the undertaking is linked to the UK; and
- The undertaking has, in respect of that digital activity, both substantial and entrenched market power and a position of strategic significance; and
- The undertaking's global turnover in the relevant period exceeds £25 billion, or its UK turnover exceeds £1 billion in the relevant period.

On 14 January 2025, the CMA **announced** the launch of its first designation investigation, assessing whether Google has SMS in search and search advertising. The CMA **announced** the launch of its second and third designation investigations on 23 January 2025, assessing whether Google and Apple have SMS in the provision of mobile ecosystem services.

*Obligations*

Undertakings designated as having SMS will be subject to additional requirements, including:

- Merger transparency requirements – designated undertakings are subject to a mandatory pre-completion notification requirement for certain mergers.
- Pro-competition interventions – the CMA is able to intervene in digital markets to promote dynamic competition and innovation by imposing 'pro-competitive interventions' (PCIs) on SMS-designated undertakings. As part of this tool, the CMA can impose a range of behavioural and structural remedies.
- Conduct requirements – the CMA is also able to impose targeted conduct requirements on SMS-designated undertakings if it would be proportionate to do so for the purposes of fair dealing, open choices and/or trust and transparency. Rather than imposing blanket rules, the CMA has **stated** in its draft annual plan for 2025 to 2026 that it will take a "highly tailored, bespoke approach to identifying and addressing specific harms". This contrasts with the standard obligations applied to all gatekeepers by the European Commission under the DMA (see a previous edition of this newsletter **here** for a comparison of the DMCC Act and the DMA).

The CMA has robust powers to deal with non-compliance and may impose penalties of up to 10% of worldwide turnover, with additional fines of up to 5% of daily worldwide turnover. The CMA also has powers to fine undertakings for failing to comply with investigative requirements.

**General competition**

The DMCC Act has also enhanced the CMA's powers to address (suspected) infringements of competition law. These include strengthened investigative powers in relation to document preservation and the production of information and seizure of documents from domestic premises, as well as enhanced fining powers and international cooperation and information-sharing powers.

QUICK LINKS

EU HORIZON SCANNING

P2B REG ENFORCEMENT

UK DMCC ACT

ITALIAN UNFAIR COMP

SPANISH AI TOOL

COMP LAW & GDPR

The DMCC Act also amends various aspects of the UK's competition law framework, including some key changes with respect to merger control:

(i) Increasing the target UK turnover threshold from £70m to £100m.
(ii) Introducing a new jurisdictional threshold where the transaction has a sufficient UK nexus and at least one party has an existing share of supply of 33% in the UK and UK turnover of at least £350m.
(iii) Introducing a safe harbour for transactions where each party's UK turnover does not exceed £10 million.
(iv) Giving the CMA the ability to fast-track mergers to a Phase 2 investigation and extend the Phase 2 timetable with the consent of the merger parties.

**Consumer protection**

In Spring 2025, the CMA will gain new consumer protection powers under the DMCC Act to issue infringement decisions for breaches of consumer law and fine businesses up to 10% of their global turnover. In addition, new laws will be introduced to guard against various harmful practices – including drip pricing, fake reviews and subscription traps.

QUICK LINKS

EU HORIZON SCANNING

P2B REG ENFORCEMENT

UK DMCC ACT

ITALIAN UNFAIR COMP

SPANISH AI TOOL

COMP LAW & GDPR

# ITALIAN SUPREME COURT: COMPETITION EXISTS BETWEEN OPERATORS THAT USE DIFFERENT DISTRIBUTION METHODS TO MARKET THE SAME PRODUCT

The Italian Supreme Court recently partially upheld (Order No. 626 of 10 January 2025) an appeal by DML, a shareholder of GRE S.p.A., claiming that another GRE shareholder, Eurocom DLE, had engaged in unfair competition to its detriment. GRE manages the exclusive licensing of the Trony brand and grants non-exclusive sublicenses to its shareholders that operate Trony-branded retail stores. More specifically, DML claimed that Eurocom DLE shared confidential pricing information with its affiliated companies – Free Shop Pesaro S.r.l., Free Shop S.p.A., and A.A. Shop S.r.l. – which enabled them to sell Trony products online at lower prices than those approved by GRE. According to DML, Eurocom DLE's conduct distorted competition within the network, giving the affiliated companies an unfair advantage over other Trony retailers. The Court's order focused on (among other things) the commonality of customers as a prerequisite for unlawful competition and on the risk of future harm constituting economic damage.

**Customer commonality is a prerequisite for unlawful competition**

The Court overturned the first- and second-instance courts' arguments that the different distribution channels – physical and e-commerce shops – precluded competition between the parties. The Court instead adopted a more dynamic view and ruled as follows:

[The commonality of customers] is not determined by the subjective identity of the product purchasers but by the totality of consumers who feel the same market need [emphasis added] and, therefore, turn to all products, either the same or similar or substitutable to those marketed by the entrepreneur complaining of unfair competition, that can satisfy that need.

This principle goes beyond the rigid distinction between sales channels and recognises that competition can exist also between operators that use different distribution methods to market the same product (in this case, in outlets throughout the territory and online). The Court emphasised that this perspective takes into account the natural osmosis between distribution channels, which has been made even more evident by the evolution of consumer habits and the interconnection between physical and digital markets. Limiting the concept of customer commonality to a strict distinction between sales methods would ignore the dynamic reality of the contemporary market. Moreover, in the Court's view, commonality must also be assessed in potential terms, considering not only actual consumers but also those who might be attracted by a given operator's products.

**The risk of future harm constitutes economic damage**

Another central aspect of the Court's order is the clarification of the notion of economic damage as a result of unfair competition. The Court of Appeal had excluded the existence of unlawful competition due to the lack of proof of a reduction in DML's turnover. But the Supreme Court rejected this approach, stating that an act of unlawful competition does not necessarily require proof of actual and tangible economic damage.

According to the Court, it is sufficient that the conduct complained of has the potential to cause harm, which thus constitutes a tort of danger. This means that the harm need not necessarily take the form of an immediate pecuniary loss but may entail a risk or possibility of future harm. This interpretation significantly broadens the scope of Art. 2598 of the Italian Civil Code and thus makes it possible to protect the competitive balance even in the absence of actual damage.

QUICK LINKS

EU HORIZON SCANNING

P2B REG ENFORCEMENT

UK DMCC ACT

ITALIAN UNFAIR COMP

SPANISH AI TOOL

COMP LAW & GDPR

# BRAVA: THE SPANISH AI TOOL TO DETECT COLLUSION IN PUBLIC PROCUREMENT

The Spanish National Markets and Competition Authority ("CNMC" by its Spanish acronym) has developed an AI tool designed to identify suspicious patterns in bidding processes at a national, regional and local level, with the aim of identifying possible cases of collusion among companies, ensuring that public contracts are awarded fairly and at competitive prices.

The tool is called BRAVA ("Bid Rigging Algorithm for Vigilance in Antitrust") and is based on a supervised machine-learning algorithm that analyses large volumes of statistical data from the public procurement database, with the aim of detecting potential competition infringements.

In order to train this tool, the CNMC has compiled and structured a database of 3.5 million public contracts. Although, in many cases, the available data is limited – i.e. only the name of the awardee is published and other relevant information is not easily accessible – the CNMC has managed to integrate key data, such as information on companies that have lost public tenders. In addition, the information BRAVA collects is checked against up-to-date corporate registry information through an agreement with the Spanish Association of Commercial Registrars.

The president of the CNMC, Cani Fernández, has explained that the new technology not only enriches and cleans the data, but also organises it in a structured format, making it much easier to identify patterns. This capability is particularly important in bid-rigging cases, which are known to involve market-sharing strategies based on pre-defined criteria (e.g. territories, time periods or customer groups).

Moreover, BRAVA has significantly improved how public procurement is monitored and controlled, resulting in more transparent and efficient processes. According to the CNMC, in its **latest update**, the tool was able to identify potentially collusive elements in bids with a high accuracy rate, which represents a significant step forward in the fight against anti-competitive practices.

The CNMC has also highlighted that it needs advanced tools such as BRAVA, given the growing volume of public procurement information it handles. In 2023, there were 196,763 public procurement tenders in Spain, with a cumulative value of approximately EUR 107,557 million. This underscores the need for innovative technologies to optimise resources and improve how competition in procurement processes is monitored.

In this context, the CNMC is tendering its **first AI contract**, which will focus on developing and maintaining AI solutions (including BRAVA) and business intelligence tools, designed to achieve more effective and proactive market supervision.

Other national competition authorities, such as the UK CMA, are also developing and using AI data-screening tools to identify potential competition infringements. Private companies have recently also been developing AI systems to analyse public tenders and improve their own compliance programmes. More national competition authorities – and private companies – are likely to follow suit in the coming years.

QUICK LINKS

EU HORIZON SCANNING

P2B REG ENFORCEMENT

UK DMCC ACT

ITALIAN UNFAIR COMP

SPANISH AI TOOL

COMP LAW & GDPR

# MIXING THE MEDICINES – THE CJEU'S LINDENAPOTHEKE RULING ON THE INTERSECTION OF COMPETITION LAW AND THE GDPR

The CJEU's preliminary ruling in ***Lindenapotheke (C-21/23)***, issued in October 2024, sheds further light on the intersection between competition law and data protection law. The central question of the case was whether a violation of data protection law (specifically of the GDPR) can be asserted by a competitor as a violation of (national) unfair competition law.

The background of the case was as follows: Lindenapotheke, a German pharmacy marketed medicinal (pharmacy-only) products on the online platform Amazon Marketplace. To make an order, customers had to provide information such as their name, address, and other details for individualizing the medicinal products. A competitor of the pharmacy challenged this practice before a German court, applying for injunctive relief based on unfair competition law. The competitor argued that the practice violated the GDPR because the pharmacy had not obtained customers' prior consent to the processing of their data concerning health. Thus, according to the competitor, the marketing of medicinal products via the online platform constituted unfair commercial practices, violating the German Act Against Unfair Competition ("UWG"). The case eventually landed before the German Federal Court of Justice, which made a preliminary reference to the CJEU, asking, in particular, whether the remedies provided by Chapter 8 of the GDPR for (alleged) GDPR violations are exhaustive (in addition to the powers of supervisory authorities), or whether national law can also allow competitors to challenge infringements as unfair commercial practices.
The CJEU, first, confirmed that the data provided in the context of ordering medicinal products online constitutes "data concerning health" in the sense of Article 9(1) GDPR. The court argued that the data creates a link between a specific medicinal product and an individual person, and is thus capable of revealing information on the person's health status. Thus, according to the CJEU, processing this data without obtaining consent from the individual violated the GDPR.

The CJEU, secondly, held that the GDPR does not preclude national law from allowing competitors to bring proceedings for GDPR infringement under unfair competition law. The court looked at the GDPR's wording and objectives and did not find that the remedies provided there are exhaustive. According to the CJEU, the coexistence of remedies under the GDPR and under national unfair competition law does not risk the uniform application of the GDPR. The court argued that the GDPR is binding in the same way across the European Union, even if only some and not all national legal orders provide remedies for competitors.

Furthermore, the CJEU argued, even if an application brought forward by a competitor may not have as its objective the protection of fundamental rights and freedoms of data subjects, but rather ensuring fair competition, it still contributes to strengthening the rights under the GDPR. In this sense, an application brought forward by a competitor may even be "particularly effective" in ensuring GDPR enforcement.

# COMPETITION LAW IN THE DIGITAL AGE

FEBRUARY 2025

| | |
|---|---|
| **BONELLIEREDE** | **www.belex.com**<br>Milan, Genoa, Rome, Addis Ababa*, Brussels, Cairo*, Dubai, London<br>*: *in cooperation with local law firm* |
| **BREDIN PRAT** | **www.bredinprat.com**<br>Paris, Brussels |
| **DE BRAUW** | **www.debrauw.com**<br>Amsterdam, Brussels, London, Shanghai, Singapore |
| **HENGELER MUELLER** | **www.hengeler.com**<br>Frankfurt, Berlin, Dusseldorf, Munich, Brussels, London |
| **SLAUGHTER AND MAY** | **www.slaughterandmay.com**<br>London, Beijing, Brussels, Hong Kong |
| **URÍA MENÉNDEZ** | **www.uria.com**<br>Madrid, Barcelona, Bilbao, Bogotá, Brussels, Lima, Lisbon, London, Porto, Santiago, Valencia |