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## QUICK LINKS

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## THE ITALIAN COMPETITION AUTHORITY FOCUS ON E-COMMERCE IN TIMES OF COVID-19

In the wake of the COVID-19 pandemic, the Italian Competition Authority (“ICA”) has started to pay greater attention to online sales, in particular those related to hygienic and sanitary products. The ICA expressed its renewed focus on e-commerce platforms in the context of two investigations it [started](#) at the beginning of March 2020 in relation to Amazon and eBay: *“in view of the particular moment in time when traditional forms of commerce are limited, the Authority has also decided to focus its attention on similar phenomena carried out on other e-commerce platforms”*.

Between March and May 2020, the ICA has opened 12 formal investigations for potential unfair and aggressive commercial practices related to online sales of:

- hand sanitizers, detergents, disinfectant products and cosmetics;
- disposable respiratory protection masks;
- medicinal products advertised as a remedy to combat COVID-19; and
- products advertised as medical diagnostic devices intended for use at home.

The alleged unlawful conducts involve the making of misleading commercial claims about the supposed effectiveness of the relevant products in terms of protection or counteraction against COVID-19 and/or the application of unjustified and significant price increases.

In several cases, the ICA has ordered interim measures to remove references to the preventive and therapeutic benefits of the relevant products advertised and marketed online. In three cases, the ICA has ordered the shutdown of the websites of operators that have been found to have illicitly sold medicinal products online without the requisite authorisation (see [here](#) and [here](#)). The ICA has also sought the cooperation of the main search engines and browser operators to remove from search results certain websites selling medicines illegally.

Some of these cases have been initiated by the ICA on the basis of complaints lodged by consumers and associations whereas others have been started *ex officio* on the basis of the intensified monitoring activity the ICA is carrying out in relation to e-commerce.

Upon commencing several of these proceedings, the ICA expressly assessed the conducts in question as *prima facie* misleading and aggressive, and therefore capable of misleading consumers. This assessment was conducted against a background of online platforms and websites exploiting the alarm caused by the constant increase in the number of people infected by COVID-19 and the risk of mortality as a result of the virus contraction.

As the ICA is expected to continue to scrutinise online commercial practices in the context of the outbreak, greater attention must be paid to online sales of products related to the treatment of COVID-19, including in relation to the marketing of such products.

## UK GOVERNMENT ANNOUNCES NEW DIGITAL MARKETS TASKFORCE AND DIGITAL MARKETS UNIT IN SPRING BUDGET

The UK Chancellor, Rishi Sunak, has announced the UK government's plans to establish a Digital Markets Unit as part of the March 2020 [Budget Statement](#). This is one of several measures that will implement the strategic recommendations of the [Furman Review](#).<sup>1</sup>

In an announcement accompanying the Budget, the government has also announced the launch of a [Digital Markets Taskforce](#), to be housed within the Competition and Markets Authority ("CMA") but which will also include officials from Ofcom and the Information Commissioner's Office ("ICO"). This new cross-regulator taskforce has a remit to "*consider the practical application of the potential pro-competitive measures*" set out by the Furman report, including advising the government on implementing a pro-competitive code of conduct for digital platforms and a methodology for designating platforms with 'Strategic Market Power'. Importantly for businesses in the digital sector, the government has been careful to state that it recognises that timely intervention in digital markets is needed but that "*future interventions must strike the right balance between promoting competition and innovation on the one hand and avoiding disproportionate burdens on business on the other hand.*" At this stage the taskforce is only temporary and is required to report to the government by September 2020.

### Implications for competition in the digital markets

The Budget acknowledges that competition is "*essential to drive innovation, produce better outcomes for consumers and allow new entrants to the market to grow*". In this context, the government accepted all six of the Furman Review's strategic recommendations for unlocking competition in the digital markets. The DCEP's first recommendation is that the government should establish and resource a Digital Markets Unit, tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses. The Digital Markets Unit will work with the digital industry to develop a principles-based code of conduct. The other strategic recommendations are:

- more frequent and firmer action by the CMA to challenge digital mergers which are likely to damage future competition, innovation and consumer choice;
- updating the CMA's enforcement tools against anti-competitive conduct, to aid their role in protecting and promoting competition in the digital economy;
- monitoring the use of machine learning algorithms and artificial intelligence to ensure this does not lead to anti-competitive activity;
- conducting a market study into the digital advertising market ([currently ongoing](#)); and
- encouraging co-operation between competition authorities to develop a common approach to regulating international digital markets.

The government has confirmed it will consult on these recommendations in due course.

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<sup>1</sup> The Furman Review is 2019 report by the Digital Competition Expert Panel ("DCEP") led by US economist Jason Furman for unlocking competition in digital markets. The Furman Review proposes a revised competition regime "to face the economic challenges posed by digital markets, in the UK and internationally".

## DECISION OF THE FRENCH COMPETITION AUTHORITY N° 20-MC-01 OF 9 APRIL 2020 RELATING TO REQUESTS FOR INTERIM MEASURES SUBMITTED BY NEWSPAPER PUBLISHERS AND NEWS AGENCIES

In November 2019, several newspapers organizations and Agence France Presse filed a complaint against Google before the French Competition Authority (“FCA”) together with a request for interim measures. They alleged that Google abused its dominant position and took advantage of a situation of economic dependency in which publishers and news agencies were, by refusing to fully comply with the compensation mechanism introduced by Law n°2019-775.<sup>2</sup>

This law corresponds to the implementation into French law of Directive n°2019/790 on copyrights.<sup>3</sup> The aim of this Directive was to rebalance the relationship between publishers, news agencies and digital platforms with a view to redistribute value among them, to the benefit of publishers and news agencies. To this end, Law n°2019-775 introduced a right for publishers and news agencies to authorise or deny reproduction of their content on digital platforms such as Google’s web browser.

In its preliminary decision, the FCA first assessed Google’s position and found that Google is likely to be dominant on the market for general search services. The FCA also found that Google may have abused its dominant position on the market for general search services by:

- avoiding negotiations with publishers and news agencies which the FCA equates with the imposition of unfair trading conditions;
- not compensating publishers, regardless of the publishers’ content or individual situations, which the FCA equates with a form of discrimination; and
- circumventing the full application of Law n°2019-775 even though Google did not violate it.

The FCA did not reach a conclusion as to whether publishers and news agencies are in a position of economic dependency vis-à-vis Google at this stage. It will examine this issue during its investigation on the merits of the case.

The FCA adopted interim measures allowing publishers and news agencies to enter into good faith negotiations with Google, in view of discussing the use of their protected content and the associated compensation.

The outcome of these negotiations must be an offer of transparent, objective and non-discriminatory compensation from Google. The negotiations must cover the period from the date of entry into force of Law n°2019-775. They will be limited to three months and Google must continue to display the content of each publisher and agency based on modalities chosen by the said publisher or news agency during this period. The negotiations should have no impact on how the content is indexed, ranked or displayed on Google’s search pages. These interim measures will remain in force until the adoption of the FCA’s final decision. Until then, Google will have to provide monthly reports to the FCA on how it complies with the decision.

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2 Law n°2019-775 of 24 July 2019 on the Creation of Neighboring Rights for the Benefit of Press Agencies and Publishers.

3 Directive n°2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, Article 15.

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## COMPETITION LAW IN THE DIGITAL AGE

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If the use of interim measures as an enforcement tool is a common feature under French competition law, this is not true at European level where the Commission has not used this tool for eighteen years. In this respect, the present case is to be put in perspective with the European Commission's renewed interest in imposing interim measures as it did in October 2019 in the Broadcom [case](#) (before the adoption of the recent *Broadcom* case Commission's interim decision dated July 2001, in the *IMS* case). As stated by Margrethe Vestager: *"interim measures are one way to tackle the challenge of enforcing our competition rules in a fast and effective manner. And this is why they are so important. Especially in fast-moving markets. Whenever necessary, I am therefore committed to making the best possible use of this important tool."*

## 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) **UPDATE:** [Adidas](#)  
(February 2020, commitment decision)
-  (HU) [Paradox Security](#)  
(December 2019, Final decision)

### 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) **NEW:** [Brother](#)  
(February 2020, Final decision)
-  (PL) **NEW:** [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)
-  (F) [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](#) (**NEW**: 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)
-  (IT) [Amazon](#) (April 2019, opening of proceedings)
-  (NL) [Apple](#) (April 2019, Opening of Proceedings)

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