COMPETITION LAW IN THE DIGITAL AGE

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THE EUROPEAN COMMISSION PUBLISHES ITS PROVISIONAL FINDINGS IN CONSUMER INTERNET OF THINGS (IOT) SECTOR INQUIRY

On June 9, 2021, the European Commission released its preliminary report setting out the provisional findings in its antitrust sector inquiry (launched in July 2020) into markets for consumer Internet of Things (**"IoT"**) related products and services in the European Union, which fits within the broader context of the Commission's Digital Strategy and ongoing policy initiatives in the IoT sector.

This preliminary report focuses on consumer-related products and services that are connected to a network and can be controlled at a distance, via a voice assistant or a mobile device (including smart home appliances and wearable devices). The sector inquiry confirms that consumer IoT products and services are relatively new but growing fast in a world of increasing connectivity. For Commissioner Vestager, *"fair competition is needed to make the most of the great potential of the IoT for consumers".*

Based on information provided by relevant industry organizations and over 200 companies active in the IoT sector, the Commission identified the main features of competition in the markets and the main areas of potential competition concern raised by respondents.

Features of competition

The Commission notes that new entrants in the consumer IoT sector, particularly in the market for voice assistants, face important barriers to entry and expansion. The high cost of technology investment is seen as a particularly important barrier to entry and/or expansion by respondents. Respondents also indicated that they may struggle to effectively compete with incumbent providers, some of whom offer complementary products and services beyond the consumer IoT sector.

Potential competition concerns

Several potential competition concerns were raised by the respondents to the IoT sector inquiry, including:

- **Lack of interoperability** due to technology fragmentation and a lack of common standards;
- **Access to data** by voice assistant providers, potentially enabling them to control the data flows and user relationships, and which could in theory confer an advantage in other markets;
- **Alleged exclusivity and tying practices** by IoT products providers, which might attempt to restrict the consumers' possibility to choose another voice assistant (other than the one installed by default) or only license their own voice assistant together with other types of software, technology or applications and not on a stand-alone basis; and
- **Intermediary position of voice assistants** who control the direct relationship between the user and smart devices or consumer IoT services (that are controllable and accessible through the voice assistant). Voice assistant providers could in theory favour their own products and services when providing recommendations to users (e.g. Apple proposing by default via Siri, its voice assistant, the use of its own apps and services).

Future steps

The Commission's public consultation on its provisional findings closed on September 1, 2021. The final report is expected to be released in the first half of 2022.

The information collected may provide guidance to the Commission's future enforcement activity. Commissioner Vestager has already highlighted that the sector inquiry is also intended to *"send an important message to powerful operators in these markets"* who should be aware of potential new investigations in the future if they do not comply with competition rules.

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CLOUD SERVICES

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DUTCH COMPETITION AUTHORITY INITIATES MARKET STUDY ON CLOUD SERVICES

Fostering competition in the digital economy is a top priority for the Netherlands Authority for Consumers & Markets (**"ACM"**), with cloud computing the latest sector to catch its eye. In May 2021, the ACM launched the first phase of a market study on cloud services to expand its knowledge and build expertise. Depending on its findings, the ACM will consider if a more in-depth study should be undertaken. The Dutch cloud services landscape is composed of several players, ranging from small data centers to bigger cloud computing platforms, which will all be affected by this market study.

Cloud services, as explained by the ACM, are related to hiring flexible capacity in data centers located around the globe (with the possibility of this being a worldwide market), for computational power, storage and software purposes. The ACM notes that the "pay-as-you-use" model associated with cloud services enables users to scale up or down easily. Similarly, the European Commission (**"EC"**) in its recently published preliminary report on the sector inquiry into the internet of things (**"IoT"**), defines "cloud computing service" as "a digital service that enables access to a scalable and elastic pool of shareable computing resources" (see further our report on the European Commission's IoT sector inquiry).

Indeed, the ACM's study will overlap with certain aspects of the EC's ongoing IoT sector inquiry. Most respondents to the EC's inquiry state that they rely on cloud services to store and process at least some of their data. Moreover, the anticipated growth of the IoT sector will further increase the reliance on cloud services for exchanges of data for linking consumer appliances and gadgets.

There have also been examples of specific national-level investigations into cloud services: for example, in September 2020, the Italian Competition Authority (**"AGCM"**) announced investigations against three of the leading cloud computing service providers, namely, Google (for Google Drive service), Apple (for iCloud service) and Dropbox. The AGCM has concerns over the inclusion of alleged unfair contractual terms such as the right of the operator to unilaterally modify the contract. From a consumer protection perspective, the AGCM will look into certain unfair commercial practices such as providing inadequate information on withdrawal rights or not explaining clearly if user data will be commercialized.

The Dutch ACM is seeking out technical information relating to the design of cloud services and the impact of their functioning on other dependent services. It further intends to identify any "market imperfections" and has already flagged market power, lock-in effects, and information asymmetry as potential concerns on which it will focus.

A lock-in effect may be caused if, for example, a cloud service agreement restricts migration to another provider caused by a lack or hindrance of data-portability. Cloud services provided by alleged "gatekeepers" are mentioned as core-platform services by the EC in the draft version of the Digital Markets Act (**"DMA"**) which will subject them to, inter alia, data portability obligations. Interoperability issues, too, may arise for users of different cloud services (e.g., Infrastructure-as-a-Service, Software-as-a-Service, Platform-as-a-Service, etc.) sourced from different providers. Concerns include that after-market policies of cloud providers may either lock in a customer to services within a cloud or exclude other cloud providers from participating in that cloud.

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The ACM has also expressed concerns about the alleged market power of major participants in the cloud services industry, and whether this may exacerbate network effects and/or enable participants to leverage their market position into other markets.

Regardless of the outcome of this market, the ACM looks set to gain valuable insight into the cloud services sector, which may assist it in its potential future role under the DMA, and the ACM is clearly eager to share the burden of digital enforcement with competition authorities throughout the EU.

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GOOGLE HELD TO HAVE ABUSED DOMINANT POSITION BY REFUSING APP INTEROPERABILITY WITH ANDROID AUTO

On 13 May 2021 Google was fined EUR 102 million by the Italian Competition Authority (**"ICA"**), concluding a process which began in February 2019 when Enel X Italia S.r.l. (**"En-el X"**) filed a complaint alleging that Alphabet Inc., Google LLC, and Google Italy S.r.l. (together **"Google"**) had refused to add its app JuicePass to Google's Android Auto platform.

Enel X (part of the Enel Group) develops innovative products and solutions in the energy sector for homes, businesses, cities, and electric mobility. Its JuicePass app is intended to provide consumers a wide range of services relating to the recharging of electric vehicles (for example finding and reserving a place at a charging station and managing the charging pro-cess). Because Enel X wanted its customers to be able to use the app while driving, it sought to make JuicePass compatible with Android Auto (which allows apps on smartphones to be used on car touchscreens). To do so, developers need access to Google's programming tools; according to Enel X's complaint, however, Google refused to allow Enel X this access and thereby prevented it from developing JuicePass to be compatible with Android Auto.

The ICA initiated a formal investigation into Google following receipt of the Enel X com-plaint. In its decision published on 13 May 2021, the ICA first determined that Google oper-ates in two relevant markets:

- the market for licensing smart mobile operating systems, in which it offers the An-droid service; and
- the market for Android app stores, in which it offers Google Play.

The ICA then went on to find that Google holds a dominant position in both these markets and therefore operates as a 'gatekeeper' for app developers that wish to reach final consum-ers: app developers have a strong incentive to create apps that are compatible with Android as it is the most used operating system in the world, and apps available on Google Play are also compatible with Android Auto.

The ICA ultimately concluded that Google had acted in a way which prevented JuiceApp's interoperability with its Android Auto offering, and in doing so had abused its dominant po-sition by excluding Enel X from the market and unfairly limiting the ability of consumers to use the Enel X app while driving and recharging an electric vehicle. The ICA further found that this conduct was unjustified because Google had both the technical and financial means to guarantee interoperability of JuicePass and also had an interest in accommodating Enel X's request (Enel X being one of Google's key commercial partners for cloud computing ser-vices).

In addition, the ICA held that Google, by refusing the request, had favoured its own Google Maps app, which runs on Android Auto and enables functional services for electric vehicle charging. Although these services are currently limited to finding and providing directions to charging points, the ICA found that other functionalities could be added in the future such as those already provided by JuicePass (e.g. reservation and payment).

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On top of the aforementioned fine of EUR 102 million, Google has been ordered by the ICA to make JuicePass available on Android Auto and to appoint a monitoring trustee to en-sure compliance with this obligation.

Given the unprecedented nature of this case and the issues it raises, it will be interesting to see both whether the ICA's assessment is challenged (and if so whether it is upheld on ap-peal) and also whether other cases related to interoperability of apps arise in the near future.

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UK COURT OF APPEAL DISMISSES FACEBOOK'S APPEAL REGARDING GIPHY-MERGER IEO

On 13 May 2021 the UK Court of Appeal (the **"Court of Appeal")** handed down its judgment in *Facebook Inc v Competition and Markets Authority*, in which Facebook appealed the decision of the UK Competition Appeal Tribunal (the **"CAT"**) to affirm an interim enforcement order (**"IEO"**) issued by the UK Competition and Markets Authority (the **"CMA"**) in respect of Facebook's merger with Giphy. The Court of Appeal dismissed each of Facebook's four grounds of appeal.

Background and Grounds of Review

The merger between Facebook and Giphy completed on 15 May 2020 and was called in by the CMA in June 2020. On 9 June 2020 the CMA issued the IEO, which involved both general obligations on the merging parties not to take action which might prejudice the reference or action taken by the CMA under the Enterprise Act 2002 (the **"2002 Act"**) as well as specific obligations applicable to Facebook's entire business, such as an obligation not to transfer any Facebook subsidiaries or make changes to the organisational structure of the business or key staff. Facebook subsequently made a number of requests which essentially sought to limit the application of the IEO only to its business as it related to the supply or procurement of GIFs (where Giphy is primarily active) (the **"Carve-Out Requests"**).

The CMA did not accept the Carve-Out Requests, on grounds that it could not make a determination until it was provided further information by Facebook. Facebook applied to the CAT in August 2020 for a review of that decision. The CAT rejected this application, and Facebook subsequently appealed the CAT's decision to the Court of Appeal on four grounds:

1. the CMA's power under the 2002 Act to issue an IEO for the purposes of *"preventing pre-emptive action"* does not extend to regulating any activity with a *"potential to affect the competitive structure of the market during [its] investigation"* but is limited to protecting its investigation and potential remedies;

2. the CMA's IEO was excessively broad – the CMA had no basis for freezing Facebook's business in order to preserve its remedies, because the most radical final remedy lawfully available to the CMA would have been to order a divestiture of Giphy, which was preserved under Facebook's derogation request;

3. the Facebook-specific obligations under the IEO were excessively broad; and

4. the CMA's information requests were disproportionate.

Decision of the Court of Appeal

At the outset, the Court of Appeal disagreed with Facebook's arguments that the CMA's ultimate statutory powers were limited to requiring divestiture, which was not the case (the 2002 Act conferring a *"broad scope"* of powers on the CMA). The Court of Appeal also explained that, given the prospective nature of the UK merger control regime, IEOs had to be cast broadly to enable the CMA to act quickly and *"hold the ring whilst [it] obtains the information that it inevitably lacks".*

The Court of Appeal then went on to dismiss the four grounds of appeal:

- **Ground One:** it followed from the wording of the 2002 Act that the threshold for granting an IEO was very low and the CMA was intended to have very wide powers in respect of granting one: the CMA could issue IEOs to prevent actions which *"[it] considers would constitute pre-emptive action"*, and while it was undesirable to attempt any comprehensive definition of what is and is not a *"pre-emptive action"*, it was at the very least clear that that wording in its proper context was *"undoubtedly broad enough to encompass the terms of the template [IEO] imposed in this case."*

- **Ground Two:** the remedies available to the CMA were broader than merely requiring divestiture, and had to extend to making orders impinging on the acquirer's existing business or else *"divestiture at the end of a relatively lengthy process would, by itself, be incapable of either restoring the status quo at the time of the merger or protecting competition in the relevant market."* The CAT was therefore right to reject Facebook's complaint that the CMA could not issue an IEO affecting Facebook's own business.

- **Ground Three:** the specific obligations on Facebook were not excessively broad, as (i) their continued application arose out of Facebook's own lack of engagement with the CMA, and (ii) the nature of the UK merger control regime, wherein the CMA has no information at the outset, requires it to have the power to impose broad measures to prevent pre-emptive actions. As such, the CMA was right to refuse to release Facebook from the specific obligations under the IEO until it had answered the CMA's questions.

- **Ground Four:** the CAT was right to hold that the test for reviewing the CMA's information requests was rationality, and to find that that threshold was not breached in this case.

Conclusion

The decision only affirms the broad approach taken by the CMA in recent years in respect of IEOs (as CMA Chief Executive Andrea Coscelli noted following the judgment) and is relevant to the interpretation, application and potential challenge of onerous IEOs going forward.

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