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Digital Markets Regulation Handbook

April 2024

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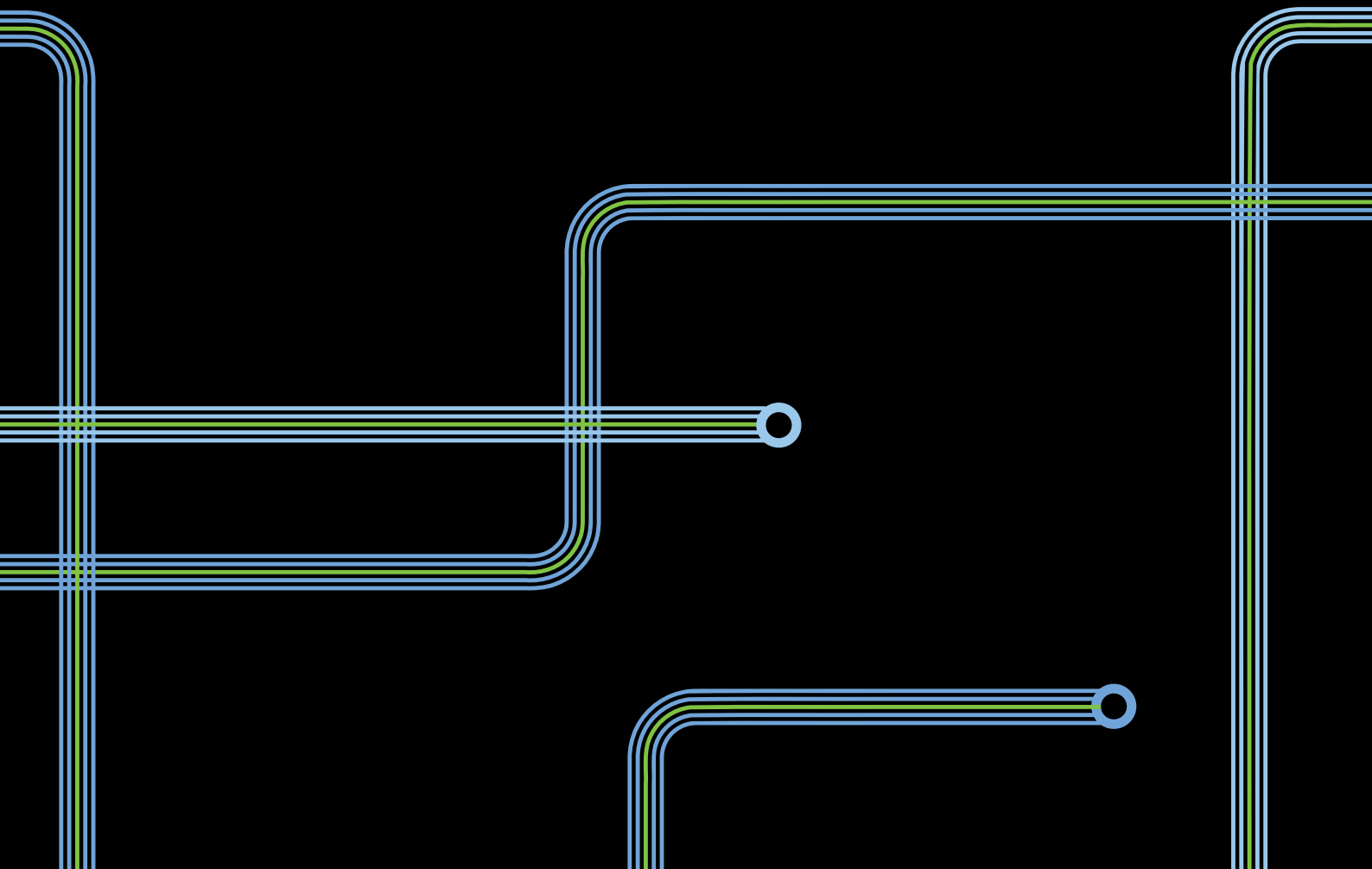

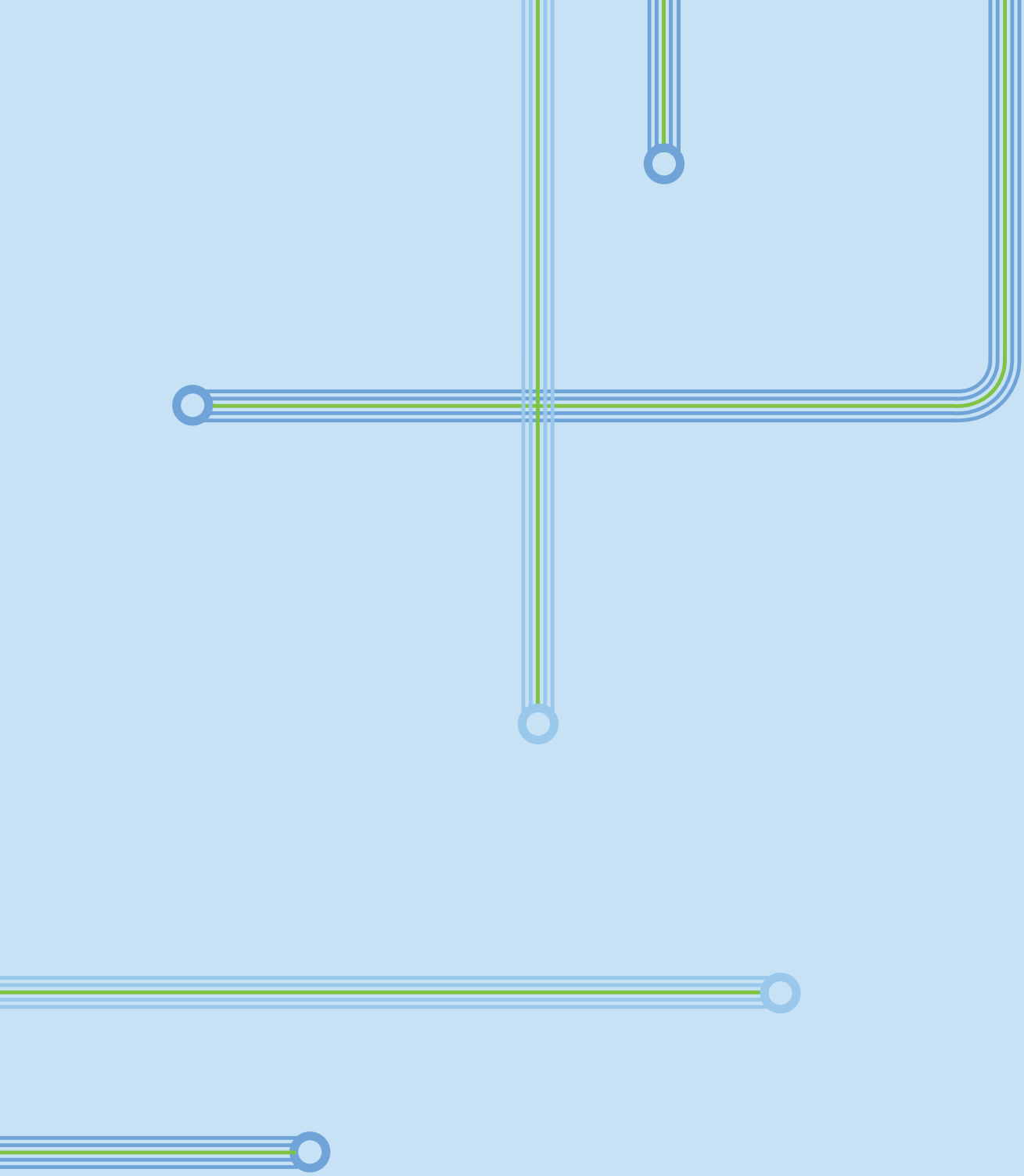

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Editors' Preface

Proposals for regulation designed to address competition issues in digital markets have started to proliferate as policymakers have, in recent years, moved from deliberation to action.

With rolling waves of overlapping rules to navigate, businesses and practitioners may rightly feel overwhelmed. Written by global experts, this guide navigates uncharted waters to bring clarity to a brave new world of competition regulation in digital markets.

From the complex network of new regimes and rules, we identify three trends.

First, **many substantive rules mimic past or pending antitrust cases**. The drive for *ex ante* regulation stems from a consensus that traditional competition law rules are too slow, and the burden of proof on authorities too high, to protect and enhance competition in digital markets. Accordingly, some forthcoming rules prohibit certain conduct up front across firms and across product and service categories, with limited scope to look at effects on competition or for firms to justify conduct based on economic efficiencies. They obviate the need for targeted antitrust enforcement against specific firms and practices.

For example, rules on interoperability for operating systems reflect the European workgroup server case against Microsoft. Rules on self-preferencing in ranking and preinstallation of apps on smartphones are inspired by previous cases against Google. Rules concerning app stores' mandated use of billing systems stem from investigations into Apple. And rules on the use of business user data to compete with those business users mirror investigations into Amazon and Meta. In addition, most regimes import broader principles from competition law, such as the notion of anticompetitive effects, the boundaries between integrated and separate products, and the concepts of fairness, reasonableness, and non-discrimination.

At the same time, competition law will remain relevant even as *ex ante* regulatory regimes come into being. Regimes like the European Digital Markets Act ("**DMA**") and South Korea's app store rules are sufficiently specific to leave space for antitrust to tackle conduct—and firms—beyond their scope. As EU Competition Commissioner Margrethe Vestager has said, antitrust and regulation "*are complementary – both will remain necessary.*"[1]

Second, **the relevance of anticompetitive effects or consumer benefits when assessing firms' practices varies across regimes**. Under the DMA, for example, there is no express requirement for the European Commission to establish that a breach of the rules adversely affects competition before finding a violation. Presuming anticompetitive harm in this way is driven by a view that certain forms of conduct that were traditionally considered competitively beneficial, or at least neutral, risk damaging competition when undertaken by large digital platforms.

The dispensation of effects analyses in certain forthcoming regimes may also result from the lodestar of competition law—the protection of competition and consumers—giving ground to a different goal: the preservation of pluralistic market structures. This goal, inspired by US Supreme Court Justice Louis Brandeis and the ordoliberal origins of EU competition policy, has the consequence of disregarding welfare gains that flow from successful competition that generates both competitive advantages for innovators and benefits for consumers. It abandons the fundamental tenet of competition law that tolerates—even lauds—the exclusion of less efficient firms.

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[1] Margrethe Vestager, speech at Global Competition Law Centre annual conference, Bruges, Competition policy: where we stand and where we're going (March 25, 2022).

This approach is not, however, universal. The proposed UK regulatory regime for digital markets, for example, will be based on evidence of harm to competition and will take consumer benefits into account. Proposed bills in the US require proof of harm to competition as a precondition of a violation. And the German section 19A amendments already in force allow firms to justify their conduct based on consumer benefits. Even under the DMA, gatekeepers should be able to rely on the general principle of proportionality under EU law to limit harmful intervention. A more flexible approach is welcome. Ignoring procompetitive benefits can deprive consumers of the fruits of innovation, whereas protecting less efficient rivals from exclusion can remove the incentive for firms to innovate altogether.

Third, **authorities should engage in regulatory dialogue with target firms and other stakeholders** in order to produce compliance solutions that balance the interests of end users, business users, and platforms. Such engagement is expressly contemplated under the DMA. Regulators appear also to envisage involving stakeholders in a form of participatory regulation. Margrethe Vestager has stated that DMA compliance solutions will be subject to dedicated "*technical workshops*" with consumers, who could help determine whether a remedy "*could actually work*" or "*[live] up to what is in the law.*"[2] The UK Competition & Markets Authority ("**CMA**") will, under the UK's proposed regulatory regime, have the power to test and experiment with compliance measures.

Authorities seem particularly interested in interventions that could result in digital firms changing the designs of their digital products in order to promote greater user choice. For example, recent investigations[3] and research[4] by the CMA demonstrate its appetite for engaging with firms' designs—from the positioning of buttons to the color of text—as it mulls potential regulatory rules. The European Commission also has experience in scrutinizing the minutiae of user interface design through previous cases where it negotiated choice screens on the Windows and Android platforms and the design of Google's search page. Participation from industry will introduce an additional dimension to designing, testing, and iterating workable compliance solutions in this area.

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[2] Lewis Crofts, MLex, 'Workshops' could see Big Tech test EU Digital Markets Act remedies with consumers, Vestager says (September 27, 2022).

[3] *See, e.g.*, CMA, Mobile Ecosystems Final Report (June 10, 2022).

[4] CMA, CMA155, Online Choice Architecture: How digital design can harm competition and consumers (April 2022).

Australia

Rules Under Development

In Australia, digital firms are subject to general competition and consumer protection laws applicable to all firms. In March 2021, Australia introduced a "News Media and Digital Platforms Mandatory Bargaining Code" intended to address the perceived bargaining power imbalance between news media businesses and digital platforms. The Australian Competition and Consumer Commission is currently conducting a five-year inquiry into digital platform services, due to be finalized in March 2025. Until then, digital markets regulation in Australia remains pending and its contents uncertain.

Authored by Henry Mostyn, Goksu Kalayci, and Leonor Vulpe Albari

Updated as of December 2023

1. What rules govern competition in digital markets in Australia?

The legislation governing competition in digital markets is set out in the Competition and Consumer Act 2020 (the "**Act**"). In March 2021, the Act was amended to include the News Media and Digital Platforms Mandatory Bargaining Code (the "**Publisher Code**"), intended to address the perceived bargaining power imbalance between news media businesses and digital platforms (specifically Google and Meta). The Code applies only to "*designated digital platforms*," but the Treasurer has not yet designated any such platform.

March 2021

IN MARCH 2021, THE COMPETITION AND CONSUMER ACT 2020 WAS AMENDED TO INCLUDE A BARGAINING CODE INTENDED TO ADDRESS THE BARGAINING POWER IMBALANCE BETWEEN MEDIA BUSINESSES AND CERTAIN DIGITAL PLATFORMS.

Any digital platform designated under the Publisher Code is required to comply with certain general requirements in relation to its designated services (*see* Question 6 for more details).

The Act is enforced by the Australian Competition and Consumer Commission (the "**ACCC**"), an independent government agency. The ACCC must apply to the Federal Court of Australia to seek orders enforcing the Act, including by penalties and injunctions. The ACCC is not itself a determinative body.

The ACCC is currently considering a new behavioral regime to regulate digital platforms. These rules are expected to come into force in 2025 at the earliest.

2. What is the status of any forthcoming digital markets regulation in Australia?

The ACCC is currently conducting a five-year inquiry into digital platform services (the "**DPS Inquiry**"), as directed by the government. Until the DPS Inquiry is finalized, digital markets regulation in Australia remains pending, and its contents uncertain.

Rod Sims' recent remarks, however, indicate that the ACCC may recommend *ex ante* rules. On September 28, 2022, the former ACCC chair said that "*there should be ex ante rules to describe what [digital platforms] should and shouldn't do.*" Sims referred to regulation in various jurisdictions, including Germany, the US, and the UK, before concluding that "*if Australia doesn't get on board, the bus will leave without us.*"[1] More recently, ACCC chair Gina Cass-Gottlieb said that digital regulation would "*ensure that Australian law keeps pace with both fast-moving digital markets and regulatory developments overseas, where many jurisdictions are already acting on these issues having also concluded that ex post enforcement of existing competition law is not sufficient.*"[2]

As part of the DPS Inquiry, the ACCC has published, and is continuing to publish, interim reports every six months. The DPS Inquiry will conclude with the publication of a final report, which the ACCC aims to publish by March 31, 2025.

March 2025

THE ACCC'S DIGITAL PLATFORM SERVICES INQUIRY IS DUE TO BE FINALIZED IN MARCH 2025.

On November 11, 2022, the ACCC published its fifth interim report on competition and consumer issues and regulatory reform. It was published off the back of a discussion paper, published on February 28, 2022, in which the ACCC sought stakeholder views on the need for new regulatory tools to address competition and consumer issues in relation to the supply of digital platform services, and if so, options for regulatory reform.

In its fifth interim report, the ACCC recommended mandatory, service-specific codes of conduct for "*designated*' digital platforms, operating under high-level principles enshrined in legislation (similar to the forthcoming regulatory regime in the UK). The ACCC also proposed strengthening consumer protection laws with an economy-wide prohibition on unfair trading practices, and rules applicable to all digital platforms on scams, harmful apps, fake reviews, dispute resolution standards, and an ombudsman scheme.

The Government is reviewing the ACCC's proposal, and conducted a consultation process from December 2022 to February 2023.[3] A spokesperson for the office of Andrew Leigh, Australia's Federal Assistant Minister for Competition, said that regulation "*hasn't kept pace with the rapid development of digital platforms*" and that "*the ACCC's recommendations*

[1] *See* Monash University, Roundtable Discussion (September 28, 2022), 1:05-1:07.

[2] Gina Cass-Gotlieb, Speech at the Committee for Economic Development of Australia (March 7, 2023).

[3] *See* Australian Government, The Treasury, Digital Platforms – Consultation on Regulatory Reform (December 20, 2022 - February 15, 2023).

around consumer and competition measures in this space are important".[4]

In short: New laws and codes are unlikely to be in place until 2024.

Most recently, on November 27, 2023, the ACCC published its seventh interim report on the expanding ecosystems of providers of digital platform services in Australia, focusing on the expansion of Google, Amazon, Apple, Meta, and Microsoft. It cautioned that the creation of large multi-product ecosystems could give rise to harms to competition and consumers, and continued to recommend economy-wide consumer measures as well as service-specific codes of conduct for digital platforms.

3. How are the proposed rules expected to be enforced?

The ACCC has indicated that it does not consider that proceedings under existing legislation will be sufficient alone to address systemic competition concerns in the digital services industry in Australia.[5] It therefore recommends that the new rules should allow the ACCC to develop mandatory, service-specific codes of conduct for "designated" digital platforms, operating under high-level principles enshrined in primary legislation.[6] The ACCC should be responsible for enforcing such regulatory solutions, including by making designation decisions, which should be wider than its current enforcement powers under the Act.

The ACCC has also established a new Digital Platforms branch with AUD 27 million in funding and extensive investigative powers. According to former ACCC chair, Rod Sims, the new branch will "*ensure continuous and close scrutiny of this complex sector.*"[7]

$27mn

THE ACCC HAS ESTABLISHED A NEW DIGITAL PLATFORMS BRANCH WITH AUD 27 MILLION IN FUNDING AND EXTENSIVE INVESTIGATIVE POWERS.

The parameters of the proposed new regime are unclear, but the ACCC's final report on digital advertising and interim reports for the DPS Inquiry suggest that the rules and enforcement of the new regulation may be structured as follows:

— The ACCC will develop sector specific rules to address competition concerns in digital markets (*e.g.*, ad tech, online search, social media, and app marketplaces).

— The rules will apply to providers of digital services that meet certain criteria, which will be linked to their market power and/or strategic position in the sector.

4. To which firms will the proposed rules apply?

The rules will apply to providers of digital services that meet certain predetermined criteria linked to a provider's market power and/or strategic position. The ACCC's final report on digital advertising, and its interim reports on search, social media, app marketplaces, and regulatory reform as part of the DPS Inquiry, contemplate that platform owners such as Google, Apple, and Meta will be within scope of the new rules. The DPS Inquiry's most recent interim report also

[4] *See* PaRR, Competition regulation 'hasn't kept pace' with growth of digital platforms in Australia: gov't (17 August 2023).

[5] *See* ACCC, Digital advertising services inquiry: Final report (August 2021).

[6] The ACCC recommends that such principles should focus on promoting competition on the merits, informed and effective consumer choice, and fair trading and transparency. *See* ACCC, Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform (September 2022).

[7] ACCC, Speech by Rod Sims: The ACCC's Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses (August 6, 2020).

discusses the core services and expansion of Amazon, Apple, Google, Meta, and Microsoft, indicating that they are likely to be in scope of the new regime.

5. What are the main substantive rules that would govern the firms covered by the proposed digital markets regulation?

The ACCC has not yet set out what its proposed *ex ante* regulations of digital platforms will cover, but it may involve obligations of the kind set out in the EU's Digital Markets Act and under consideration in other jurisdictions.

The ACCC's fifth, sixth, and seventh interim reports on regulatory reform[8] (published as part of the DPS Inquiry) provides some examples of what could be covered in the ACCC's codes of conduct:

— Rules prohibiting anticompetitive **self-preferencing**;

— Rules prohibiting anticompetitive **tying** and **bundling**;

— Rules limiting **pre-installation** and **default settings** in certain circumstances;

— Rules prohibiting impediments to **consumer switching**;

— **Data access** and **portability** requirements, but only once privacy and security risks are appropriately managed;

— **Interoperability** requirements;

— **Transparency** requirements in **app review processes**;

— **Transparency** requirements in **ad tech**;

— Requirements to deal **fairly** with business users;

— Rules limiting **exclusivity** and **price parity clauses** in contracts with business users; and

— **Choice screens**, following a careful examination of the effectiveness of such rules in other jurisdictions.

As described under Question 2, the ACCC also proposes strengthening consumer protection laws with an economy-wide prohibition on unfair trading practices, and rules applicable to all digital platforms on scams, harmful apps, fake reviews, dispute resolution standards, and an ombudsman scheme.

6. Are there specific rules governing digital platforms' relationships with publishers in Australia?

As described under Question 1, Australia's Publisher Code addresses the perceived bargaining power imbalance between digital platforms and news media businesses. It aims to facilitate bargaining between designated digital platforms and news media businesses for remuneration for their news content. The Publisher Code applies only to "*designated digital platforms*" and their "*designated services*." No digital platform has yet been designated by the Treasurer.

Any digital platform that is designated under the Publisher Code will be required to comply with a set of general requirements in relation to its designated services and its engagement with registered news businesses. For example, designated digital platforms will be required:

— to participate in bargaining, and negotiate in good faith, upon receiving a notice from a registered news business to bargain;

[8] ACCC, Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform (September 2022); ACCC, Digital Platforms Services Inquiry Interim Report No. 6: Report on social media services (March 2023); and ACCC, Digital Platform Services Inquiry Interim Report N. 7: Report on expanding ecosystems of digital platform service providers (September 2023).

— if no agreement is reached within three months, to participate in a mediation and negotiate in good faith; and

— if no agreement is reached after two months of mediation, to participate in arbitration in good faith.

The Publisher Code also allows designated digital platforms and news businesses to reach agreements outside the Code. The ACCC must be notified of any agreements to disapply provisions of the Code.

On February 28, 2022, the Treasurer began its review of the Publisher Code in consultation with the ACCC and other Australian government departments.

7. Will the ACCC need to show anticompetitive effects in order to establish a breach of the proposed rules?

Until the ACCC's DPS Inquiry final report is published, it remains unclear what rules the ACCC will recommend, and whether the ACCC will need to demonstrate the effects of firms' conduct in order to establish a breach of the proposed rules.

8. Will firms be able to defend or objectively justify their conduct under the proposed rules?

Until the ACCC's DPS Inquiry final report is published, it remains unclear what rules the ACCC will recommend, and whether, under those rules, firms will be able to defend or objectively justify their conduct.

The ACCC's fifth and sixth interim reports[9] (published as part of the DPS Inquiry) indicates that the ACCC is considering drafting codes of conduct that allow for defenses or justifications. In discussing its recommendations for targeted competition obligations, the ACCC explained that "*[t]he drafting of obligations should consider any justifiable reasons for the conduct (such as necessary and proportionate privacy or security justifications).*"[10]

9. What procedural safeguards will there be under the proposed rules?

Until the ACCC's DPS Inquiry final report is published, it remains unclear what rules the ACCC will recommend and what procedural safeguards will accompany those rules.

10. What kinds of penalties or remedies will the ACCC be able to impose following a breach of the proposed rules?

Potential sanctions and penalties will likely be addressed in the ACCC's final report at the conclusion of its five-year DPS Inquiry. In its fifth interim report, the ACCC explained that "*significant financial penalties*", as well as injunctions, declarations, and disqualification orders should be available for breaches of new consumer and competition obligations.[11] The ACCC stated that penalties available against digital platforms should reflect the financial strength of the digital platforms and should, at a minimum, be equivalent to the largest penalties already available under the Act.[12]

11. Has the ACCC issued any guidance or reports regarding the proposed rules?

The ACCC has published a series of reports following sector inquiries into digital platforms, digital advertising services, and digital platform services:

[9] ACCC, Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform (September 2022).

[10] Ibid., p. 123 and ACCC, Digital Platforms Services Inquiry Interim Report No. 6: Report on social media services (March 2023), p. 135.

[11] ACCC, Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform (September 2022), p. 191.

[12] Ibid., pp. 191-192.

— Digital platforms inquiry: final report (June 2019).[13]

— Digital advertising services inquiry: final report (August 2021).[14]

— Digital platform services inquiry 2020-2025, including:

  • September 2020 interim report.[15]

  • March 2021 interim report on app marketplaces.[16]

  • September 2021 interim report on search defaults and choice screens.[17]

  • February 2022 discussion paper seeking stakeholder views on the need for new regulatory tools to address competition and consumer issues in relation to the supply of digital platform services, and if so, options for regulatory reform.[18]

  • March 2022 interim report on general online retail marketplaces.[19]

  • September 2022 interim report on regulatory reform (published on November 11, 2022).[20]

  • March 2023 interim report on social media services (published on April 28, 2023).[21]

  • September 2023 interim report on expanding ecosystems of providers of digital platform services (published on November 27, 2023).[22]

12. Will the proposed rules be competition based, or will they target other types of conduct, such as consumer protection, moderation of content, or privacy?

Until the ACCC's DPS Inquiry final report is published, it remains unclear what rules the ACCC will recommend, and whether the regime will be competition based.

In light of the ACCC's fifth and sixth interim reports[23] (published as part of the DPS Inquiry), it is likely that any new regime, if proposed, will touch on a range of related issues, from competition to consumer protection and online privacy.

The ACCC's fifth interim report proposes regulation to address the harms to competition and consumers arising from digital platform services, and discusses how to implement regulation without causing more harm than good, for example by safeguarding consumers' privacy. The sixth report makes similar recommendations, with a focus on social media platforms.

[13] ACCC, Digital Platforms Inquiry: Final report (June 2019).

[14] ACCC, Digital advertising services inquiry: Final report (August 2021).

[15] ACCC, Digital Platform Services Inquiry: Interim Report (September 2020).

[16] ACCC, Digital Platforms Services Inquiry Interim Report No. 2: App marketplaces (March 2021).

[17] ACCC, Digital Platforms Services Inquiry Interim Report No. 3: Search defaults and choice screens (September 2021).

[18] ACCC, Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services (February 2022).

[19] ACCC, Digital platform services Inquiry Interim Report No. 4: General online retail marketplaces (March 2022).

[20] ACCC, Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform (September 2022).

[21] ACCC, Digital Platform Services Inquiry Interim Report No. 6: Report on social media services (March 2023).

[22] ACCC, Digital Platform Services Inquiry Interim Report N. 7: Report on expanding ecosystems of digital platform service providers (September 2023).

[23] ACCC, Digital Platform Services Inquiry Interim Report No. 5: Regulatory Reform (September 2022) and ACCC, Digital Platforms Services Inquiry Interim Report No. 6: Report on social media services (March 2023).

13. What is the current enforcement practice with respect to conduct that is expected to be addressed by the proposed rules?

Enforcement action against digital platforms has largely focused on consumer protection measures, as opposed to breaches of antitrust law. Recent enforcement action includes:

— Federal Court proceedings against Meta alleging that it misled consumers by representing that the free Onavo Protect app would keep users' data private, but instead used the data for its commercial benefit (since December 2020).[24] The Federal Court fined Meta AUD 14 million in July 2023.[25]

— Federal Court finding against Google that it misled consumers about personal location data collected through Android mobile devices between 2017-2018 (April 2021).[26] The Federal Court imposed AUD 60 million in penalties and ordered Google to ensure its policies include a commitment to compliance and to train staff about Australian Consumer Law.[27]

— Federal Court proceedings against Meta, alleging that the company engaged in false, misleading, or deceptive conduct by publishing scam advertisements featuring prominent Australian public figures (since March 2022).[28] Meta is defending against all claims.

14. Are there merger rules specific to digital platforms in Australia?

While new merger control rules for digital platforms are not yet in force, the ACCC recommended the following changes to Australian merger control in its final report on the Digital Platforms Inquiry:[29]

— Amend the relevant part of the Act to include the following additional factors to be taken into account in the merger analysis:

- the likelihood that the acquisition would result in the removal from the market of a potential competitor; and
- the nature and significance of assets, including data and technology, being acquired.

— Require large digital platforms to provide advance notice to the ACCC of any proposed acquisitions that may impact competition in Australia. The ACCC proposes that the details of the notification protocol be agreed between it and each digital platform, and would specify:

- the types of acquisitions would require notification, including minimum transaction value; and
- the minimum advance notification period prior to completion for ACCC to assess the proposed acquisition.

The seventh report of the DPS Inquiry also recognized that challenges with existing merger laws "*are particularly acute in markets for digital platform services due to their fast-paced and dynamic nature,*" but continued to recommend

[24] ACCC, ACCC alleges Facebook misled consumers when promoting app to 'protect' users' data (December 16, 2020).

[25] ACCC, $20m penalty for Meta companies for conduct liable to mislead consumers about use of their data (July 26, 2023).

[26] ACCC, Google misled consumers about the collection and use of location data (April 16, 2021).

[27] ACCC, Google LLC to pay $60 million for misleading representations (August 12, 2022).

[28] ACCC, ACCC takes action over alleged misleading conduct by Meta for publishing scam celebrity crypto ads on Facebook (March 18, 2022).

[29] ACCC, Digital Platforms Inquiry: Final report (June 2019).

"*an economy-wide review of Australia's merger laws.*"[30]

In August 2021, the ACCC proposed a further set of significant revisions to Australian merger control, stating that the current regime is not "*fit for purpose.*"[31] These wider-ranging proposals include:

— Changing Australia's current voluntary merger review regime to a mandatory or suspensory one, where merging parties contemplating transactions that exceed certain thresholds cannot complete pending ACCC approval.

— Confining appeals against ACCC decisions to limited merits review.

— Changing the substance of the merger test, including by:

- updating the factors to be taken into account (as above);
- lowering the current threshold of "*likely*" to substantially lessen the competition in the market;
- introducing a presumption that transactions where a merger party has substantial market power substantially lessens competition; and
- introducing special rules for acquisitions involving large digital platforms, to address the particular challenges these transactions can pose.

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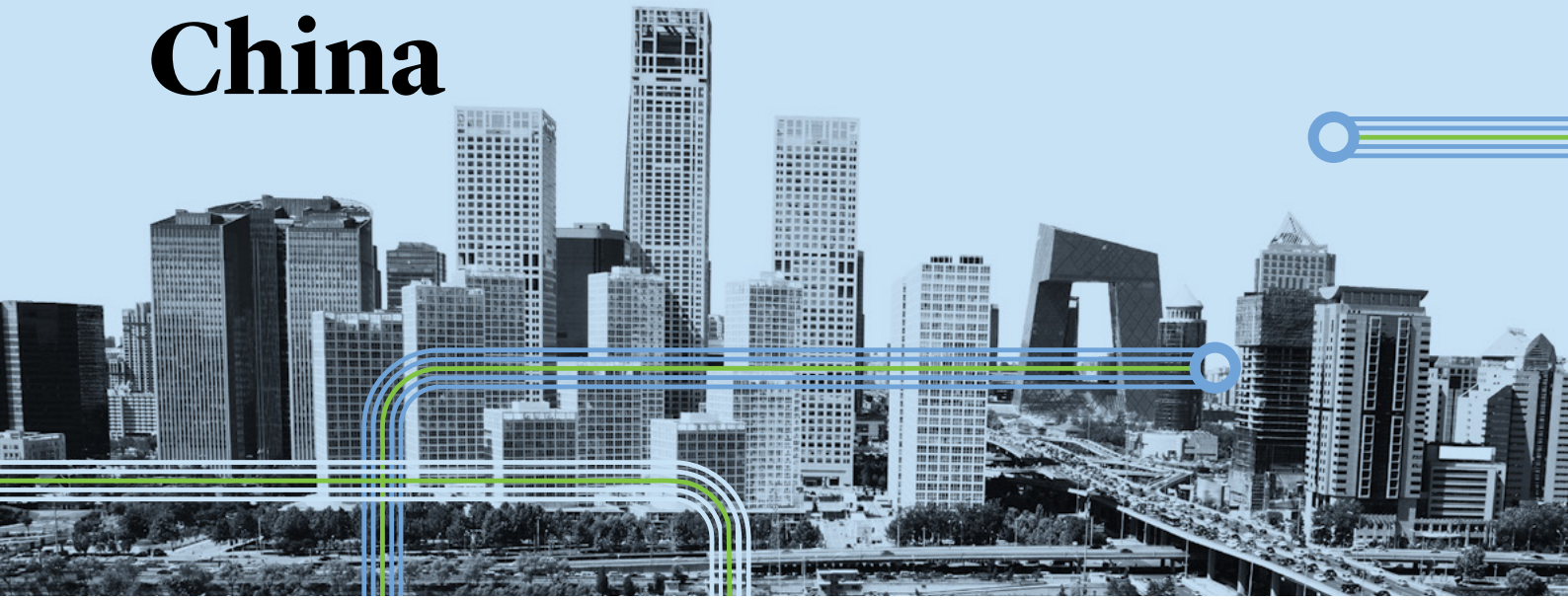
[30] ACCC, Digital Platform Services Inquiry Interim Report N. 7: Report on expanding ecosystems of digital platform service providers (September 2023).

[31] ACCC, Speech by Rod Sims: Protecting and promoting competition in Australia (August 27, 2021).

China



Rules Under Development

A range of new digital-specific laws are under consideration in China, including rules to tackle self-preferencing and exploitation of data advantages by dominant digital platforms. The timing of their adoption is currently uncertain. Meanwhile, the Chinese competition authority has ramped up enforcement using existing competition laws.

Authored by Huanbing Izzy Xu and Yiming Sun

Updated as of December 2023

1. What rules govern competition in digital markets in China?

There is currently no standalone digital-specific competition legislation in China. Digital firms are subject to general competition, consumer protection, and data security laws applicable to all firms, which may contain competition-related provisions specific to online platform operators.[1]

The main governing competition law in China is the Anti-Monopoly Law ("**AML**"). The first major amendments since AML's enactment ("**AML Amendments**"), which include digital-specific provisions, took effect on August 1, 2022. The AML is supplemented by a number of implementing regulations and guidelines, including the Antitrust Guidelines for Online Platforms that provide guidance on the application of AML to online platforms. The AML is supplemented by various pieces of guidance and implementing regulations, including:

— Updates to the Regulation on Prohibition of Abuse of Dominant Market Position ("**Abuse of Dominance Regulation**"), and

— Updates to the Regulation on Prohibition of Monopolistic Agreements.

Both regulations were updated in March 2023 and include new provisions prohibiting firms from abusing market dominance or entering into monopolistic agreements via data, algorithms, technologies, or platform rules.

[1] Certain existing and draft non-competition laws and regulations contain digital-specific rules and provisions. This chapter focuses on laws and regulations that are substantially related to competition.

2. What is the status of any forthcoming digital markets regulation in China?

The AML Amendments, which include digital-specific provisions, took effect on August 1, 2022. The AML Amendments are vague and designed to be supplemented by updates to various pieces of guidance and implementing regulations, including the Abuse of Dominance Regulation and the Regulation on Prohibition of Monopolistic Agreements.

Numerous other digital-specific regulations are under consideration in China, but it is currently uncertain whether and when they will take effect. In particular:

AUGUST 2021

A new "Anti-Unfair Online Competition Regulation" was published for public consultation.

OCTOBER 2021

Two draft guidelines for Online Platform Classification Regime were published for public comments.

NOVEMBER 2021

The Cybersecurity Administration of China published the draft Network Data Security Management Regulation for public comments.

— In August 2021, a new Anti-Unfair Online Competition Regulation was published for public consultation. The draft regulation covers conduct including online false advertising, online defamation, and exclusive dealing. It requires that online platform operators enforce against unfair behavior on their platforms by participants such as vendors.

— In October 2021, two draft guidelines were published for public comments proposing to adopt an online platform classification regime ("**Platform Classification Regime**") where platforms would be classified based on factors such as main business area, number of active users, and market capitalization. Based on their classifications, platforms would be subject to different obligations in the areas of data protection, fair competition, and labor treatment.

— In November 2021, the Cybersecurity Administration of China published the draft Network Data Security Management Regulation ("**Data Security Regulation**") for public comments. The draft regulation focuses on cybersecurity and privacy but also includes competition rules, such as those that prohibit online platform operators from taking advantage of data for unfair discriminatory practices against users or vendors using the platform.

3. How are the proposed rules expected to be enforced?

The AML and the accompanying antitrust regulations and guidelines are enforced by the State Anti-Monopoly Bureau of China's State Administration for Market Regulation ("**SAMR**") and its local branches.[2] Anti-monopoly Enforcement Division I of the State Anti-Monopoly Bureau has also set up a department dedicated to enforcement against online platforms.

The enforcement of competition rules under the other digital legislation may involve other authorities, such as the Cybersecurity Administration of China.

[2] The proposed Anti-Unfair Online Competition Regulation and the proposed Platform Classification Regime will also be enforced by SAMR.

4. To which firms will the proposed rules apply?

The AML is applicable to all firms. Certain provisions in the accompanying regulations and guidelines apply to operators of online platforms, which are defined as "*a form of business organization that enables bilateral or interdependent parties across the platform to interact through network information technology under the rules and facilitation provided by a specific carrier, thereby creating value together.*"[3]

The proposed Anti-Unfair Online Competition Regulation would apply to all firms that carry out activities online.

The proposed Platform Classification Regime covers all operators of online platforms. Platforms that are classified as "*super large platforms*" would face additional obligations. Super large platforms are those with more than 500 million annual active users in China, are active in multiple business areas, have a market capitalization of more than CNY 1 trillion (c. USD 137 billion), and exercise very strong control over the accessibility of vendors to consumers or users.

The proposed Data Security Regulation is applicable to all online data processing and management activities within China. Data processing activities outside of China would also be subject to the proposed Regulation if the data processed is data of individuals and organizations in China and the data processing activities have a connection with China (*e.g.*, for the purpose of providing goods or services to China).

5. What are the main substantive rules that would govern firms covered by the proposed rules?

The various proposals under consideration in China (*see* Question 2 above) include a mix of new rules that would apply to various classes of digital firms. For example:

— **Interoperability**. Under the Platform Classification Regime, those firms operating super large platforms would be subject to obligations to ensure interoperability with other platforms. For example, super large platforms may be required to offer multiple e-payment options at checkout, including those offered by rivals.

— **Unfair data practices**. The draft Data Security Regulation prohibits online platform operators from engaging in a range of anticompetitive or unfair competition practices concerning data. Several of these rules mirror proposals in other jurisdictions, like the EU (but go even further). Proposed rules include addressing platforms from taking advantage of data for unfair discriminatory practices, unfair competition against vendors within the platform, impairing users' right to make decisions about the processing of their data, processing data without user consent, and unreasonably restricting small-to-medium sized enterprises on the platform from fairly obtaining industry and market data generated by the platform.

6. Are there specific rules governing digital platforms' relationships with publishers?

No.

7. Will SAMR need to show anticompetitive effects in order to establish a breach of the proposed rules?

Under the AML and their accompanying regulations, SAMR generally needs to establish anticompetitive effects in order to prove an infringement, although effects can be presumed for the most serious anticompetitive conduct (*e.g.*, price-fixing cartels).

[3] Article 2(1), Antitrust Guidelines for Online Platforms.

Under the draft competition-related provisions of the proposed digital-specific rules, authorities may not need to establish the effects of certain conduct in order to establish a breach. For example, the proposed Platform Classification Regime requires that super large platforms avoid self-preferencing and promote interoperability with other platforms, regardless of the conduct's effect on competition.

8. Will firms be able to defend or objectively justify their conduct under the proposed rules?

Under the AML, firms may defend against an abuse of dominance allegation by showing justifiable reasons for their conduct.

Firms will also be able to defend themselves based on justifications under the Abuse of Dominance Regulation. The Regulation provides that potential legitimate justifications may include that the display or order of products is based on fair, reasonable, and non-discriminatory terms, the conduct is necessary to maintain the platform's reasonable business model, the conduct is consistent with industry standards or transaction norms, and other justifications support the reasonableness of the conduct.[4]

Whether such a defense is available under the proposed Anti-Unfair Online Competition Regulation and Platform Classification Regime varies between the specific provisions.[5]

9. What procedural safeguards will there be under the proposed rules?

Under the AML and the accompanying regulations, a firm may appeal SAMR's decisions via administrative reconsideration or litigation pursuant to the Administrative Procedure Law.[6] Prior to a penalty decision, a firm has the right to be informed of the facts and reasons against it, state its case, put forward a defense, and apply for a hearing according to laws.[7] To date, few parties have pursued administrative appeals, which ended either in dismissal or affirmation of the penalty decisions.

A decision under the proposed Anti-Unfair Online Competition Regulation and the draft Data Security Regulation may also be appealed via administrative reconsideration or litigation pursuant to the Administrative Procedure Law, which also provides for the right to be informed, the right to put forward a defense, and the right to request a hearing.

It is unclear at this time what procedural safeguards would be available under the proposed Platform Classification Regime.

10. What kinds of penalties or remedies will SAMR be able to impose following a breach of the proposed rules?

Under the AML, a firm may be fined 1-10% of its turnover for implementing monopolistic agreements based on either horizontal violations or abuse of dominance violations. For severe violations or repeat offenders, the AML now allows SAMR to impose a fine two to five times the statutory limit.

The proposed Anti-Unfair Online Competition Regulation provides that most violations would be subject to fines up to CNY 5 million (c. USD 740,000) pursuant to China's Anti-Unfair Competition Law. Violations that constitute abuse of dominance should be fined in accordance with the AML.[8] In 2021, Alibaba was fined CNY 18.2 billion (c. USD 2.5 billion) and Meituan was fined CNY 3.4 billion (c. USD 471 million) for abuse of

[4] Art. 16, 17, 18, and 19, of the Regulations on Prohibition of Abuse of Dominant Position.

[5] In particular, the defense would be available for provisions with qualifiers such as "*without justifiable reasons*" or "*reasonable*".

[6] Art. 65, Anti-Monopoly Law (First Amendment).

[7] Art. 51, Anti-Monopoly Law (First Amendment), Arts. 44, 45 and 63 of Administrative Penalty Law.

[8] Art. 38, Anti-Unfair Online Competition Regulation (August 2021, Draft for comments).

dominance based on platform exclusive dealing requirements (*see further* Question 14).

The draft Data Security Regulation provides for fines of up to CNY 10 million (c. USD 1.4 million), suspension or termination of operation, and revocation of business licenses.

It remains unclear what penalties or remedies can be imposed under the Platform Classification Regimes.

11. Has SAMR issued any guidance or reports regarding the proposed rules?

No. However, the Anti-Monopoly Committee of the State Council has issued Antitrust Guidelines for Online Platforms that provide guidance on the application of AML to online platforms.[9]

12. Will the new regime be competition based, or will it target other types of conduct, such as consumer protection, moderation of content, or privacy?

The AML Amendments and the accompanying guidelines and regulations are competition based.

The proposed Anti-Unfair Online Competition Regulation covers a wide range of issues, including competition, consumer protection, moderation of content, and data usage.

The proposed Platform Classification Regime likewise touches on a wide range of issues, including fair competition, anti-monopoly, data protection, cybersecurity, credit rating, anti-monopoly, intellectual property, privacy, and consumer protection.

The proposed Network Data Security Management Regulation focuses on cybersecurity and privacy.

13. What is the current enforcement practice with respect to conduct that is expected to be addressed by the proposed rules?

Antitrust enforcement against Chinese internet platforms has been an enforcement focus of SAMR since 2020. SAMR has issued a handful of penalty decisions under the current AML, focusing on the imposition of exclusive dealing contracts on platforms' business users. For example:

— **Abuse of dominance fine against Alibaba**. In April 2021, SAMR imposed a record CNY 18.2 billion (c. USD 2.5 billion) fine against Alibaba for abuse of dominance in the market for internet retail platform services by forcing exclusive contracts on vendors and restricting vendors from multi-homing on other platforms via incentive and penalty mechanisms.

— **Abuse of dominance fine against Meituan**. In October 2021, SAMR fined Meituan CNY 3.4 billion (USD 471 million) for abuse of its dominant position in the Chinese market for online food delivery platform services by forcing exclusive dealing contracts on vendors and restricting vendors from participating on rival food delivery platforms by charging non-exclusive high commission fees, giving lower promotional priority, and other differential conditions.

— **Abuse of dominance fine against CNKI**. In December 2022, SAMR fined CNKI CNY 87.6 million (c. USD 12 million) for abusing its dominant position in the Chinese online academic database market, by forcing exclusive publication contracts with publishers and universities, and charging unfairly high prices for its academic database services.

[9] *See* Anti-Monopoly Committee of the State Council, Antitrust Guidelines for Online Platforms (January 7, 2021).

14. Are there merger rules specific to digital platforms in China?

Recent AML amendments specify that SAMR has the power to investigate transactions that fall below the notification thresholds if they have anticompetitive effects. This power was previously specified in the AML implementing regulations, and its recent statutory footing reflects the growing appetite in China to enforce merger control rules against so-called "killer acquisitions".

SAMR has also proposed amendments to the current merger filing thresholds that are generally applicable to all firms, though are clearly targeted at acquisitions of smaller companies by larger Chinese technology firms. The proposed amendments include a new threshold covering acquisitions of companies with a market capitalization (or valuation) no lower than 800 million (c. USD 109 million) and at least one third of its revenues generated in China by a company with China turnover exceeding RMB 100 billion (c. USD 14 billion). The amendments also propose to increase the current turnover thresholds applicable to all transactions.

NEW THRESHOLD COVERING ACQUISITIONS OF COMPANIES WITH A MARKET CAPITALIZATION (OR VALUATION)

¥800MN

Target has market capitalization of at least ¥800 million (c. $120 million) and at least one third of its revenues are generated in China.

¥100BN

Acquirer's Chinese turnover exceeds ¥100 billion (c. $15 billion)

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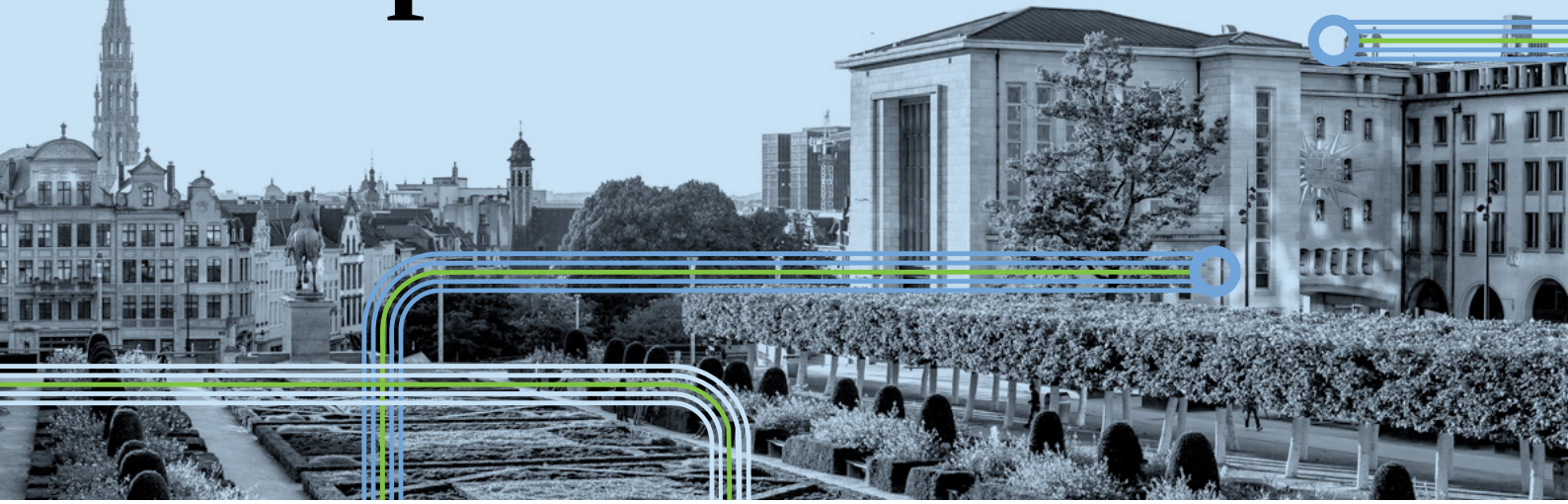

Rules In Force

The EU has adopted the Digital Markets Act, the most advanced regulation of large digital platforms globally. It sets out a series of "dos and don'ts" for so-called "gatekeeper" platforms that are inspired by competition law cases. The DMA entered into force on November 1, 2022, and its substantive behavioral rules will become operational on March 7, 2024 for gatekeepers that were designated on September 6, 2023. Meanwhile, enforcement of existing competition laws against large digital platforms remains a priority for the European Commission, with pending cases against Google, Apple, Meta, and Microsoft.

Authored by Thomas Graf, Henry Mostyn, Paul Stuart, Emmi Kuivalainen, and Leonor Vulpe Albari

Updated as of December 2023

1. What rules govern competition in digital markets in the EU?

Digital firms are subject to general competition and consumer protection laws applicable to all firms (*e.g.*, the Treaty of the Functioning of the European Union ("**TFEU**"), European Union Merger Regulation, and General Data Protection Regulation).

The European institutions have adopted two main regulations to govern the conduct of digital firms: the Digital Markets Act ("**DMA**") and the Digital Services Act ("**DSA**"). These regulations form part of the European Commission's wider "Digital Services Act Package" which aims to "*establish a level playing field for businesses*" and to "*create a safer digital space where the fundamental rights of users are protected*."[1]

The DMA marks a paradigm shift in the regulation of digital markets, giving the Commission unprecedented powers to regulate large digital platforms. It formulates a series of behavioral "dos and don'ts" for "gatekeeper" platforms that are inspired by past and current competition cases and that are considered important to protect and enhance competition in digital markets. The DMA entered into force on November 1, 2022 and became applicable on May 2, 2023. The DMA's

[1] European Commission, The Digital Services Act package (July 5, 2022).

behavioral rules will kick-in on March 7, 2024 for gatekeepers that were designated on September 6, 2023.

The DSA, in turn, seeks to improve user safety online and ensure accountability of platforms for content that they transmit, host, or publicly disseminate. It formulates rules for digital intermediaries relating to exemption from liability for content, due diligence obligations, and oversight of content moderation activities.

The DSA entered into force on November 16, 2022. Designated "Very Large Online Platforms" ("**VLOPs**") and "Very Large Online Search Engines" ("**VLOSEs**") had until August 25, 2023 to comply with the relevant DSA obligations. The DSA's substantive rules will start applying to all other intermediary service providers during Q1 of 2024.

2. What is the status of the DMA ?

The DMA formally entered into force on November 1, 2022, and became applicable on May 2, 2023. Firms that triggered the gatekeeper notification requirements notified the Commission of their "Core Platform Services" ("**CPSs**") on July 3, 2023.

The Commission received notifications from Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung.

On September 6, 2023, the Commission designated six gatekeepers and a total of 22 CPSs based on these notifications:

— **Alphabet**: Google Search, Google Ads, Google Android, Google Play, Google Shopping, Google Maps, Chrome, and YouTube.

— **Amazon**: Amazon Marketplace and Amazon Ads.

— **Apple**: App Store, Safari, and iOS.

— **ByteDance**: TikTok

— **Meta**: Facebook, Instagram, Meta Ads, WhatsApp, and Messenger

— **Microsoft**: Windows PC OS and LinkedIn

In addition, the Commission:

— Opened market investigations into four services to assess whether they can be exempted as "important gateways" despite meeting the DMA's user thresholds. These are: Microsoft's Bing, Edge, and Microsoft Advertising and Apple's iMessage. These investigations will last five-months.

— Opened an additional 12-month market investigation into Apple's iPadOS to assess whether it should be designated despite not meeting the users thresholds.

— Decided to not designate Gmail, Outlook, and Samsung Internet Browser as CPSs despite these services meeting the DMA's thresholds.

The DMA's substantive rules will become operational for the designated gatekeepers six months after the designation decisions, on March 7, 2024. The rules on mergers, discussed below in Question 15, entered into force on the date of the designation decisions.

For an overview of the CPS designations, *see* Annex 1 at the end of this Chapter.

3. What is the status of the DSA?

The DSA formally entered into force on November 16, 2022.

Providers of online platforms and search engines were required to publish data on their average monthly active service recipients (*i.e.*, end users and business users) by February 17, 2023.

Based on this publication, on April 25, 2023, the Commission designated the following platforms as VLOPs or VLOSEs:

— **VLOPs**: Alibaba Aliexpress, Amazon Store, Apple App Store, Booking.com, Facebook, Google Maps, Google Play, Google Shopping, Instagram, LinkedIn, Pinterest, Snapchat, TikTok, Twitter, Wikipedia, YouTube, Zalando.

— **VLOSEs**: Bing and Google Search.

Firms designated as VLOPs and VLOSEs had until August 25, 2023 to comply with the relevant DSA obligations. The DSA's substantive rules will start applying to all other online intermediary service providers during Q1 of 2024.

4. How will the DMA be enforced?

The Commission is the sole authority empowered to enforce the DMA, though private parties may be able to bring actions based on the DMA before civil courts for some of the rules (*see* Question 16).

Designation process. Firms need to be designated as gatekeepers for the DMA's rules to become applicable. Only the specific services designated as CPSs are subject to the DMA's behavioral rules. The process for designation is as follows:

— **Gatekeeper notification.** If a firm operates one of the CPSs listed in the DMA that meets the quantitative thresholds under Art. 3 (*see further* Question 5), it must notify the Commission within two months that it falls within the scope of the DMA.[2] In their gatekeeper notifications, firms can seek to rebut the presumption of gatekeeper status, albeit the DMA says that this would happen only in "*exceptional circumstances*". The DMA also explains that the Commission will not consider arguments against designation based on market definition or economic efficiencies.[3]

— **Gatekeeper designation.** The Commission must designate a firm as a gatekeeper within forty-five working days after receiving the firm's gatekeeper notification.[4]

- If a firm has sought to rebut the gatekeeper presumption, but the Commission does not believe the arguments to be "*sufficiently substantiated*," it must reject the rebuttal within forty-five working days after receiving the firm's gatekeeper notification.[5]

- If a firm has sought to rebut the gatekeeper presumption, and the Commission believes the arguments to be "*sufficiently substantiated*", it may launch a market investigation within forty-five working days.[6] The Commission should communicate its preliminary findings within three months and complete the investigation within five months.[7]

- The Commission may also launch a market investigation to determine whether a CPS should be designated despite the service not meeting the quantitative thresholds.[8] The Commission should communicate its preliminary findings within six months and complete the investigation within twelve months.[9]

[2] DMA, Art. 3(3).

[3] DMA, Art. 3(5) and Recital 23.

[4] DMA, Art. 3(4).

[5] DMA, Art. 3(5).

[6] DMA, Art. 3(5), referring to the procedure in Art. 17.

[7] DMA, Art. 17(3).

[8] DMA, Art. 3(8), referring to the procedure in Art. 17.

[9] DMA, Art. 17(1).

— **Compliance.** Firms will have six months to comply with the DMA's behavioral rules following the Commission's designation decision.[10] Within this timeframe, gatekeepers must submit to the Commission an independently audited description of any consumer profiling techniques that it applies to or across its CPSs.[11] They should also submit a report describing their compliance with the behavioral rules in Arts. 5-7.[12]

Further specification process. The behavioral rules set forth in Arts. 5 to 7 of the DMA apply directly and are self-executing, without further specification by the Commission.

That said, gatekeepers may request the Commission to engage in a process to determine whether the gatekeeper's measures comply with the behavioral obligations set out in Arts. 6 and 7 (but not Art. 5).[13] The Commission has the discretion to decide whether to engage in this process in line with general principles of equal treatment, proportionality, and good administration.

If the Commission wants to specify measures the gatekeeper must implement to comply with Arts. 6 or 7, it must first adopt a decision opening formal proceedings.[14] Within six months of this decision, it may then adopt an implementing act specifying the measures that the gatekeeper must implement to be compliant.

This engagement process, however, does not prevent the Commission from adopting a non-compliance decision or imposing fines.

Enforcement process. The Commission may at any stage issue a request for information to a firm, carry out interviews with consenting natural or legal persons, and conduct physical inspections.[15]

Where the Commission suspects that a gatekeeper may not be complying with the DMA's rules, its enforcement practice will likely follow these steps:

— **Opening of proceedings.** The Commission must adopt a decision opening formal proceedings when it intends to investigate potential non-compliance.[16]

— **Statement of objections.** If the Commission considers adopting a non-compliance decision, it must communicate its preliminary findings to the gatekeeper and set out its proposed remedies in a statement of objections. The Commission may also consult with third parties.[17]

— **Response to statement of objections and access to file.** Gatekeepers will be permitted to respond to the Commission's preliminary findings.[18] They will also be able to receive access to the Commission's file (*see* Question 10).[19]

— **Non-compliance decision.** The Commission must aim to publish a non-compliance decision

[10] DMA, Art. 3(10).

[11] DMA, Art. 15.

[12] DMA, Art. 11.

[13] DMA, Arts. 8(2-3). To do so, the gatekeeper must submit a "*reasoned submission*" setting out the measures it intends to and/or has already implemented to comply with Art. 6 or 7 rules. It must also submit a non-confidential version which can be shared with third parties.

[14] DMA, Art. 8(2) referring to the procedure in Art. 20.

[15] DMA, Arts. 21-23.

[16] DMA, Art. 20.

[17] DMA, Arts. 29(2-3).

[18] DMA, Arts. 34(1-2).

[19] DMA, Art. 34(4).

within twelve months from the opening of proceedings where it considers that a gatekeeper has infringed the DMA's rules.[20] The Commission may impose fines (*see* Question 11).[21] The DMA does not set out a timeline for the Commission to adopt a decision finding no violation.

— **Response to non-compliance decision.** In response to a non-compliance decision, the gatekeeper must explain how it intends to bring the infringement to an end within the deadline specified in the Commission's decision.[22]

— **Appeal.** Commission decisions are subject to appeals before the EU courts by the addressees of those decisions but they do not automatically have suspensory effect (*see* Question 10).

— **Investigations into systematic non-compliance.** The Commission may also launch a market investigation to assess whether a gatekeeper engages in systematic non-compliance (*i.e.*, where the Commission has issued at least three non-compliance decisions within a period of eight years). The Commission must communicate its preliminary findings to the gatekeeper within six months (including what remedies it considers may be necessary and proportionate) and conclude the investigation within twelve months.[23] If the Commission finds a gatekeeper to have engaged in systematic non-compliance, the Commission may impose behavioral or structural remedies on the gatekeeper (*see* Question 11).[24]

5. What firms does the DMA apply to?

The DMA applies to platforms that operate as gatekeepers between business users and end users and that hold an "*entrenched and durable position*."

To be a gatekeeper, a firm must operate at least one CPS in at least three member states. CPSs are defined based on a broad list of services: online intermediation services (*e.g.*, online marketplaces

Designated Gatekeepers and their CPSs

Alphabet	Amazon	Apple	ByteDance	Meta	Microsoft
Intermediation Maps, Play, Shopping	**Intermediation** Amazon Marketplace	**Intermediation** App Store*	**Social networks** TikTok*	**Social networks** Facebook, Instagram	**Social networks** LinkedIn
Ads Google	**Ads** Amazon	**Browser** Safari*		**Intermediation** Meta Marketplace*	**OS** Windows PC OC
Browser Chrome		**OS** iOS		**Ads** Meta	
OS Android				**N-IICS** Whatsapp Messenger*	
Video sharing YouTube					
Search Search					

* On appeal to the Court of Justice

[20] DMA, Art. 29.

[21] DMA, Art. 30.

[22] DMA, Arts. 29(5-6).

[23] The Commission may, however, extend the deadline within which it must communicate its preliminary findings or publish a non-compliance decision where it is objectively justified and proportionate.

[24] DMA, Art. 18.

and app stores), search engines, social networks, video-sharing platforms, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising services.[25]

CPS CATEGORIES:

1. **Online intermediation services (e.g., online marketplaces and app stores)**
2. **Search engines**
3. **Social networks**
4. **Video-sharing platforms**
5. **Number-independent interpersonal communication services**
6. **Operating systems**
7. **Web browsers**
8. **Virtual assistants**
9. **Cloud computing services**
10. **Online advertising services.**

If a firm operates a CPS, it will be presumed to be a gatekeeper if it meets three cumulative criteria:[26]

— **Financial threshold.** The firm's group must have an annual EU turnover of at least EUR 7.5 billion in each of the last three financial years or an average market capitalization amounting to at least EUR 75 billion in the last financial year.

— **End users and business users.** The CPS must have at least 45 million monthly active end users ("**MAUs**") established or located in the EU and at least 10,000 annual active business users established in the EU. The DMA's annex provides a methodology and indicators for calculating MAUs and business users, per CPS category.

— **Lasting basis.** The quantitative thresholds for end users and business users must be met in each of the last three financial years.

Even if the presumption of gatekeeper status does not apply, the Commission can designate firms offering CPSs as gatekeepers on the basis of qualitative criteria, albeit this is a longer process requiring an up to twelve month market investigation.[27] The Commission is currently conducting such a market investigation into Apple iPad OS (set to be completed by September 2024).

The Commission must, under the qualitative designation procedure, establish that the firm in question has a significant impact on the market and operates a CPS that is an important gateway and that enjoys an entrenched and durable position.

The DMA sets out a series of factors that the Commission must take into account, at least in part, to qualitatively designate a gatekeeper.[28] Examples include the size and turnover of the firm, CPS user figures, network effects and data-driven advantages, benefits arising from scale and scope, and lock-in effects.

The DMA also allows firms providing CPSs, in exceptional circumstances, to rebut a presumption of gatekeeper status.[29] The DMA states that arguments related to market definition or efficiencies will not be taken into account as part of this assessment.[30] As discussed in Question 4, the Commission may reject these

[25] DMA, Art. 2(2).

[26] DMA, Art. 3.

[27] DMA, Arts. 3(8) and 17.

[28] DMA, Art. 3(8).

[29] DMA, Art. 3(5).

[30] DMA, Recital 23.

arguments within forty-five working days after the firm's gatekeeper notification or launch a market investigation that should take up to five months.[31] The Commission is currently conducting such market investigations into Bing, Edge, Microsoft Advertising and Apple's iMessage (set to be completed by February 2024).

Once a firm is designated as a gatekeeper, it must comply with the DMA's behavioral rules for each of its CPSs that satisfy the quantitative thresholds. In other words, the DMA is not "all in" such that once a firm is designated as a gatekeeper, the DMA's rules would apply to all its products or services. Rather, only the specific products or services designated as CPSs are subject to the DMA's rules. This feature of the DMA contrasts with some other digital regulatory regimes, such as Section 19a of the German Competition Act.

6. What are the main substantive rules that govern the firms covered by the DMA?

The DMA sets out three sets of behavioral obligations with which gatekeepers must comply. The first set of obligations is presented as being "*specific*" (Art. 5), while the other two are described as being open ended and capable of further specification by the Commission (Arts. 6 and 7). In practice, the difference between these obligations is reasonably minor: all rules appear to apply directly and are self-executing.[32]

Some of the DMA's rules apply to all CPS categories. For example:

— Prohibition on combining or cross-using personal data obtained by a CPS with data obtained by other services without the user's consent (Art. 5(2)).

— Prohibition on using non-publicly available data of business users of CPSs to compete with the business users (Art. 6(2)).

— Requirement to provide end users of CPSs, free of charge, with the ability to port their data to other platforms (Art. 6(9)).

Other rules apply to specific categories of CPS. For example:

— Requirement to allow end users to uninstall apps from a CPS operating system (Art. 6(3)).

— Requirement to enable users to easily change defaults and to show choice screens on their CPS operating systems for choosing virtual assistants, web browsers, and online search engines in certain circumstances (Art. 6(3)).

— Prohibition on CPS search engines, online intermediation platforms, social networking services, virtual assistants, and video sharing platforms to treat first party services more favorably in ranking compared to similar third party services (Art. 6(5)).

— Requirement for CPS operating systems and virtual assistants to give third party service providers and hardware providers, free of charge, interoperability with and access to the same hardware and software features as to the gatekeepers first party products (Art. 6(7)).

— Requirement for CPS online search engines to share anonymized ranking, query, click, and view data with rival search engines on a fair, reasonable, and non-discriminatory basis (Art. 6(11)).

— Requirement to make the basic functionalities of a number-independent interpersonal communications service interoperable with rival service "*by providing the necessary*

[31] DMA, Arts. 3(5) and 17(3).

[32] As discussed in response to Question 16, Art. 5 rules may be susceptible to private litigation but arguably Arts. 6 and 7 are not because the DMA recognizes that these rules require further specification.

technical interfaces or similar solutions that facilitate interoperability" (Art. 7).

For a summary of all the DMA's rules, *see* Annex 2 at the end of this Chapter.

7. Are there specific rules governing digital platforms' relationships with news publishers?

There are no rules in the DMA regulating the relationship of online platforms and news publishers. In particular, contrary to some demands raised during the legislative process, there are no obligations for platforms to pay news publishers for content that appears on their CPSs.

While some have suggested that Art. 6(12) might require gatekeepers to pay news publishers for the display of content, Members of Parliament that were involved in the negotiation of the DMA's text have clarified that this is not the case.[33]

8. Does the Commission need to show anticompetitive effects in order to establish a breach of the DMA?

Not expressly. The Commission does not need to establish the competitive effects of gatekeeper's conduct in order to establish a breach of the DMA's behavioral rules. The Commission will, however, need to consider firms' arguments that the conduct in question either is not covered by the scope of the rule, falls under the narrow grounds for suspension or exemption in Arts. 9 and 10 of the DMA, or is proportionate given the DMA's overall objectives.

In addition, the DMA is subject to the overall principle of proportionality (*see* Question 9).

9. Can firms defend or justify their conduct under the DMA?

The DMA does not explicitly allow for efficiency justifications and only provides for narrow grounds for suspension or exemption:

— **Suspension**, if the obligation puts the "*viability*" of the service at risk "*due to exceptional circumstances beyond the control of the gatekeeper*," which is a high bar.[34] Suspension may be subject to conditions and obligations defined by the Commission.

— **Exemption**, on grounds of public health or public security.[35]

In practice, however, the DMA must be interpreted, applied, and enforced based on the fundamental principle of proportionality.[36] The Commission's measures must therefore be appropriate and necessary to achieve the objectives of the DMA. Where there are numerous appropriate measures, the least onerous measures should be used, and the disadvantages of the measures must not be disproportionate to the aims pursued.[37]

Accordingly, gatekeepers should be able to rely on the principle of proportionality to justify their conduct under the DMA. Proportionality is a general principle of EU law, and it is therefore implied that proportionality has to be considered by the Commission in each individual case.

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[33] *See e.g.,* tweets by Marcel Kolaja.

[34] DMA, Art. 9.

[35] DMA, Art. 10.

[36] TFEU, Art. 5. *See also* Maurits Dolmans, Henry Mostyn, and Emmi Kuivalainen, Rigid Justice is Injustice: The EU's Digital Markets Act should include an express proportionality safeguard (December 10, 2021).

[37] *See* Judgment of the Court of Justice of November 13, 1990, in Case C-331/48 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health*, ex *parte: Fedesa et al.*, ECR I-4023; Judgment of the the Court of Justice of October 5, 1994 in Joined Cases C-133/93, C-300/93 and C-362/93 *Antonio Crispoltoni v Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v Donatab Srl., ECR I-4863; and Judgment of the Court of Justice of May 5, 1998 in Case C-180/96 United Kingdom v Commission,* ECR I-2265.

Finally, several rules explicitly import concepts of fairness, reasonableness, or proportionality, and therefore by implication allow for justifications on those grounds. Such rules include:

— **Art. 6(3)**, which carves out the uninstallation obligation for apps that are essential for the operating system or device and are not offered on a standalone basis by third parties;

— **Art. 6(5)**, which refers to fair conditions of ranking;

— **Art. 6(7)**, which refers to necessary and proportionate measures to ensure interoperability while not compromising the integrity of the CPS or its associated hardware and software;

— **Art. 6(11)**, which refers to fair and reasonable conditions of access to search data; and

— **Art. 6(12)**, which refers to fair and reasonable access to app stores, search engines, or social networks.

10. What procedural safeguards does the DMA provide?

Ahead of adopting any decision under the DMA (*e.g.*, non-compliance, fines, commitments, suspension, exemption, market investigation), the Commission must inform the gatekeeper of its preliminary findings and measures that it may propose in light of its preliminary findings. The Commission will provide the gatekeeper with a deadline (at least fourteen days) within which it may respond to the Commission's preliminary findings.[38]

Gatekeepers are entitled to have access to the Commission's file subject to the legitimate interests of undertakings in the protection of their business secrets. The right of access does not extend to confidential information and internal documents of the Commission or the NCAs.[39]

Gatekeepers will be able to appeal the Commission's decisions under the DMA before the EU courts. The EU courts will conduct a full review of the facts and law underpinning the Commission's reasoning, and the normal processes can be expected to apply (*e.g.*, there is no bar on private parties adducing new evidence before the EU Courts).[40]

In traditional competition cases, the Commission has enjoyed a margin of discretion when it comes to complex economic assessments, such as market definition and dominance.[41] When it comes to the DMA, however, there is not expected to be such a margin of discretion because the DMA is supposed to avoid complex economic assessments in favor of simple rules.

Appeals before the EU courts will not have automatic suspensive effect unless interim measures are granted. Parties can apply for interim measures. The test for granting such measures is whether the appeal gives rise to a *prima facie* case and there is urgency because implementing the decision gives rise to a risk of serious and irreparable harm.

[38] DMA, Arts. 34(1-2).

[39] DMA, Art. 34(4).

[40] Judgment of the Court of Justice of January 21, 2016, in case C-603/13 P *Galp Energía España*, EU:C:2016:38.

[41] *See* Judgment of the Court of Justice of December 8, 2011 in Case C-272/09 P *KME Germany v Commission*, EU:C:2011:810; Judgment of the Court of Justice of December 8, 2011 in Case C-386/10 P *Chalkor v Commission*, EU:C:2011:815; Judgment of the Court of Justice of February 15, 2005 in Case C-12/03 P *Commission v Tetra Laval*, EU:C:2005:87; or Judgment of the Court of Justice of November 22, 2007 in Case C-525/04 P *Spain v Lenzing*, EU:C:2007:698.

11. What kinds of penalties or remedies can the Commission impose following a breach of the DMA?

Non-compliance with the DMA's rules can lead to fines of up to 10%—or, in the event of repeated infringements, up to 20%—of annual global turnover.[42] The Commission may also impose behavioral and structural remedies in the case of systematic infringements (*i.e.*, where the gatekeeper violates the rules at least three times in eight years).[43]

In instances where there has been a breach of the procedural framework (*e.g.*, failure to provide the Commission with complete and accurate info, including notification for gatekeeper designation), gatekeepers can be fined up to 1% of global annual turnover.[44]

There is no personal or criminal liability under the DMA.

12. Has the Commission issued any guidance or reports regarding the DMA?

The Commission has issued the following guidance to assist gatekeepers in the implementation of their obligations under the DMA:[45]

— On April 14, 2023, the Commission adopted the final text of the DMA's Implementing Regulation setting out the procedural requirements for the form gatekeepers use to notify their CPSs and other procedural elements of the DMA, including time limits, confidentiality, and access to file. The final text was adopted following a public consultation period from December 2022 to January 2023.

— On July 31, 2023, the Commission published for consultation a draft Independent Audit Report. As with the Compliance Report, gatekeepers will have six months following the Commission's designation decision to submit an Independent Audit Report, in line with the Commission's template, providing an independently audited description of any consumer profiling techniques that it applies to or across its CPSs (*see* Question 4).[46]

— On October 9, 2023, the Commission published the final text of:

- **The Compliance Report Template.** Gatekeepers will have six months following the Commission's designation decision to submit a Compliance Report, in line with the Commission's template, describing their compliance with the behavioral rules in Arts. 5-7 (*see* Question 4).[47]

- **The Request for Specification Dialogue Template.** Gatekeepers can request to engage in a process with the Commission to determine whether the gatekeeper's measures comply with the behavioral obligations set out in Arts. 6 and 7 (but not Art. 5). They can make this request by submitting a Request for Specification Dialogue, in line with the Commission's template (*see* Question 4).[48]

- **The Art.** 14 Template. Gatekeepers have had to notify the Commission of virtually all intended mergers and acquisitions since September 6, 2023 by providing all

[42] DMA, Arts. 30(1-2).

[43] DMA, Arts. 18(1-2).

[44] DMA, Art. 30(3).

[45] DMA, Art. 46 and Recital 95.

[46] DMA, Art. 15. *See* European Commission, Consultation on the template relating to the reporting on consumer profiling techniques.

[47] DMA, Art. 11. *See* European Commission, DMA Legislation.

[48] DMA, Art. 8(3). *See* European Commission, DMA Legislation.

the information requested in the Art. 14 Template (*see* Question 15).[49]

- **The Suspension Request Template.** Gatekeepers can request that the Commission suspend compliance with any of the behavioral rules in Arts. 5-7 by submitting a Suspension Request, in line with the Commission's template.[50]

- **The Exemption Request Template.** Gatekeepers can request to be exempt, in whole or in part, from any of the behavioral rules in Arts. 5-7 by submitting an Exemption Request, in line with the Commission's template.[51]

13. Is the new regime competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

The DMA is principally competition based and many of its behavioral rules have been inspired by previous competition cases. Its rules touch on conduct relating to a range of issues, such as privacy, data usage, and consumer protection issues.

The EU is separately introducing new regimes to tackle other areas of concern in digital markets. The DSA seeks to improve user safety online (particularly in relation to illegal content), transparency, and the accountability of online platforms. The Data Act intends to regulate online platforms' data practices, provide users and businesses with greater control over their data, and create a harmonized framework for data sharing within the EU.[52]

14. What is the Commission's current enforcement practice with respect to conduct that is expected to be addressed by the DMA?

Many of the DMA's rules are inspired by the European Commission's previous competition decisions or ongoing investigations. For example:

— ***Apple Pay* investigation**. The Commission has issued a statement of objections in its investigation into whether Apple has abused its dominance by limiting access to the near-field communication technology used for contactless payments on mobile devices only to Apple Pay.[53] This investigation inspired the DMA's interoperability obligation for operating systems and virtual assistants (Art. 6(7)), along with the workgroup server case against Microsoft.

— ***Apple App Store* investigation.** The Commission's initial investigation focused on concerns of Apple mandating the use of its proprietary in-app billing system by app developers on iOS and restricting the ability of iOS app developers to inform users of alternative payment methods outside of apps via anti-steering provisions.[54] This inspired the DMA's anti-steering provisions (Arts. 5(4) and 5(5)) and the ban on app stores requiring the use of first party payment systems by app developers (Art. 5(7)). The most recent statement of objections focuses only on Apple's anti-steering provisions and no longer raises

[49] DMA, Art. 14. *See* European Commission, DMA Legislation.

[50] DMA, Art. 9. *See* European Commission, DMA Legislation.

[51] DMA, Art. 9. *See* European Commission, DMA Legislation.

[52] The European Commission published its proposal for the Data Act in February 2022. The European institutions are currently negotiating the final text. *See* European Commission, COM/2022/68 final, Proposal for a Regulation of the European Parliament and of the Counsel on harmonised rules on fair access to and use of data (Data Act).

[53] *See* European Commission, Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay (May 2, 2022).

[54] *See* European Commission, Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers (April 30, 2021) and European Commission, Antitrust: Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers (February 28, 2023).

concerns about Apple's requirements relating to its billing systems (the latter will be covered by the DMA).

— ***Amazon Marketplace* investigation.** In December 2022, the Commission accepted commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to "Buy Box" and the "Prime" label.[55] The commitments follow the Commission's investigation into Amazon's use of non-public data related to its third party sellers to compete with them as a retailer on its own online marketplace, its criteria for selecting which product offer is placed in the "Buy Box", and which sellers can list products under Amazon's "Prime" label on its marketplace.[56]

— ***Google Shopping* decision.** The Commission found that Google had abused its dominance by positioning and displaying Google Shopping more prominently than rival comparison shopping services in its general search results pages. The General Court partly upheld the Commission's ruling.[57] Google is appealing the decision to the Court of Justice. This decision inspired the DMA's non-discriminatory ranking obligation (Art. 6(5)).

15. Are there merger rules specific to digital platforms in the EU?

Art. 14 DMA requires gatekeepers to inform the Commission of all intended mergers and acquisitions "*where the merging entities **or** the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data,*" regardless of whether these transactions meet EU merger control thresholds.[58]

Article 14

ARTICLE 14 IS DESIGNED TO HELP THE COMMISSION REVIEW TRANSACTIONS THAT FALL BELOW THE JURISDICTIONAL THRESHOLDS OF THE EU MERGER REGULATION.

In practice, Art. 14 means that gatekeepers should inform the Commission of substantially all of their transactions prior to closing. But the Commission does not need to make a clearance decision under Art. 14 before a gatekeeper can close a deal.

Art. 14 is designed to help the Commission review transactions that fall below the jurisdictional thresholds of the EU Merger Regulation by making it easier for NCAs to create jurisdiction for the Commission through referrals under Art. 22 of the EU Merger Regulation. The Art. 22 route allows the Commission to review transactions that do not meet EU or national merger control thresholds, even post-closing, within strict time limits.

This rule became applicable for Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft on September 6, 2023.

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[55] *See* European Commission, Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime (December 20, 2022).

[56] *See* European Commission, 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 (November 10, 2020).

[57] *See* Judgment of the General Court of November 10, 2021 in Case T-612/17 *Google and Alphabet v Commission* (Google Shopping), ECLI:EU:T:2021:763.

[58] DMA, Art. 14(1) (emphasis added). "Digital sector" means the sector of products and services provided by means of, or through, information society services. "Information society service" means any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

16. Is private enforcement possible under the DMA?

EU law provides for the ability of parties to invoke EU regulations before national courts if the rules in question are sufficiently precise and unconditional and confer rights to individuals.[59] At least some, but not necessarily all, of the DMA's behavioral rules may meet these conditions. The DMA, accordingly, formulates rules for "*proceedings for the application*" of the DMA before national courts (*e.g.*, the right of the national court to ask the Commission for an opinion, the obligation to transmit judgments, and the right of the Commission to intervene in such proceedings).[60]

National courts will, however, not have the power to impose fines or to designate gatekeepers, which will be reserved for the Commission.

Behavioral rules susceptible to private litigation might include rules listed under Art. 5. By contrast, it is more questionable whether the rules under Art. 6 and 7 are sufficiently precise for private litigation because the DMA recognizes that these rules require further specification.

The recent Court of Justice judgment in *DB Station & Service AG* may have implications for private enforcement of secondary EU legislation such as the DMA.[61] On one reading, the judgment suggests that before a private action could be taken, there needs to be a decision of the competent sectoral regulator. The consequences of this judgment are still being assessed.

17. What is the role of national competition authorities in DMA enforcement?

As the Commission will be the sole enforcer of the DMA, national competition authories ("**NCAs**") will not be able to adopt gatekeeper designation or infringement decisions under the DMA. However, the DMA provides for NCA involvement in supporting enforcement and investigating potential DMA infringements. In particular:

— The Commission may consult NCAs on any aspect of the DMA.[62]

— The Commission will have the ability to ask NCAs to support its market investigations under the DMA.[63]

— NCAs may investigate cases of potential non-compliance under Arts. 5, 6, and 7 of the DMA in their own territories provided that the Commission is not investigating the same conduct.[64]

— NCAs will be competent to hear complaints by third parties about non-compliance with the DMA.[65]

— Once a gatekeeper informs the Commission of an intended acquisition under Art. 14(1) (*see* Question 15), the Commission must share that information with NCAs.[66] NCAs may then request the Commission to analyze the concentration under Art. 22 of the EU Merger Regulation.[67]

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[59] *See* Judgment of the Court of Justice of December 17, 2002 in Case C-253/00 *Muñoz*, ECR I-7289, para. 27.

[60] DMA, Art. 39.

[61] *See* Judgment of the Court of Justice of October 27, 2022 in Case C-721/20 *DB Station & Service AG v ODEG Ostdeutsche Eisenbahn GmbH*, ECLI:EU:C:2022:832.

[62] DMA, Art. 37(2).

[63] DMA, Art. 38(6).

[64] DMA, Art. 38(7).

[65] DMA, Art. 27(1).

[66] DMA, Art. 14(4).

[67] DMA, Art. 14(5).

18. What role do interested third parties (such as complainants) play in DMA enforcement?

While the DMA does not set out a specific complaint handling procedure, third parties may inform the Commission or NCAs about any conduct that may infringe the DMA. The Commission and NCAs retain full discretion to decide whether or not to investigate the conduct in question.[68]

The DMA also provides for third party involvement at various stages of the enforcement process. In particular:

— Third parties may provide comments ahead of the Commission adopting any specifying measures that the gatekeeper must implement to comply effectively with specific Art. 6 or 7 obligations.[69]

— Third parties may be consulted before the Commission implements a non-compliance decision.[70]

— Third parties may provide comments prior to the Commission adopting any commitments to address non-compliance.[71]

— The Commission may consult third parties during a market investigation into whether to expand the list of CPSs or gatekeeper obligations.[72]

— Third parties may provide comments ahead of the Commission adopting an implementing act.[73]

Forthcoming implementing legislation may specify the position of complainants and interested third parties in more detail.

19. Can the Commission add new CPS categories or substantive rules?

Yes, the Commission may conduct a market investigation to examine whether other services in the digital sector should be added to the list of CPSs or whether new obligations should be included in the DMA. The Commission must aim to publish a report outlining the findings of its investigation within eighteen months from the opening of the investigation. It may then make a legislative proposal to the European Parliament and Council to add further CPSs or new obligations to the DMA.[74]

[68] DMA, Arts. 27(1-2).

[69] DMA, Art. 8(6).

[70] DMA. Art. 29(3).

[71] DMA, Art. 18(6).

[72] DMA, Art. 19(2).

[73] DMA, Art. 46(3).

[74] DMA, Art. 19.

Annex 1: Overview of Designated CPSs under the DMA

Gatekeeper	CPS	CPS Category	Designation Date
Alphabet	• Google Search • Google Ads • Google Android • Google Play • Google Shopping • Google Maps • Chrome • YouTube	• Online Search Engine • Online Advertising Service • Operating System • Online Intermediation Service • Online Intermediation Service • Online Intermediation Service • Web Browser • Video-Sharing Platform	06/09/2023
Amazon	• Amazon Marketplace • Amazon Ads	• Online Intermediation Service • Online Advertising Service	06/09/2023
Apple	• App Store • Safari • iOS	• Online Intermediation Service • Web Browser • Operating System	06/09/2023
ByteDance	• TikTok	• Online Social Networking Service	06/09/2023
Meta	• Facebook • Instagram • Meta Ads • WhatsApp • Messenger	• Online Social Networking Service • Online Social Networking Service • Online Advertising Service • Number-Independent Interpersonal Communication Service • Number-Independent Interpersonal Communication Service	06/09/2023
Microsoft	• Windows PC OS • LinkedIn	• Operating System • Online Social Networking Service	06/09/2023

Annex 2: Overview of the DMA's Substantive Rules

Article	Summary
5(2)	**User consent for combining personal data.** Requires gatekeepers to obtain user consent for (1) processing personal data obtained from third parties using a CPS for advertising purposes; (2) combining personal data between a CPS and another first party or third party service; (3) cross-using personal data between a CPS and a first party service provided separately by the gatekeeper; and (4) signing in users to other first party services in order to combine their personal data, subject to certain GDPR-based carve-outs, for instance, to protect users or to comply with other laws.
5(3)	**No MFNs.** Requires designated online intermediation services (like app stores or marketplaces) to allow their businesses to offer the same products to end users at different prices or conditions both on other platforms and their own websites.
5(4)	**No anti-steering provisions.** Gatekeepers cannot restrict app developers from promoting offers to users and contracting with users outside the gatekeeper's app store. Gatekeepers must allow users to access content, subscriptions, features, and other items acquired without using the gatekeeper's app store.
5(5)	
5(7)	**Use of identification services, payment services, and web browser engines.** Prohibits gatekeepers from requiring businesses or end users to use a gatekeeper's identification service, payment service, or web browser engine in the context of services provided by businesses using the gatekeeper's CPS.
5(8)	**Tying subscriptions or registrations.** Prohibits gatekeepers from conditioning business or end users' access to one CPS on the users subscribing or registering with another CPS.
5(9)	**Disclosure of ads prices and revenue shares.** Requires gatekeepers to disclose pricing information, revenue share information, and the measures on which prices and remuneration are calculated to advertisers and publishers upon their request, free of charge and on a daily basis, if this information is also available to the gatekeeper.
5(10)	
6(2)	**Use of business data to compete.** Prohibits gatekeepers from using non-publicly available data generated or provided by business users and the customers of those business users on gatekeepers' CPSs, to compete with the business users.
6(3)	**App uninstallation, easily switchable defaults, and choice screens.** Requires gatekeepers to allow end users to uninstall apps from the operating system ("OS") of the gatekeeper. The provision includes a safeguard for apps that (1) are considered essential to the functioning of the operating system or the device; and (2) are not offered by third parties on a standalone basis. Gatekeepers will also be required to enable users to easily switch defaults on their designated operating systems, browsers, or virtual assistants. They will also, in certain circumstances, have to show choice screens to prompt users to select their default search engine, browser, or virtual assistant on the gatekeeper's designated operating system and select their default search engine on the gatekeeper's designated browser or virtual assistant.
6(4)	**"Sideloading" and app stores.** Requires gatekeepers to allow third party apps and app stores to be installed on their operating systems. These third party apps and app stores must be accessible via means other than the CPS of the gatekeeper (*i.e.*, users must be able to "sideload" them or download them through another app store). The obligation also precludes gatekeepers from preventing third party developers from prompting users to set their apps as default.

6(5)	**Non-discriminatory ranking.** Prohibits gatekeepers from treating their first party services and products more favorably in ranking compared to similar third party services.
6(6)	**No restrictions on multi-homing or switching on an CPSs.** Prohibits gatekeepers from imposing any restrictions on end users' ability to switch or multi-home across apps and services accessed through the gatekeeper's CPSs.
6(7)	**Enable interoperability for operating systems and virtual assistants.** Requires CPS operating systems and virtual assistants to give third party service providers and hardware providers, free of charge, interoperability with and access to the same hardware and software features as first party services. Gatekeepers may take strictly necessary and proportionate measures to ensure that interoperability does not compromise the integrity of the operating system, virtual assistant, hardware, or software.
6(8)	**Ads performance measurement tools.** Requires a gatekeeper to provide advertisers and publishers with free access to relevant information and performance measuring tools so they can independently verify the performance of their advertisements.
6(9)	**Data portability.** Requires gatekeepers to provide end users, free of charge, with the ability to port their data to other platforms, as well as tools to facilitate data portability.
6(10)	**Data access.** Requires gatekeepers to provide businesses, upon their request, with "*continuous and real time access*" to data on their use of their CPS and the users interacting with their products.
6(11)	**Search data sharing.** Requires online search engines to share anonymized ranking, query, click, and view data with rival search engines.
6(12)	**Fair, reasonable, and non-discriminatory access to app stores, search engines, and social networking services.** Requires gatekeepers to apply fair, reasonable, and non-discriminatory general terms and conditions of access to their CPS app stores, search engines, and social networking sites. The accompanying recital makes clear that this article does not provide a general right of access to these services.
6(13)	**Termination of use.** Prohibits gatekeepers from imposing contractual or technical restrictions to termination (*e.g.*, unsubscribing or terminating a service contract more generally) on its business users and end users.
7	**Enable interoperability for messaging services.** Requires gatekeepers to make the basic functionalities of their "*number-independent interpersonal communications services*" interoperable with rival services upon request and free of charge. This rule is designed to expand over time. Following designation, the requirement will be limited to text messages and sharing of images, voice messages, and videos between two users. Within two years of designation, the obligation will expand to messaging and sharing in groups, and within four years of designation to voice and video calls between two users as well as groups.
14	**Merger alerts.** Gatekeepers will have to inform the Commission of all intended mergers and acquisitions involving "*another provider of core platform services or of any other services provided in the digital sector*" regardless of whether these transactions meet EU merger control thresholds. This rule is designed to facilitate the possibility of referrals under Art. 22 of the EU Merger Regulation, which enables the Commission to take jurisdiction over transactions referred by national competition authorities.

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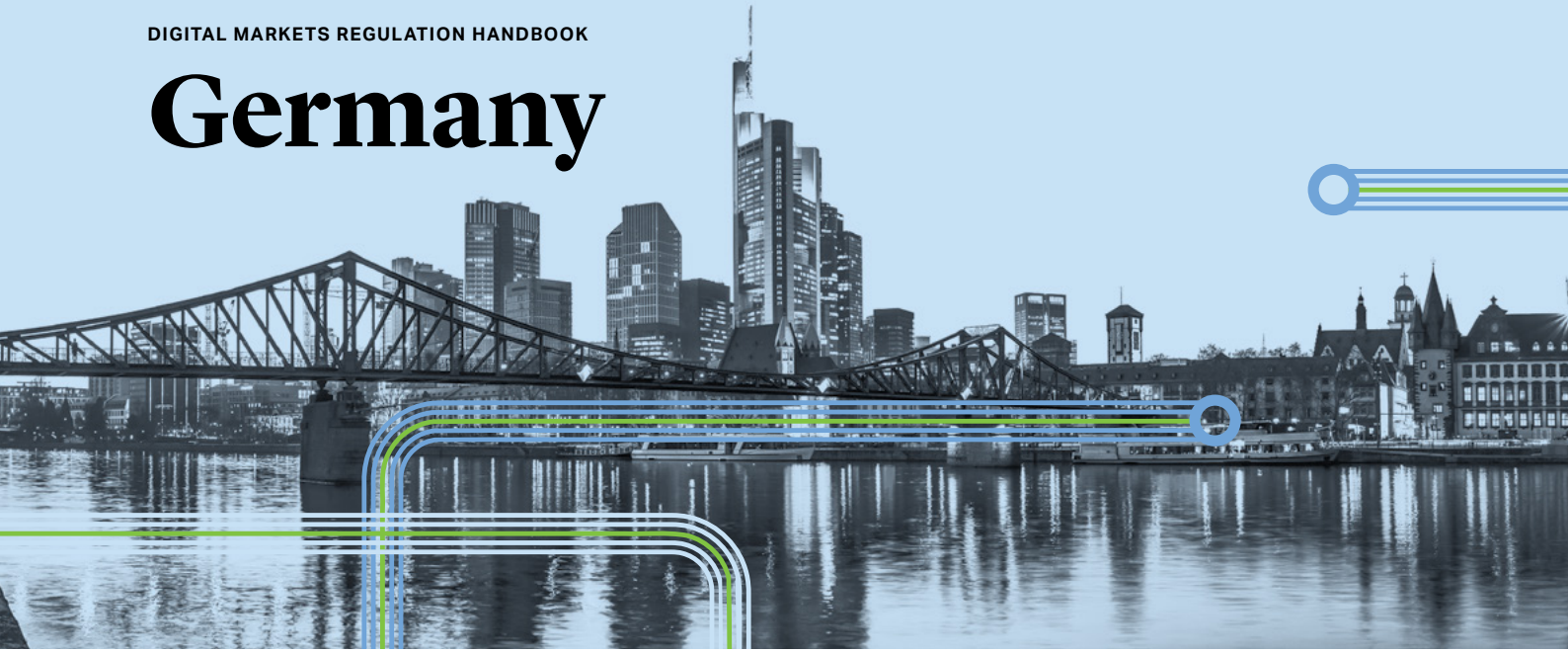

Rules in Force

Effective January 2021, Germany has introduced new rules for undertakings with "*paramount cross-market significance*." The provisions, which target large digital platforms, enable the Federal Cartel Office to prohibit forms of conduct legally defined as problematic without the need to prove anticompetitive harm. General competition rules have been extended and remain applicable in parallel. On November 7, 2023, further amendments entered into force to further strengthen the FCO's enforcement powers.

Authored by Romina Polley, Philipp Kirst, and Hendrik Wendland

Updated as of December 2023

1. What rules govern competition in digital markets in Germany?

In January 2021, the 10th Amendment of the Act against Restraints of Competition ("**ARC**") came into effect. Focusing on competition in the digital sector, the ARC contains a new regulatory framework targeting large digital platforms, along with a revised legal framework for abuse of dominance.

With Section 19a ARC, the German legislator has enabled the Federal Cartel Office ("**FCO**") to intervene in digital markets without establishing anticompetitive effects, going beyond existing rules on abuse of dominance. Section 19a follows a two-step process:

SECTION 19A FOLLOWS A TWO-STEP PROCESS:

1. **The Federal Cartel Office designates an undertaking as having "paramount cross-market significance" ("PCMS")**
2. **If PCMS is established, the FCO can prohibit specific forms of conduct ex ante**

— First, the FCO designates an undertaking as having "*paramount cross-market significance*" ("**PCMS**") based on a set of qualitative criteria without having to prove dominance in any specific market. Undertakings found to have PCMS will be subject to a five-year monitoring period.

— Second, if PCMS is established, the FCO can prohibit specific forms of conduct *ex ante* (*i.e.*, conduct deemed, in principle, harmful to competition without a finding of anticompetitive effects).

Digital undertakings remain subject to the existing provisions prohibiting the abuse of dominance. The 10th Amendment introduced several changes directed specifically at abusive conduct in digital markets, including the following:

— The relatively strict causality required between an undertaking's dominant position and exploitative conduct like excessive contract terms has been abolished.[1] Under the new rules,[2] a normative causal link between the dominant position and the anticompetitive conduct is sufficient to establish an exploitative abuse. In practice, this means that conduct that the undertaking is only able to enforce due to its dominant position, (*e.g.,* contractual terms that violate other legal requirements) may be regarded as abusive, even if smaller competitors engage in the same conduct.[3]

— The 10th Amendment clarifies that the essential facilities doctrine applies not only to physical assets, but also to data.[4] Access to data can be required if it is objectively indispensable for the requesting party to compete on the upstream or downstream market. Dominant undertakings may refuse access to their data only if they can show an objective justification.

— New criteria were introduced for the assessment of relative dominance of intermediaries.[5]

— Existing rules on abusive conduct by undertakings with relative market power were extended to capture relative dominance based on access to data.[6] This can capture scenarios where data has not been shared with any third party in the past.

In addition, the 10th Amendment introduced a provision enabling the FCO to counter the so-called "tipping" of markets towards a company that benefits from strong network effects.[7] The new provision prohibits undertakings from hindering competitors from achieving their own network effects if fair competition is significantly impeded. This applies not only to undertakings with dominance but also with relative or superior market power.

Aside from the ARC, digital undertakings can be subject to sector-specific regulations such as the German Telemedia and Telecommunications Acts and general consumer and data protection laws (*e.g.*, consent requirements for data processing, the requirement to provide a masthead on websites, and various customer protection provisions). The Network Enforcement Act requires digital platforms to moderate content, in particular to remove illegal content. Recently, Germany introduced the Telecommunications-Telemedia Data Protection Act, implementing the rules for tracking "cookies" under the EU ePrivacy Directive (EU/2002/58).

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1 In exclusionary conduct cases, normative causality was already accepted by the Federal Court of Justice before.

2 This was implemented by a small change of wording in Section 19(1) ARC ("*abuse*" instead of "*the abusive exploitation*").

3 *See* Explanatory Memorandum, BT-Drs. 19/23492 (October 19, 2020), p. 71 *et seq*.

4 Section 19(2) no 4 ARC.

5 Section 18(3)(b) ARC.

6 Section 20(1a) ARC.

7 Section 20(3a) ARC.

Moreover, on July 5, 2023, the German Parliament (Bundestag) passed the Competition Enforcement Act, amending the ARC for the 11th time ("**11th Amendment**").[8] The new law entered into force on November 7, 2023 and introduces the following changes:[9]

— **Sector inquiries**. The FCO is now able to impose structural remedies, independent of an abuse, when a significant and continuous, or repeated distortion of competition is identified during a sector inquiry. As a last resort, the FCO may order the divestment of shares or assets if the company holds a dominant market positions or has been designated as an undertaking with PCMS, the sales price amounts to at least 50% of the value of the shares or assets and those shares or assets have been acquired more than ten years prior to the investigation and cleared under German or EU merger control rules.[10] Following a sector inquiry, the FCO can order undertakings active in this sector to notify acquisitions where the target's turnover is more than EUR 1 million.[11]

— **Profit skimming**. The new rules introduce a presumption that an undertaking violating competition rules has obtained a profit of at least 1% of its domestic turnover with the affected product over the entire duration of the infringement. At the same time, the maximum profit that can be skimmed off is capped at 10% of the worldwide turnover of the undertaking.[12]

— **Digital Markets Act enforcement**. While the European Commission remains the sole enforcement authority for the DMA, the new rules authorize the FCO to assist the European Commission by reviewing compliance with Articles 5-7 of the DMA. The FCO can also publish reports on undertakings' compliance with the DMA. To facilitate private enforcement of the DMA in Germany, the 11th Amendment extends the provisions transposing the Damages Directive to the DMA where appropriate.[13]

2. What is the status of any forthcoming digital regulation in this jurisdiction?

— On November 6, 2023, the Ministry for Economic Affairs and Climate Action has launched a public consultation on the modernization of the competition law. The consultation aims at "improving the framework conditions for fair competition", while integrating "aspects of innovation, sustainability, consumer protection and social justice".[14]

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[8] German Parliament, Recommendation of the Economic Committee (July 5, 2023). For an overview of the draft proposed by the Federal Ministry for Economic Affairs, Referentenentwurf Wettbewerbsdurchsetzungsgesetz (September 26, 2022) see Wolfgang Deselaers & Philipp Kirst, New Toolkit for Intervention Under the Draft Competition Enforcement Act, Cleary Antitrust Watch Blog (September 30, 2022). The changes proposed by the Government are discussed in Edmund Melzer & Philipp Kirst, New Toolkit for Intervention Under the German Government's Draft 11th Amendment (Update), Cleary Antitrust Watch Blog (June 5, 2023).

[9] The new rules are discussed in more detail in Romina Polley, Janine Discher, Miroslav Georgiev & Hendrik Wendland, Once Again, New Powers For The Federal Cartel Office: German Parliament Passes The Government's Draft Bill On The 11th Amendment To The German Act Against Restraints Of Competition, Cleary Antitrust Watch Blog (July 14, 2023).

[10] Section 32f(4) 11th Amendment.

[11] Section 32f(2) 11th Amendment.

[12] Section 34h(4) 11th Amendment.

[13] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1.

[14] *See* BMWK, Public Consultation (November 6, 2023).

3. How are competition rules in digital markets enforced?

Only the FCO can prohibit conduct under Section 19a ARC. The provision is not self-executing, meaning changes in market conduct are only required following an order from the FCO. Using the new powers set out in Section 19a ARC, the FCO has so far determined that Google (Alphabet), Amazon, Apple, and Meta have PCMS, and has initiated related investigations into their conduct. In its investigations, the FCO can employ a wide range of measures, ranging from requests for information or surrender of documents to the right to search business premises, homes, land, and objects.[15]

PCMS designation and prohibition of conduct can be combined in one decision, but the FCO has not done this in any PCMS decisions to date (*see* Question 12).

The FCO also enforces general provisions against abuse of dominance by ordering undertakings to cease problematic conduct and by imposing fines. However, in practice abuse of dominance provisions, including the new provisions on data access, tipping, and intermediation power, are mainly enforced by private parties before German civil courts without an intervention by the FCO. By contrast, private parties can only enforce Section 19a ARC before courts after the FCO has imposed a prohibition decision.

The 11th Amendment strengthens the FCO's role as the primary enforcer of German competition law, especially with regard to its proposed new power to impose structural remedies following sector inquiries.[16] In addition, with the entry into force of the EU Digital Markets Act the FCO could become the central national authority in all related enforcement matters (*e.g.*, assisting the European Commission in its investigations or investigating DMA violations at national level).

4. Which firms does Section 19a ARC apply to?

Section 19a ARC applies to undertakings that are found to have PCMS.[17] The provision is aimed mainly at digital platforms.[18] For a finding of PCMS, the FCO takes into account in particular the following (non-exhaustive) factors:

— an undertaking's dominant position on one or several markets;

— the undertaking's financial strength or access to other resources;

— vertical integration and activities in related markets;

— access to data relevant for competition; and

— relevance of the undertaking's activities for third party access to supply and its related influence on the business activities of third parties.

The FCO has designated Apple, Amazon, Google, and Meta as undertakings that have PCMS (*see also* Question 12). Amazon and Apple have appealed the designation decision to the Federal Court of Justice. A designation investigation against Microsoft is currently ongoing.

The rules on abuse of dominance apply to all undertakings with a dominant market position, including undertakings in the digital sector. As a special feature of German competition law, the ARC's provisions are also aimed at undertakings with relative market power that are not dominant in absolute terms but only in relation *inter partes* to other market participants. Some factors are

[15] Section 59 - 59b ARC.

[16] It is not clear whether the German legislator has the right to propose such a significant power under Regulation 1 /2003.

[17] Section 18 (3a) ARC.

[18] Explanatory Memorandum, BT-Drs. 19/23492 (October 19, 2020), p. 74.

of particular relevance for digital companies, such as the "*access to competitively relevant data*," which is listed as a factor to determine PCMS and can also support a finding of relative market power.[19]

5. What are the main substantive rules that govern the firms covered by Section 19a ARC?

When the FCO has designated an undertaking to have PCMS, the FCO can prohibit the following conducts:

— **Self-preferencing**,[20] *i.e.*, giving preferential treatment to the firm's own products or services to the detriment of those offered by the firm's rivals, in particular by preferential display of the firm's own services on its platform or exclusive pre-installation or integration of its own services.

— **Exclusionary conduct targeting companies active on upstream and downstream markets if the platform with PCMS is relevant for access to those markets**,[21] *i.e.*, hindering market access by using mandatory pre-installation or integration of software or by creating hurdles for other companies to advertise or to contact new customers outside the platform.

— **Leveraging or "market roll up"**,[22] *i.e.*, hindering competitors on markets into which the undertaking could quickly expand its position (*e.g.*, through tying or bundling).

— **Impediment of competition through data processing**,[23] *i.e.*, increasing entry barriers or otherwise hindering rivals through the processing of competitively relevant data or requiring users to consent to such processing, in particular:

- Making the use of a service conditional on the user agreeing to the processing of data from other services of the undertaking or a third party provider without giving the user sufficient choice as to whether, how, and for what purpose such data are processed; and

- Processing competitively sensitive data received from other undertakings for purposes other than those necessary for the provision of the firm's own services to these undertakings without giving these undertakings sufficient choice as to whether, how, and for what purpose such data are processed.

— **Hampering interoperability or data portability**, thereby impeding competition.[24] This rule aims to prevent lock-in effects that discourage consumers and/or commercial customers from switching between different platforms or services or to use multiple services or platforms in parallel.

— **Withholding information**,[25] *i.e.*, making it difficult for commercial customers to assess the value of the services they provide (*e.g.*, by giving insufficient information on scope, quality, and performance of the service).

— **Demanding disproportionate fees or conditions** for displaying the offers of another undertaking (*e.g.*, by requiring the transfer of rights or data not required for their display).[26]

[19] Section 18 (3a), Section 20 (1a), (3a) ARC.

[20] Section 19a(2) no 1 ARC.

[21] Section 19a(2) no 2 ARC.

[22] Section 19a(2) no 3 ARC.

[23] Section 19a(2) no 4 ARC.

[24] Section 19a(2) no 5 ARC.

[25] Section 19a(2) no 6 ARC.

[26] Section 19a(2) no 7 ARC.

If the FCO establishes that the requirements of one or more of the conducts listed above are met, it can prohibit that conduct if the undertaking in question fails to establish that its conduct is objectively justified (*see* Question 8). Violating a legally binding order can lead to fines of up to 10% of the undertaking's worldwide turnover in the previous business year (*see* Question 10).

6. Are there specific rules governing digital platforms' relationships with publishers in Germany?

Under German copyright law, press publishers have a right to collect fees from digital platforms if the platforms access or use their content for commercial purposes (*e.g.*, search engines that show extracts of press articles in their search results).[27] However, in 2019 the European Court of Justice held that this provision is inapplicable because Germany failed to notify the European Commission contrary to obligations under the Transparency Directive.[28]

Media platforms and intermediaries are also subject to specific rules laid down in the "State Media Treaty" (*Medienstaatsvertrag*).[29] These provisions are not primarily focused on maintaining effective competition in media or digital markets, but instead aim to ensure plurality of opinions and diversity of media offerings. Although there are some overlaps between the two regimes, the rules against abuse of dominance and Section 19a ARC remain applicable in parallel.[30] Accordingly, the FCO has initiated an investigation under Section 19a ARC regarding alleged unlawful discrimination against individual news publishers. The investigation was concluded in December 2022 when the FCO accepted Google's commitment not to integrate News Showcase in Google Search. [31]

7. Does the FCO need to establish the effects of certain conduct in order to establish a breach of Section 19a ARC?

When an undertaking has been designated as having PCMS, the FCO can prohibit certain conduct without having to show that the conduct has resulted in anticompetitive effects, as long as specific conditions are met (*e.g.*, some of the relevant conducts result in hindrance of other companies). The legislator considers all forms of conduct listed in Section 19a ARC to be capable of preventing competition on the merits. The FCO will, however, have to consider pro-competitive effects as potential objective justifications (*see* Question 8).

8. Can firms defend or objectively justify their conduct under Section 19a ARC?

Yes, under Section 19a(2) ARC. The burden of proof for the justification lies with the undertaking under investigation. Whether the conduct in question was objectively justified is ultimately determined in an overall assessment balancing various interests, taking into account the regulatory objective to ensure undistorted competition.

9. What procedural safeguards does Section 19a ARC include?

If the FCO intends to prohibit a specific form of conduct under Section 19a ARC, there is no statutory requirement to issue a written statement of objections before it adopts a decision. However, during the investigation, the FCO must respect

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[27] Section 87f - 87h UrhG.

[28] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations. *See also* CJEU, judgment of September 12, 2019, C-299/17 - *VG-Media/Google*.

[29] Section 78 - 99e MStV (State Media Treaty).

[30] *Pohlmann/Lindhauer/Peter*, Das Leistungsschutzrecht für Presseverleger und die qualifizierte News-Aggregation durch Google News Showcase: Ein Fall für § 19 und § 19a GWB? – Teil 1, NZKart 2021, 466, 469 f.

[31] *See* FCO, Press Release (December 21, 2022).

parties' procedural rights, including the right of access to file and the right to be heard. In practice, the FCO shares a statement of objections subject to a relatively short deadline for the response (*e.g.*, one month).

An appeal against a Section 19a ARC decision is limited to one instance: the Federal Court of Justice. The judicial review is therefore significantly shortened compared to other FCO proceedings. Both the decision finding an undertaking to have PCMS and the prohibition decision(s) can be appealed on the merits. In addition, the undertaking can apply for suspension of the FCO order.

AN APPEAL AGAINST A DECISION UNDER SECTION 19A OF THE ACT AGAINST RESTRAINTS OF COMPETITION IS LIMITED TO ONE INSTANCE: THE FEDERAL COURT OF JUSTICE.

In the course of the FCO's proceedings, the undertaking under investigation can offer to enter into commitments that are capable of resolving the FCO's concerns.[32]

10. What kinds of penalties or remedies can be imposed following a breach of Section 19a ARC?

Under Section 19a ARC, an undertaking can be fined for violating a binding FCO order prohibiting certain conduct. Fines can amount to 10% of the undertaking's worldwide turnover in the previous business year. Personal fines against individuals are capped at EUR 1 million. In addition, the FCO may require undertakings to commit to all necessary and proportionate behavioral or structural remedies to end an infringement effectively. The FCO may also impose interim measures if they are deemed necessary to protect competition or other undertakings from serious harm.[33]

The 11th Amendment introduces a presumption that an undertaking violating the competition rules has obtained a profit of at least 1% of its domestic turnover from the affected product over the entire duration of the infringement. At the same time, the maximum profit that can be skimmed off is capped at 10% of the worldwide turnover of the undertaking.[34]

11. Has the FCO issued any guidance or reports regarding Section 19a ARC?

The FCO has not published any specific guidance for undertakings operating in the digital sector regarding Section 19a ARC. It has so far only issued press releases on the progress of its ongoing investigations and case summaries.[35] The FCO has to date published decisions designating Google (Alphabet), Amazon, Apple, and Meta as undertakings with PCMS.[36]

12. Has the FCO issued any decisions under Section 19a ARC?

The FCO has determined that Google (Alphabet), Amazon, Apple, and Meta have PCMS.[37] The FCO has not yet issued a prohibition decision regarding specific conduct under Section 19a ARC. It has, however, accepted commitments in the Google News Showcase investigation (*see* Question 6). It has also accepted commitments by Alphabet to provide users choice options to consent to

[32] Section 19a(2) ARC, Section 32b ARC.

[33] Section 19a(2) ARC, Section 32(2) ARC, Section 32a ARC.

[34] Section 34(4) 11th Amendment.

[35] FCO, Annual Report 2022/2023 (July 11, 2023).

[36] For a list of all ongoing investigations against digital companies *see* here (in German).

[37] *See* FCO, Press Releases regarding Alphabet/Google (January 5, 2022), regarding Amazon (July 6, 2022), and regarding Meta/Facebook (May 4, 2022).

the cross-use of their data in separate services offered by Google.[38]

Separately, the new provision aiming to prevent "tipping"[39] of markets has been applied in several related court cases by the Berlin Regional Court[40] and the Berlin Court of Appeal.[41] The courts found that the "list-first" rebates granted by leading real estate comparison platform, Immoscout, were abusive because smaller competitors were hindered from establishing their own network effects and fair competition was restricted.

13. Is Section 19a ARC competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

Section 19a ARC is principally competition based, though there is some theoretical debate as to whether it should be considered as part of the body of competition law in Germany or as a form of *ex ante* regulation.

Even prior to the entry into force of Section 19a ARC, the FCO had taken into account goals adjacent to effective competition in its analyses in competition cases, (*e.g.*, privacy and consumer protection). For example, in 2019, the FCO found that Meta abused its alleged dominance through cross-service combination of user data without user consent in violation of the GDPR.[42] The EU Court of Justice subsequently confirmed that national competition authorities can consider data protection compliance in abuse of dominance investigations.[43]

14. What is the current enforcement practice with respect to conduct addressed by Section 19a ARC or 11th Amendment to the ARC?

The FCO has not yet issued a decision prohibiting a specific conduct listed in Section 19a ARC. Based on its previous findings of PCMS, the FCO is conducting the following proceedings:

— In May 2021, the FCO initiated a proceeding to determine whether Google's cross-service data processing conditions sufficiently take into account user choice. It issued a Statement of Objections on December 23, 2022.[44] The FCO accepted Alphabet's commitments in October 2023 (*see* Question 12). On December 21, 2022, the FCO concluded by way of commitments an investigation into Google's alleged self-preferencing of its own services and discrimination of individual news publishers in the "Google News Showcase" (*see* Question 6).[45] On 21 June, 2023, the FCO issued a Statement of Objections against Google in relation to the bundling of Maps, Assistant, and Play with its Android Automotive Operating System.[46]

— In the case of Meta, the FCO is examining the linking of Oculus' virtual reality products with Meta's Facebook platform. After the 10th Amendment of the ARC entered into force, the FCO extended its investigation under the

[38] *See* FCO, Press Release (October 5, 2023).

[39] Section 20(3a) ARC.

[40] Berlin Regional Court, judgment of April 8, 2021, Case 16 O 73/21 Kart; and related proceedings (Case 15 O 290/21 Kart; Case 16 O 82/22 Kart) - *Immoscout/Immowelt24*.

[41] Berlin Court of Appeal, judgment of February 11, 2022, Case U 4/21 Kart - *Immoscout/Immowelt24*.

[42] FCO, Press Release (February 2, 2019).

[43] CJEU, Case C-252/21 – Meta Platforms Inc. v. Bundeskartellamt (EU:C:2023:537), para. 62.

[44] FCO, Press Release (January 11, 2023).

[45] *See* FCO, Press Release (May 25, 2021), and Press Release (June 4, 2022).

[46] *See* FCO, Press Release (June 21, 2023).

regular abuse of dominance framework to cover the new Section 19a provision.[47]

— In June 2022, the FCO initiated a proceeding to investigate Apple's tracking rules for third party apps and its "App Tracking Transparency Framework," which raised concerns about self-preferencing and/or impediment of other companies.[48]

— In November 2022, the FCO extended two open investigations into Amazon (regarding its alleged influence on resale pricing of independent merchants and agreements between Amazon and branded goods manufacturers) which were initially launched under existing abuse of dominance rules to the new rules under Section 19a ARC.[49]

The 11th Amendment to the ARC aims to increase the efficiency and impact of the FCO's sector inquiries to improve consumer protection. The number of these inquiries can therefore be expected to increase.

The FCO has previously conducted sector inquiries into comparison websites and[50] mobile apps.[51] In March 2022, the FCO launched a further sector inquiry into the procedures of merchants for the verification of consumer solvency when shopping online.[52] In May 2023, the FCO published its report in the sector inquiry on messenger and video services.[53]

15. Are there merger rules specific to digital platforms in Germany?

Undertakings designated as having PCMS are not subject to additional merger control obligations. However, the 10th and 11th Amendments modified the merger control regime to introduce new rules designed to capture acquisitions by large digital platforms that may not have been caught by existing jurisdictional thresholds:

— First, new powers were introduced enabling the FCO to order undertakings subject to a sector inquiry to notify transactions where the target's turnover exceeds EUR 1 million if the FCO sees "*indications that future concentrations will impede competition*".[54] The purchaser must have had domestic sales exceeding EUR 50 million in the last financial year.

— Second, a transaction must also be notified to the FCO despite the merger not meeting traditional turnover thresholds if (1) the transaction's consideration (*i.e.*, "*all assets and other monetary benefits*" that the seller will receive in connection with the transaction) exceeds EUR 400 million at the date of closing; and (2) the target has significant market activity in Germany.

[47] *See* FCO, Press Release (December 10, 2020).

[48] *See* FCO, Press Release (June 14, 2022).

[49] *See* FCO, Annual Report 2022/2023 (July 11, 2023), p. 36.

[50] FCO, Sektoruntersuchung Vergleichsportale, (April 11, 2019).

[51] FCO, Sektoruntersuchung Mobile Apps (July 2021); Press Release (July 29, 2021).

[52] *See* FCO, Press Release (March 31, 2022).

[53] *See* FCO, Press Release (May 17, 2023); FCO, Sektoruntersuchung Messenger- und Videodienste - Abschlussbericht (May 15, 2023).

[54] Section 32f(2) 11th Amendment.

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Japan

Rules In Force

In Japan, competition in digital markets is mainly governed by general competition laws. The only current regulation that specifically targets competition in digital markets is the Act on Improving Transparency and Fairness of Digital Platforms, which came into force in 2021. This is a platform-to-business regulation, and its scope is fairly narrow. The Government is considering *ex ante* regulations for mobile ecosystems. A new set of regulations on competition in digital markets could therefore be forthcoming in the next year.

Authored by Fay Davies

Updated as of April 2024

1. What rules govern competition in digital markets in Japan?

Digital markets are governed by general competition law in Japan, including the Antimonopoly Act ("**AMA**"). The Japan Fair Trade Commission ("**JFTC**") amended its Merger Review Guidelines in 2019 to apply the AMA more effectively in digital markets. For example, the Guidelines now specify that the JFTC will examine network effects in mergers where relevant.

Beyond general competition law rules, there is one new law and a potential set of new regulations that govern competition in digital markets in Japan:

— **Act on Improving Transparency and Fairness of Digital Platforms.** In May 2020, the Government introduced the Act on Improving Transparency and Fairness of Digital Platforms ("**TFDPA**") to address transparency and fairness issues in digital markets. The TFDPA entered into force in February 2021. The TFDPA is a platform-to-business regulation that imposes a code of conduct on certain platform operators. Initially, it applied only to app stores and online marketplaces. In July 2022, the TFDPA's scope was expanded to include digital ads services.

— **Potential new rules**. A draft bill on new digital regulations for providers of mobile ecosystems is expected in early 2024. The regulations would address potential competition concerns in different layers of mobile ecosystems, including operating systems, browsers, app stores, search engines, and other digital products. The precise scope and framework of any new regime is still uncertain, but is likely to be similar in style to the EU Digital Markets Act.

2. What is the status of any forthcoming digital regulation in Japan?

After a year-long consultation on potential digital markets regulation, the government (through an inter-ministry organization called the Digital Market Competition Headquarters ("**DMCH**")) published a Final Report on 16 June 2023.[1] The Report proposes two forms of digital markets regulation: co-regulation involving voluntary efforts by platform operators, and an *ex ante*, DMA-style framework.

In late 2023, the DMCH said it would conduct a hearing and then draft a bill, potentially for the parliamentary session to be held early 2024.

3. How are the rules enforced or expected to be enforced?

Ordinary competition rules are enforced by the JFTC. The Government Ministry of Economy, Trade and Industry ("**METI**") enforces the TFDPA. It is too early to say how new regulations resulting from the DMCH process will be enforced, but it seems likely that it will involve voluntary efforts from platform operators as well as stricter, *ex ante* rules.

4. Which firms do the rules apply to?

The TFDPA applies to "Specified Digital Platform Providers". To date, METI has designated the following firms as Specified Digital Platform Providers:[2]

— **Online shopping marketplaces:** Amazon.co.jp, Rakuten Ichiba, and Yahoo! Shopping.

— **App stores:** Apple's App Store and Google's Play Store.

— **Digital ads platforms**:

- **Media-integrated digital ad platform providers:** Google (Google Search and YouTube), Meta (Facebook, Messenger, and Instagram), and Yahoo! Japan.
- **Ad intermediary digital platform providers:** Google.

ONLINE SHOPPING MARKETPLACES:
Amazon.co.jp, Rakuten Ichiba, Yahoo! Shopping

APP STORES:
Apple's App Store, Google Play Store

DIGITAL ADS PLATFORMS:
Google, Meta and Yahoo!

The potential new DMCH rules would likely apply to large providers of mobile ecosystems.

[1] See DMCH, Competition Assessment of the Mobile Ecosystem Final Report: Summary (Tentative Translation), (June 16, 2023) and DMCH, Competition Assessment of the Mobile Ecosystem Final Report [title translated from Japanese], (June 16, 2023) [Japanese].

[2] METI, Designation of Digital Platform Providers Subject to Specific Regulations Under the Act on Improving the Transparency and Fairness of Digital Platforms (April 1, 2021) and Designation of Digital Platform Providers Subject to Specific Regulations Under the Act on Improving the Transparency and Fairness of Digital Platforms (October 3, 2022).

5. What are the main substantive rules that govern the firms covered by the digital regulation?

Under the TFDPA, Specified Digital Platform Providers must;

— Disclose their terms and conditions and other information (such as criteria for refusals to deal and for determining search ranking);

— Voluntarily develop procedures and systems to ensure transparency and fairness on their platforms; and

— Submit to METI an annual report with a self-assessment, explaining the measures they have taken to comply.

METI will review the annual report of each Specified Digital Platform Provider and publish an assessment of the transparency and fairness of each firm. Specified Digital Platform Providers will be expected to make voluntary improvements based on the results of those assessments. If METI suspects that a Specified Digital Platform Provider is violating the Antimonopoly Act, it can request the JFTC to take action.

For the potential new regulations, the DMCH is exploring concerns around the following broad areas:

— Pre-installation and defaults;

— Self-preferencing;

— Collection and use of data to the platform operator's competitive advantage;

— Interoperability;

— Practices that might restrict the user from leaving the platform operator's ecosystem; and

— Transparency and disclosure to digital platforms' business users.

6. Are there specific rules governing digital platforms' relationships with publishers?

No. The DMCH is not currently considering specific rules governing digital platforms' relationships with publishers.

7. Does the authority need to establish the effects of certain conduct in order to establish a breach of the new or proposed rules?

TFDPA: No. METI assesses compliance with the TFDPA rules based on the annual reports submitted by the Specified Digital Platform Providers. Stakeholders may be invited to contribute to METI's assessments. The results of the assessment are published along with a summary of the annual report submitted by the Specified Digital Platform Providers.

Where METI has any suspicion that a given Specified Digital Platform Provider is in violation of the AMA, it will refer the matter to the JFTC.

Potential new rules: It is not clear how any potential new rules would apply in practice and whether an effects analysis would be required, but the direction of travel seems to be toward an *ex ante* framework together with voluntary co-regulation.[3]

8. Can firms defend or objectively justify their conduct under the new or proposed rules?

The TFDPA does not expressly provide that firms can objectively justify their conduct. METI assesses Specified Digital Platform Providers' conduct based on the annual reports they submit. There is nothing to prevent providers from including objective justifications in their reports.

[3] See DMCH, Competition Assessment of the Mobile Ecosystem Final Report: Summary (Tentative Translation), (June 16, 2023), page 10.

It is too early to say definitively whether potential new DMCH rules would allow firms to defend or objectively justify their conduct, but it seems likely. The DMCH's Final Report recommends that any regulatory framework should provide the opportunity for firms to justify their conduct.[4]

Some obligations may also provide expressly for justifications and proportionality thresholds. For example, in relation to a proposed obligation for OS providers to enable interoperability with third-party services, the DMCH notes that "*it is assumed that necessary and proportionate measures can be taken to ensure privacy*".[5]

9. What procedural safeguards are there under the new or proposed rules?

The TFDPA does not provide for express procedural safeguards, but usual competition procedures would apply if METI referred a case to the JFTC. JFTC decisions can be appealed before Japanese courts under the AMA and general administrative litigation legislation. It is too early to say what kinds of procedural safeguards are being considered under potential new DMCH rules.

10. What kinds of penalties or remedies can be imposed following a breach of the new or proposed rules?

A Specified Digital Platform Provider can be fined up to JPY 1 million (approximately USD 7,000) if it breaches an order issued by METI requesting it to perform disclosure obligations properly. These orders can be issued if the platform fails to implement a METI recommendation without justification.

A platform can be fined up to JPY 500,000 (approximately USD 3,500) if it fails to file an annual report, fails to provide necessary information in an annual report, or makes a false statement in an annual report.

¥500,000

A PLATFORM CAN BE FINED UP TO JPY 500,000 (APPROXIMATELY USD 3,500) IF IT FAILS TO FILE AN ANNUAL REPORT, FAILS TO PROVIDE NECESSARY INFORMATION IN AN ANNUAL REPORT, OR MAKES A FALSE STATEMENT IN AN ANNUAL REPORT.

It is too early to say what kinds of remedies could be imposed under the potential new DMCH rules, but the DMCH's Final Report proposes a range of measures, including financial penalties, orders to correct behaviour, urgent injunctions, and the possibility of private enforcement.[6]

11. Has the authority issued any guidance or reports regarding the digital regulation?

METI has issued various pieces of guidance on aspects of the TFDPA.[7]

The DMCH has issued:

— A summary of its Final Report in English.[8] The full version of the Final Report is only available in Japanese.

[4] See DMCH, Competition Assessment of the Mobile Ecosystem Final Report [title translated from Japanese], (June 16, 2023), Section 3-1 (イ) [Japanese].

[5] See DMCH, Competition Assessment of the Mobile Ecosystem Final Report: Summary (Tentative Translation), (June 16, 2023), page 38.

[6] See DMCH, Competition Assessment of the Mobile Ecosystem Final Report [title translated from Japanese], (June 16, 2023), Section 3-2 [Japanese].

[7] METI, Key Points of the Act on Improving Transparency and Fairness of Digital Platforms; METI, Making the Digital Market Easier to Use: The Act on Improving Transparency and Fairness of Digital Platforms (April 23, 2021); METI, Related Cabinet Order, Ministerial Ordinance and Guidelines (July 29, 2022).

[8] DMCH, Competition Assessment of the Mobile Ecosystem Final Report: Summary (June 16, 2023)

— A summary of its Interim Report in English.[9] The full version of the Interim Report is only available in Japanese.[10]

12. Has the authority issued any decisions under the digital regulation in this jurisdiction?

So far, METI has only issued decisions designating Specified Digital Platform Providers under the TFDPA (*see* Question 4).

13. Is the new regime competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

The potential new DMCH rules will be competition based. The TFDPA is a broader platform-to-business regulation that is mainly about promoting transparency in platforms' dealings with the listed businesses on the platform.

14. What is the current enforcement practice with respect to conduct that is expected to be addressed by the digital regulation?

The JFTC has increased its scrutiny of conduct in digital markets over the past few years. For example:

— **Investigation into Amazon's conduct on online marketplaces (closed in 2017)**. The JFTC investigated Amazon Japan for a suspected breach of the AMA due to its use of most favored nation clauses in seller contracts. Amazon agreed to remove the relevant clauses from contracts (or waive its right to exercise them), and not to include the clauses in future contracts.[11]

— **Investigation into Airbnb for alleged exclusionary practices (closed in 2018)**. The JFTC investigated Airbnb on suspicion that it was restricting competition by preventing property owners from listing properties on websites other than Airbnb. Airbnb agreed to waive its right to enforce the offending provisions.[12]

— **Investigation into Apple for its agreements with mobile network operators (closed in 2018)**. The JFTC investigated Apple for potential breaches of the AMA through its sales contracts with mobile network operators. The JFTC found that Apple was distorting competition by requiring three mobile network operators to offer users a plan with a lower upfront cost but potentially higher monthly costs. Apple did not allow the operators to offer any other type of iPhone plan. Apple agreed to change its sales contracts to remedy this concern.[13]

— **Investigation into Apple's conduct on its App Store (closed in 2021)**. The JFTC investigated Apple on suspicion that certain App Store practices breached the AMA. For example, the App Store Guidelines stipulated that app developers selling digital content through their apps had to use Apple's in-app payments system, which charges a fee of 15-30%. The JFTC found that this could restrict competition from other potential sales channels. Apple agreed to allow "reader" apps like Netflix, Spotify, and Hulu to include an

[9] DMCH, Competition Assessment of the Mobile Ecosystem, Interim Report Summary (April 26, 2022).

[10] DMCH, Evaluation of Competition in the Mobile Ecosystem - Interim Report [title translated from Japanese] (April 26, 2022) [Japanese]; DMCH, Evaluation of Competition in the New Customer Touchpoints (Voice Assistants and Wearables) - Interim Report [title translated from Japanese] (April 26, 2022) [Japanese].

[11] JFTC, Press release: Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Amazon Japan G.K. (June 1, 2017).

[12] JFTC, Press release: Closing the investigation on the Suspected Violation of the Antimonopoly Act by Airbnb Ireland UC and Airbnb Japan K.K. (October 10, 2018).

[13] JFTC, Press release: Closing the investigation on suspected violation of the Antimonopoly Act by Apple Inc. regarding its agreements with mobile network operators (July 11, 2018).

in-app link to allow users to make payments through their websites.[14]

— **Investigation into Expedia MFNs (closed in 2022)**. The JFTC investigated Expedia on suspicion that its use of wide MFNs violated the AMA. The JFTC accepted commitments from Expedia to remove wide price parity clauses from contracts with accommodation providers.[15]

— **Report on cloud services (2022)**. The JFTC published the results of a survey on trade practices in the public cloud sector. The report sets out the JFTC's assessment of the competitive environment, potential concerns and recommendations. The JFTC resolved to "continue to watch the state of competition in this sector".[16]

— **Market study on mobile OS and mobile app distribution (2023)**. The JFTC published the results of a market study into the market for mobile OS and app distribution, focusing on Apple and Google.[17] In its press release announcing the final report, the JFTC notes that it will continue to "respond strictly and appropriately to concrete cases involving a mobile OS provider or an app store operator that become problematic under the Antimonopoly Act".[18]

15. Are there merger rules specific to digital platforms in Japan?

No. However, in April 2022, the JFTC announced the creation of a new office specialized in market analysis for the review of, among others, digital-related mergers.

This proposal followed the publication of a revised set of merger review guidelines in December 2019,[19] which introduced significant amendments to better capture transactions in the digital sector. Under the new guidelines, parties to a merger that does not meet the notification thresholds but has a transaction value over JPY 40 billion (approximately USD 275 million) and is expected to affect Japanese consumers are strongly encouraged to voluntarily consult with the JFTC. The revised guidelines also mention data foreclosure and network effects as elements to be considered in the substantive assessment of a merger.

[14] JFTC, Press release: Closing the investigation on the Suspected Violation of the Antimonopoly Act by Apple Inc. (September 2, 2021).

[15] JFTC, Press release: Approval of the Commitment Plan submitted by Expedia Lodging Partner Services Sàrl (June 2, 2022).

[16] JFTC, Press release: Report Regarding Cloud Services (June 28, 2022).

[17] JFTC, Market Study Report on Mobile OS and Mobile App Distribution (Summary) (February 2023).

[18] JFTC, Press release: Market Study Report on Mobile OS and Mobile App Distribution (February 9, 2023)

[19] JFTC, Press release: Amendments of the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" and the "Policies Concerning Procedures of Review of Business Combination" (December 17, 2019).

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South Korea

Rules In Force

Korea's Telecommunications Business Act imposes specific obligations on app store operators. Other digital regulations have been introduced as bills, although the new Government is looking at setting up a framework of digital platform self-regulation as an alternative. Digital markets remain an enforcement priority area for the Korean competition authority under existing competition law rules. In particular, the Korean authority has issued a proposal for new guidance on how it will assess abuse of dominance by online platforms, signaling its focus on the digital sector.

Authored by Henry Mostyn and Bianca Buzatu

Updated as of December 2023

1. What rules govern competition in digital markets in South Korea?

Competition in digital markets is governed by general Korean competition law, including the Monopoly Regulation and Fair Trade Act. On 12 January 2023, the Korea Fair Trade Commission ("**KFTC**") released its proposed new Guidelines for Review of Abuse of Dominance and Unfair Trade Practices by Online Platform Operators (the "**Online Platform Guidelines**"). Online platforms include online intermediation services, online search engines, digital content services, operating systems and online advertising services. The Online Platform Guidance covers aspects relevant to assessing market definition, market dominance and anticompetitive effects, for example:

— When assessing market definition, the KFTC may focus on the practical and resulting harmful effects from the conduct given the dynamic nature of the online platforms sector, rather than merely focusing on a theoretically accurate market definition.

— When assessing market dominance, the KFTC may consider barriers to entry due to cross-platform network effects, the platform's influence as a gatekeeper and ability to collect, retain and use data, and potential new entrants.

— When assessing anticompetitive effects, the KFTC may consider not only changes in prices and output but also any decrease in the variety of products or services, deterioration of quality, higher costs for users and effects on innovation.

— The KFTC lists specific examples of unlawful conduct it will seek to regulate in the future, namely: restrictions on multi-homing, demanding most favored nation clauses, self-preferencing, and tying.

Korea was the first jurisdiction to implement — and enforce — legislation targeting specific exclusionary and unfair conduct by digital platforms. In particular, the Telecommunications Business Act has been amended to impose particular obligations on app store operators (the "**TBA Amendment**") (*see* Question 5). This amendment took effect on September 14, 2021.

Other proposed legislation and rules governing competition in digital markets include:

— The Fairness in Online Platform Intermediary Transactions Act and the Act on Protection of Online Platform Users, which include restrictions on the terms and conditions of online intermediation platforms, price transparency obligations, and rules on the use of data generated on the platform.

— The Act on the Consumer Protection in Electronic Commerce, which includes consumer protection rules for online retailers and other platform operators.

— The Act on Protection of Newspapers, which imposes an obligation on online news service providers to remunerate news publishers.

Following the 2022 elections, the Government decided to set up a framework for platform self-regulation as an alternative to these measures.

Earlier this year, the Korea Communications Commission ("**KCC**"), the Ministry of Science, and ICT publicly consulted on amendments to the Telecommunications Business Act to establish a legal framework for online platform self-regulation. The amendments will establish a legal basis for self-regulation by digital platforms and the government's corresponding support, regulatory actions and stakeholder engagement. As of November 2023, the amendments are pending the President's approval and proclamation, after which they will be submitted for review by the Parliament.

In the meantime, in August 2022, the KFTC announced a survey into online platform sectors in order to identify unfair trade practices.[1] The KFTC intends to use the survey to identify potential enforcement cases and devise a suitable and timely policy for digital platforms. The results of this survey are yet to be announced.

2. What is the status of any forthcoming digital regulation in South Korea?

The TBA Amendment, which introduced new rules specific to app stores, entered into force on September 14, 2021.[2] The status of other legislative proposals remains unclear due to the Government's new emphasis on self-regulation by digital platforms (*see* Question 1).

September 14, 2021

THE TBA AMENDMENT, WHICH INTRODUCED NEW RULES SPECIFIC TO APP STORES, ENTERED INTO FORCE ON SEPTEMBER 14, 2021.

[1] *See* MLex, South Korean competition regulator to conduct survey of online-platform sectors (August 2, 2022); MLex, Online platforms target of survey by South Korean antitrust regulator (August 2, 2022).

[2] Telecommunications Business Act, Article 22-9 and Article 50.

3. How are the rules enforced or expected to be enforced?

The KFTC is generally responsible for enforcing competition law and digital markets regulation in Korea. In January 2022, the KFTC announced that its "*ICT Task Force*" would be reorganized into a more comprehensive "*digital market response team*" that will be better able to deal with fast-paced and multi-faceted digital markets.

January 2022

IN JANUARY 2022, THE KFTC ANNOUNCED THAT ITS "ICT TASK FORCE" WOULD BE REORGANIZED INTO A MORE COMPREHENSIVE "DIGITAL MARKET RESPONSE TEAM" THAT WILL BE BETTER ABLE TO DEAL WITH FAST-PACED AND MULTI-FACETED DIGITAL MARKETS.

The Telecommunications Business Act, which includes the new rules specific to app stores, is enforced by the KCC, despite the competition law focus of the rules.

If the Government follows its current proposed path of self-regulation, it is unclear whether there would be any oversight of the firms subject to the rules that are introduced.

4. Which firms do the rules apply to?

Currently, the only new digital sector regulation in force — the TBA Amendment — applies to businesses that operate app stores that intermediate transactions of mobile content.

Other rules that have been proposed (*see* Question 1) would apply to digital platforms such as app stores, online marketplaces, online shops, online news services providers, search engines, and others.

5. What are the main substantive rules that govern the firms covered by the digital regulation?

The TBA Amendment prohibits app store operators from:[3]

1. Requiring app developers to use a specific payment method or preventing promotion of other payment methods by unfairly taking advantage of their superior bargaining position in intermediating transactions involving apps;
2. Unfairly delaying the review of apps;
3. Unfairly removing apps from their app stores; or
4. Unfairly imposing discriminatory conditions and restrictions on app developers.

6. Are there specific rules governing digital platforms' relationships with publishers?

If passed by the National Assembly, the proposed Amendment of the Newspaper Act would impose an obligation on online news service providers to pay compensation to news suppliers. It also provides for the establishment of a committee that would mediate disputes regarding payment of compensation by online news service providers and would have the authority to request submission of relevant materials.

The rules are not expected to come into force imminently, though, and their future is uncertain in light of the Government's recent exploration of self-regulation as an alternative to legislation (*see* Question 1).

[3] Telecommunications Business Act (April 20, 2022), Article 22-9 and Article 50.

7. Does the authority need to establish the effects of certain conduct in order to establish a breach of the rules?

Liability for breaches of the app store provisions of the Telecommunications Business Act referred to in Question 5 is strict. There is no need for the KCC to establish anticompetitive effects in order to find an infringement. However, certain aspects of the provision, such as notions of unfairness and superior bargaining power, imply that there needs to be unmeritorious conduct established based on evidence before an infringement can be found.

8. Can firms defend or objectively justify their conduct under the new or proposed rules?

Liability for breaches of the app store provisions of the Telecommunications Business Act referred to in Question 5 is strict. There is no scope for firms to objectively justify their conduct.

9. What procedural safeguards do the rules include?

Under the Telecommunications Business Act, the KCC must inform the company of any measures it may seek to take and provide the company with an opportunity to be heard before issuing a formal order. The KFTC's investigatory powers under general antitrust law are subject to the usual procedural safeguards. KFTC and KCC decisions are subject to appeal on the merits.

10. What kinds of penalties or remedies can be imposed following a breach of the rules?

The regulator can issue a corrective order and/or impose a fine of up to 3% of the company's average annual Korean revenue during the three preceding years. A criminal fine of up to KRW 300 million (approximately USD 250,000) is also possible.

11. Has the authority issued any guidance or reports regarding the digital regulation?

An amended Enforcement Decree providing guidance on the new provisions in the TBA Amendment took effect on March 15, 2022.[4] The guidance includes detailed information on relevant standards included in the app store rules, such as "*bargaining position*," "*forcedness*," and "*unfairness*".[5]

The KFTC has a rich pipeline of reports in the digital sector. For example, it has commissioned a study titled "*Review on M&A in the online platform sector and establishment of regulatory measures*," scheduled for completion in Q4 2022. It has also completed, but has not yet published, studies titled "*Investigation of Conditions in Digital Ad Markets*" and "*Competition/Consumer Issues and Proposals for Establishment of a Fair Trade Order in the Data Sector*", which may lead to additional rules or enforcement in these areas.

Finally, the KFTC has published for comment a set of proposed Draft Guidelines for Review of Abuses of Dominance and Unfair Trade Practices by Online Platform Operators, which include self-preferencing as a representative type of anticompetitive conduct in the online platform sector. It remains uncertain, though, when these guidelines will be implemented.

12. Has the authority issued any decisions under digital regulations in South Korea?

No. Under the TBA Amendment, the KCC has conducted an initial examination of app market operators like Google, Apple, and One Store to identify possible violations of the new app store

[4] Enforcement Decree Of The Telecommunications Business Act (March 15, 2022).

[5] KCC Press Release, KCC Draws Up Standards To Determine Violation Of Prohibited Acts By App Market Business Operators (March 10, 2022).

rules.[6] The examination found that Google, Apple and One Store may be violating the new rules. As a result, in August 2022, the KCC announced that it would begin a fact-finding investigation to determine whether there have been any specific violations of the app store rules that warrant the imposition of a penalty or other corrective measures.[7] The KCC's investigation remains ongoing.

13. Is the new regime competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

The TBA Amendment that imposes obligations on app store operators is principally competition-based, but some rules have a consumer protection flavor.

Other new laws in the digital sector that may be adopted are also expected to be competition-based with consumer protection and privacy elements. The self-regulation proposal is likely to seek to achieve similar goals.

14. What is the current enforcement practice with respect to conduct that is expected to be addressed by the digital regulation?

Digital markets remain a priority area for the KFTC. For example, the agency is launching a market survey into online platform sectors with a view to identifying potential new cases and areas of concern. In recent years it has pursued investigations into the practices of international digital companies, including Apple,[8] Google,[9] and Meta,[10] as well as large Korean digital platforms, such as Naver[11] and Kakao.[12] In September 2022, the KFTC conducted a dawn raid in Apple's Korea headquarters in connection with alleged abuse of its dominance in app stores.[13]

15. Are there merger rules specific to digital platforms in South Korea?

No. However, in December 2021, a transaction value jurisdiction threshold took effect under the Monopoly Regulation and Fair Trade Act. Under the new threshold, a transaction is notifiable if its value exceeds KRW 600 billion (approximately USD 540 million) and the acquired company is substantially active in the Korean market. This jurisdiction test applies to all firms, not only digital platforms. However, as with other jurisdictions that have implemented transaction value tests (*e.g.*, Germany and Austria), its introduction follows growing concerns about so-called "killer acquisitions" where large firms, especially in the digital sector, acquire nascent potential competitors with small current revenues.

KRW 600mn

UNDER THE NEW THRESHOLD, A TRANSACTION IS NOTIFIABLE IF ITS VALUE EXCEEDS KRW 600 BILLION (APPROXIMATELY USD 540 MILLION) AND THE ACQUIRED COMPANY IS SUBSTANTIALLY ACTIVE IN THE KOREAN MARKET.

[6] KCC Press Release, KCC Begins Fact-Finding Examinations Of App Market Operators Regarding Possible Violations Of Prohibited Acts In Telecommunications Business Act (May 16, 2022).

[7] KCC Press Release, KCC Begins Fact-Finding Investigation Of Three App Market Operators Including Google, Apple (August 16, 2022).

[8] The Korea Herald, Regulator to refer Apple Korea to prosecution for hampering probe (March 31, 2021).

[9] CNBC, South Korea's antitrust regulator fines Google $177 million for abusing mobile market dominance (September 14, 2021).

[10] MLex, Facebook's South Korea office inspected by KFTC for alleged anticompetitive conduct in digital ad market (April 14, 2021).

[11] The Korea Herald, Naver faces 26.7b-won fine, accused of manipulating algorithms (October 6, 2020); Competition Policy International, South Korea Raids Naver Over Allegedly Abusing Market Position (August 14, 2022).

[12] The Korea Economic Daily, Antitrust body takes aim at Kakao's taxi-hailing app, Coupang (September 12, 2021).

[13] PaRR, KFTC raids Apple Korea over alleged abuse of dominance - report (translated) (September 27, 2022).

According to press reports, the KFTC is preparing an administrative notice to put in place new criteria for merger control reviews for transactions involving digital platforms, expected in the second half of 2023.[14]

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[14] See PARR, Korean government agencies seeking commercial balance with online platform regulations (July 21, 2023).

Turkiye

Rules Under Development

There are currently no digital-specific competition law rules in force in Turkiye. In October 2022, the Turkish Government published draft amendments to the Turkish Competition Act, proposing to introduce new obligations that specifically target digital platforms. The government published revisions to the original draft in November 2023. The proposed regulations largely mirror the operation of and substantive provisions in the EU Digital Markets Act, though go further in certain respects. Pending passage of the new rules, digital markets remain an enforcement priority area for the Turkish competition authority under existing competition law rules.

Authored by Henry Mostyn, Patrick Todd, and Goksu Kalayci

Updated as of December 2023

1. What rules govern competition in digital markets in Turkiye?

There are currently no digital-specific competition law rules in force in Turkiye. Digital firms are subject to general competition and consumer protection laws applicable to all firms under the Act No. 4054 on the Protection of Competition ("**APC**"). There are no special rules or exemptions applying to competition in digital markets.

2. What is the status of any forthcoming digital regulation in Turkiye?

At the start of 2020, the Turkish Competition Authority ("**TCA**") initiated a sector inquiry into e-commerce platforms. In its Final Report,[1] published in April 2022, it made policy recommendations applicable to a wider set of technology companies beyond e-commerce platforms.

[1] Turkish Competition Authority, E-Pazaryeri Platformlari Sektor Incelemesi Nihai Raporu (available in Turkish only) (April 2022).

Following these recommendations, in October 2022, the Turkish Government published its Draft Regulation on Amending Law on the Protection of Competition, revised by a later draft in November 2023 (the "**Draft Regulation**"). The Draft Regulation proposes amendments to the APC that in several places track the language of the EU Digital Markets Act ("**DMA**") (*see* Question 5). The preamble to the Draft Regulations states that "*the fast-paced changes in internet technologies in recent years have reshaped the digital market and consumer habits.*"[2]

Draft rules modeled on the DMA

IN OCTOBER 2022, THE TURKISH GOVERNMENT PUBLISHED DRAFT REGULATIONS GOVERNING DIGITAL MARKETS, MODELED ON THE EU DIGITAL MARKETS ACT. IN NOVEMBER 2023, THE GOVERNMENT PUBLISHED REVISIONS TO THE ORIGINAL DRAFT.

The Draft Regulation was issued for feedback from companies that are expected to be in-scope. There are, however, no updates on when the regulation is expected to take effect or what the final law will look like, if passed.

3. How is the Draft Regulation expected to be enforced?

The Draft Regulation proposes an enforcement mechanism similar to that provided by the DMA, albeit in several places it goes further. The TCA may choose to cooperate with relevant public authorities and institutions[3] in monitoring obligations and enforcement.

Designation process

Only firms designated as undertakings with significant market power ("**USMPs**") will be subject to the obligations and prohibitions proposed in the Draft Regulation. The process for designation is structured as follows:

— **Notifications of USMPs.** Firms that provide core platform services ("**CPSs**") must apply to the TCA within thirty days of the thresholds in the relevant Communiqué (which is yet to be published) being exceeded.[4] This application must contain the firm's objections, if any, that despite meeting the thresholds, it does not enjoy significant market power. The TCA must review the application and make a USMP designation decision within sixty days.[5] The TCA may also designate a firm as an USMP on qualitative grounds, even if the firm does not exceed the quantitative thresholds in the relevant Communiqué (*see* Question 4). A USMP designation is valid for three years. This period is extended by a further three years automatically if the undertaking does not apply to the TCA to dispute its designation at least ninety days before the end of the initial three-year period.

— **CPSs.** The Draft Regulation has replicated the list of CPSs from the DMA, which includes online intermediation services, online search engines, online social networks, video-sharing platforms, number independent communication services, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising services.

The Draft Regulation has also largely copied the definitions of the CPSs, but not always identically.

[2] General Preamble to the Draft Regulation.

[3] The Draft Regulation specifically mentions the Information Technologies and Communication Authority, and a Coordination Committee consisting of representatives of the General Directorate of Domestic Trade, Digital Transformation Office of the Presidency, Information Technologies and Communication Authority, and Personal Data Protection Authority.

[4] Draft Regulation, Article 5 (introducing a new Article 8/A).

[5] For applications filed in the first year following enactment of the relevant Communiqué, the time periods for application to the TCA and for the TCA's designation decision are doubled (Draft Regulation, Article 12(introducing a Provisional Article 8)).

— **Relevant thresholds**. The relevant quantitative thresholds that must be met for obligations to apply will be set by the TCA's Communiqué, which has not yet been published. The Draft Regulation states that the quantitative thresholds will take into account: (1) annual gross revenues; (2) the number of end users **or** the number of commercial users, and (3) the length of time these numbers were maintained.

— **Compliance**. Together with its designation decision, the TCA must determine a reasonable period of time not exceeding six months for the USMP to fulfill the substantive obligations proposed in the Draft Regulation. The USMP may submit justifications explaining why it will not be able to fulfill the relevant obligations within the prescribed time period. The TCA must evaluate the justifications within sixty days, and may order compliance by the firm if it is not convinced by the justifications.

Enforcement process

— **Notification of infringement**. The TCA may determine that there is an infringement on its own initiative or in response to a denouncement, complaint, or request from the Ministry. The TCA must notify an infringement decision to the defendant firm, setting out any behavioral or structural remedies with which the firm must comply. The TCA may impose structural remedies only if it is clear that behavioral measures would not be sufficient.

— **Failure to comply**. If a USMP fails to comply with the obligations set out in the Draft Regulation twice or more in a five year period in relation to the same CPS, the TCA will have the power to ban mergers and acquisitions by that USMP in digital markets for up to three years.[6] This is said to protect against "*the damages arising from repeated violations or to prevent serious or irreparable damages that may arise.*"[7] For other penalties imposable under the Draft Regulation, *see* Question 10.

4. Which firms would the Draft Regulation apply to?

The Draft Regulation is proposed to apply to firms designated as being USMPs. This is a similar concept to "gatekeeper" under the DMA.

USMPs will be designated, similar to the DMA, based on whether they operate a CPS and meet certain quantitative thresholds. The Draft Regulation has not yet set out what these quantitative thresholds may be, so it is not yet possible to assess which kind of firms will be subject to the Draft Regulation. As noted in response to Question 3, the quantitative thresholds will take into account: (1) annual gross revenues; (2) the number of end users or the number of commercial users, and (3) the length of time these numbers were maintained.

THE DRAFT REGULATION STATES THAT THE QUANTITATIVE THRESHOLDS WILL TAKE INTO ACCOUNT:

1. **Annual gross revenues;**
2. **The number of end users or the number of commercial users, and**
3. **The length of time these numbers were maintained.**

In USMP designation decisions, the TCA may take into account factors such as ownership of the undertaking, vertical integration and conglomerate structure, economies of scale and scope, lock-in and evolution impact, switching costs, multi-homing, user behavior, M&A activity, and quantitative thresholds to be set by the relevant Communiqué.[8]

[6] Draft Regulation, Article 6.

[7] *Ibid*.

[8] Draft Regulation, Article 5.

While not completely clear, the proposed set of substantive obligations seem to apply not only to specific products (or CPSs) of the USMP, but to the whole undertaking designated as an USMP.[9] This would mark a significant departure from the DMA, despite the obvious inspiration that has been drawn from it.

The rules proposed by the Draft Regulation apply to USMPs that provide CPSs to end users or business users located in Turkiye, irrespective of whether they have offices or establishments in Turkiye.[10]

5. What are the main substantive rules that govern the firms covered by the Draft Regulation?

Several of the rules appear to have been modeled on behavioral obligations in the DMA, but in places they go considerably further due to the Draft Regulation's uncertain and open-ended drafting. These include:

— Prohibitions on:

- Self-preferencing in ranking, crawling, or indexing (equivalent to Art. 6(5) of the DMA);
- The use of non-public data when competing with business users (equivalent to Art. 6(2) of the DMA);
- Conditioning the supply of goods and services offered to business users and end users on the supply of other goods and services offered by the USMPs (there is no equivalent DMA provision);
- Conditioning users' access to any CPS offered by the USMP on membership or registration to another CPS offered by the USMP (similar to Art. 5(8) of the DMA);
- Restricting business users from working with competing undertakings (there is no equivalent DMA provision);
- Restricting business users' ability to enter into contracts with or submit proposals to end users (similar to Art. 5(4) of the DMA); and
- Combining users' personal data obtained from one CPS with data obtained from other services the firm offers, and using such data in the context of other services, especially targeted advertising (the November 2023 draft added an explicit carveout where a user has given consent, similar to Art. 5(2) of the DMA).

— Obligations to:

- Allow users to uninstall preinstalled applications, switch to third-party applications or software, and easily change default settings (this is somewhat similar to Art. 6(3) of the DMA, though there are no express requirements to show choice screens);
- Provide business users with free, effective, continuous, and real-time access to end users' data produced by their use of CPS (this is somewhat similar to Art. 6(10) of the DMA);
- Facilitate data portability (this is similar to Art. 6(9) of the DMA, which is about user data portability);
- Enable effective and free access to OS, hardware, or software features to allow for co-functionality (equivalent to Art. 6(7) of the DMA); and

[9] *See* Draft Regulation Article 4 (introducing a new Article 6/A to the APC).

[10] Draft Regulation, Article 2.

- Provide advertisers and publishers, if they so request, with access to free information regarding the visibility and usability of ad portfolio, including pricing terms of bids submitted, the auction process and pricing principles, and the fee paid to the publisher for the ad services (similar to Art. 5(10) of the DMA).

While the prohibitions and obligations are largely similar to those contained in the DMA, certain provisions are significantly wider in scope in comparison. For example:

— The prohibition on rendering goods and services dependent on other goods and services offered by the USMP might, if enforced literally, impose a broad and absolute ban on tying or bundling any type of product.

— The prohibition on restricting business users' work with competing undertakings may cover all contractual exclusivity agreements or loyalty arrangements, irrespective of the market share of the product.

— More generally, it is unclear whether the substantive obligations apply to specific CPSs provided by USMPs, or to USMPs as a whole. If the latter, the scope of the Draft Regulation would be significantly wider than the DMA.

6. Are there specific rules governing digital platforms' relationships with publishers in Turkiye?

There are no rules in the Draft Regulation which regulate digital platforms' relationships with publishers.

7. Will the TCA need to establish the effects of certain conduct in order to establish a breach of the rules?

No, there is no requirement for the TCA to establish the effects of conduct to establish a breach of the rules proposed under the Draft Regulation.

8. Can firms defend or objectively justify their conduct under the Draft Regulation?

The Draft Regulation does not contain any provisions that allow for objective justifications or defenses. In fact, it goes even beyond the DMA, which, as well as being subject to the overall principle of proportionality, has narrow defenses to cover public health and public security, and cases where the gatekeeper can demonstrate that complying with an obligation would endanger the economic viability of its operation.

9. What procedural safeguards does the Draft Regulation include?

Procedural details have not been included in the Draft Regulation. But given that the Draft Regulation contains a set of rules proposed to amend the APC, we would expect the procedural safeguards and processes set out under the APC to apply, such as the right to judicial review of TCA decisions,[11] the right of access to file,[12] and the right to be heard before the TCA makes a decision on remedies.[13]

10. What kinds of penalties or remedies can be imposed following a breach of the rules under the Draft Regulation?

The TCA may impose penalties on USMPs for non-compliance with the notification obligation and for breach of the substantive obligations. For breaches of substantive obligations, the TCA may

[11] Article 55 of the APC.

[12] Communiqué No. 2010/3 on the Regulation of the Right of Access to the File and Protection of Trade Secrets.

[13] Article 9 of the APC.

impose administrative fines of up to 10% of the USMPs' annual gross revenue in the financial year preceding the TCA's decision (increasing to up to 20% if the USMP violates the obligations at least twice within the last five years with regards to the same CPS). The Draft Regulation does not specify whether the revenue generated in Turkiye or globally is used.[14]

The Draft Regulation expressly allows the TCA to impose structural remedies, seemingly even in cases where behavioral measures would be sufficient to cure the non-compliant conduct and its effects.[15]

Finally, the TCA may ban for up to three years the mergers and acquisitions in digital markets by USMPs that have violated the substantive obligations at least twice in the last five years with regards to the same CPS.

11. Has the TCA issued any guidance or reports regarding the digital regulation?

On April 14, 2022, the TCA published the Final Report in its sector inquiry on e-commerce platforms.[16] The Final Report made policy recommendations, including *ex ante* regulation of USMPs.

In April 2023, the TCA published a working paper titled Reflections on Digital Transformation in Competition Law.[17] The report identifies data collection, data portability and interoperability, self-preferencing, tying and bundling, and lack of transparency as practices that could result in competition law violations in the digital sector. In line with the contents of the Draft Regulation, the TCA recommends DMA-style regulation to address these concerns.

12. Is the new regime competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

The proposed regime is principally competition based, with many of the rules having been inspired by the DMA. The Draft Regulation touches on issues relating to data usage, but does not address other issues relevant to digital platforms such as privacy or content moderation.

13. What is the current enforcement practice with respect to conduct that is expected to be addressed by the digital regulation?

The TCA has been active in its use of existing enforcement tools against digital platforms. Some recent enforcement action taken by the TCA include:

— **Investigation into Trendyol's use of business data (July 2023)**. The TCA concluded an investigation against Trendyol in July 2023, finding that Trendyol uses business user data to compete with its business users, providing its first-party services with an unfair advantage. The TCA imposed a fine of 61 million Turkish Liras.[18] Interim measures were in force from October 2021.[19]

— **Investigation into Google online advertising services**. The TCA launched an investigation into Google's adtech services in June 2023.[20] The investigation was announced

[14] Draft Regulation, Article 14.

[15] Draft Regulation, Article 9 expressly states that "*In order to be able to decide on a structural measure ... it is not necessary to first have a behavioral measure taken with a final decision.*"

[16] Turkish Competition Authority, E-Pazaryeri Platformlari Sektor Incelemesi Nihai Raporu (available in Turkish only) (April 2022).

[17] Turkish Competition Authority, Dijital Donusumun Rekabet Hukukuna Yansimalari (available in Turkish only) (April 2023).

[18] NTV Haber Merkezi, Rekabet Kurumu'ndan Trendyol'a para cezası (July 27, 2023).

[19] Arden Papuççiyan, Webrazzi, Rekabet Kurulu, Trendyol hakkinda gecici tedbir karari aldi (October 1, 2021).

[20] Francesca McClimont, Turkish agency continues Google scrutiny with another adtech probe (June 19, 2023), Global Competition Review.

soon after the European Commission issued a Statement of Objections against Google in its investigation into similar concerns.

— **Fine against Meta for data sharing between platforms (November 2022).** The TCA had found in a 2021 decision that WhatsApp's terms of use and privacy policy requiring mandatory consent to data sharing was likely to result in serious and irreparable harm, and imposed interim measures to cease the roll out of the new terms of use in Turkiye. In October 2022, the TCA concluded that Meta's data sharing practices raised barriers to entry and harmed competitors and fined Meta $18.6 million.[21]

— **Investigation into Google Search (April 2021).**[22] The TCA fined Google over 296 million lira for abusing a dominant position in search engine services, including by favoring its own price comparison for accommodation and local search services.

— **Interim measures against Meta for data sharing between platforms (January 2021).**[23] The TCA found that WhatsApp's terms of use and privacy policy requiring mandatory consent to data sharing was likely to result in serious and irreparable harm. It imposed interim measures, requiring Meta to cease the roll out of the new terms of use in Turkiye.

— **Investigation into Google Adwords (November 2020).**[24] The TCA found that Google had abused a dominant position by increasingly placing text ads above general search results. The TCA's decision requires Google to offer text advertisements at the quality, scale, and location that will not exclude organic search results, and to submit compliance measures to the TCA.

14. Are there merger rules specific to digital platforms in Turkiye?

Under the Draft Regulation, the TCA may ban mergers and acquisitions in digital markets involving a USMP for up to three years if the USMP has breached the newly proposed obligations twice or more in five years in relation to the same CPS. Save for this provision, the Draft Regulation does not propose amendments to existing merger rules.

UNDER THE AMENDED MERGER CONTROL REGIME, THE LOCAL TURNOVER THRESHOLD DOES NOT APPLY TO ACQUISITIONS OF TECHNOLOGY COMPANIES THAT OPERATE IN THE TURKISH MARKET OR ARE ENGAGED IN R&D ACTIVITIES OR PROVIDE SERVICES IN TURKEY.

Merger rules applicable to transactions involving technology companies[25] were amended in March 2022[26] and came into force in May 2022. Under the amended regime, the local turnover threshold does not apply to acquisitions of technology companies that operate in the Turkish market or are engaged in research and development activities or provide services in Turkiye. It requires mandatory notification even where the target company has no turnover, as long as the other notification thresholds are met.

[21] Ebru Tuncay, Turkish competition board fines Meta Platforms $18.6 million (October 26, 2022), Reuters.

[22] Reuters, Turkey fines Google for abusing dominant position (April 14, 2021).

[23] TCA, The Competition Board launched an investigation against Facebook and WhatsApp and stopped the data sharing obligation imposed by Facebook to WhatsApp users, (January 11, 2021)

[24] TCA, Reasoned Decision on Adwords (available in Turkish only) (November 12, 2020).

[25] "*Technology companies*" include companies active in digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies, as well as assets related to these companies.

[26] *See* Communiqué No. 2022/2 on Amending Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Requiring the Turkish Competition Board's Approval.

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Rules Under Development

There are currently no digital-specific competition law rules in force in the UK. Digital firms are subject to general competition and consumer protection laws applicable to all firms. The Government has introduced the Digital Markets, Competition, and Consumers Bill that would create a digital regulation regime targeting firms with "*strategic market status*". The Bill is not expected to pass until the first half of 2024 at the earliest, meaning its rules may not kick-in until late 2024.

Authored by Patrick Todd and Anders Jay

Updated as of December 2023

1. What rules govern competition in digital markets in the UK?

There are currently no digital-specific competition law rules in force in the UK. Digital firms are subject to general competition and consumer protection laws applicable to all firms (*e.g.*, the Competition Act 1998, the Enterprise Act 2002, and the Consumer Rights Act 2015). Digital firms may also be subject to other sectoral regulation, depending on their activities (*e.g.*, telecommunications rules under the Communications Act 2003).

The Government has, however, introduced the Digital Markets, Competition, and Consumers Bill which will create a new "*pro-competition regime for digital markets*".[1] The regime is intended to "*proactively shape the behaviour of the most powerful technology firms.*"[2]

2. What is the status of the forthcoming pro-competition regime for digital markets in the UK?

On April 15, 2023, the Government introduced the Digital Markets, Competition, and Consumers Bill to Parliament. Among other reforms to UK competition and consumer law, the Bill would

[1] References to the Bill in this chapter refer to the version published on November 22, 2023.

[2] HM Government, Government response to the consultation on a new pro-competition regime for digital markets (May 2022), p. 5 (hereinafter "**Government Consultation Response**").

create a new "*pro-competition regime for digital markets*" targeting a small number of firms designated as having "strategic market status" ("**SMS**") in relation to specific digital activities. The Government consulted on the introduction of the new regime in July 2021,[3] and published its response in May 2022.[4]

A number of amendments were made to the Bill in the House of Commons. After the third reading (on 21 November 2023), the Bill was transferred to the House of Lords where it is currently under consideration.

The timing for passage of the Bill is not yet clear, but it is currently expected to receive Royal Assent in the first half of 2024, and come into force in late 2024. Once the Act comes into force, the DMU will be able to open investigations to designate firms as having SMS in relation to one or more digital activities and impose conduct requirements (*see* Question 4 below). The reviews are expected to take up to 9 months and so we are unlikely to see DMU conduct requirements taking effect before 2025.

The Competition and Markets Authority ("**CMA**") has welcomed the Bill, saying that it "*has the potential to be a watershed moment in the way we protect consumers in the UK and the way we ensure digital markets work for the UK economy, supporting economic growth, investment and innovation.*"[5]

The Government has said that the regime will be more flexible than the EU's Digital Markets Act (*see* European Union chapter). The UK Secretary of State for Science, Innovation, and Technology stated that "*the EU approach is blunt and applies blanket rules on firms, which risks creating unnecessary burdens on business*" and that the UK regime—"*a key Brexit opportunity*"—will be "*more flexible, bespoke, and targeted*".[6]

3. How is the pro-competition regime for digital markets expected to be enforced?

The new regime will be enforced by the "Digital Markets Unit" ("**DMU**"), a specialist team within the CMA. Since April 2021, the DMU has been operating in shadow form pending establishment of the new regime. As of May 2022, the DMU was reported to have approximately 70 staff members.[7] According to the CMA's 2023/2024 annual plan, the DMU accounted for 3.8% of the CMA's staff time from January to December 2022.[8] The CMA also said it plans to recruit more DMU staff in preparation for the regime coming into force, particularly at its new Manchester office.[9]

The UK pro-competition regime for digital markets will be structured as follows:

— The DMU will designate firms as having SMS in relation to specific digital activities following evidence-driven assessments (*see* Question 4 below).

— The DMU will have the power to impose "*conduct requirements*" on SMS firms, specifying how the designated firm must conduct itself in relation to a relevant digital activity (*see* Question 5 below).

— Following a "*conduct investigation*", the DMU will have the power to impose fines and remedies on firms that breach the conduct rules

[3] HM Government, Consultation Document: A new pro-competition regime for digital markets (July 2021).

[4] Government Consultation Response.

[5] CMA, Press release: New bill to stamp out unfair practices and promote competition in digital markets (April 25, 2023).

[6] Michelle Donelan MP, The Times, Digital Markets, Competition and Consumers Bill: ensuring fairness and free markets in the digital age (April 25, 2023).

[7] Will Hayter, CMA Blog, Digital markets and the new pro-competition regime (May 10, 2022).

[8] CMA, Competition and Markets Authority Annual Plan 2023/24 (March 23, 2023), ¶7.2.

[9] Ibid, ¶6.22.

(*see* Question 10 below). It will also be able to issue interim orders to pause or reverse actions taken by SMS firms if they breach conduct requirements.

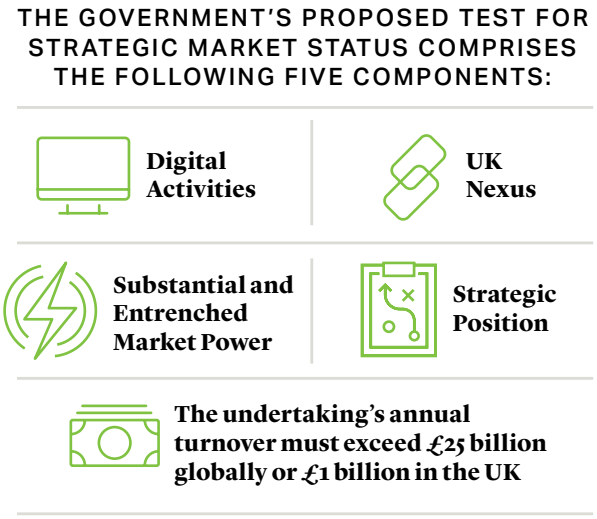
— Separate to conduct requirements, the DMU will be able to impose targeted "*pro-competitive interventions*" ("**PCIs**") on SMS firms to remedy adverse effects on competition. The remedies available to the DMU match those the CMA can impose following a market investigation under the Enterprise Act 2002, including behavioral and structural remedies.

The costs of the new regime will be partially recouped through a levy on SMS firms.[10]

4. Which firms will the pro-competition regime for digital markets apply to?

The new regime will apply to firms designated as having strategic market status ("**SMS**"). An undertaking as a whole will be designated as having SMS, but the rules will only apply to designated activities.[11]

Test for Establishing SMS



The Bill's test for SMS comprises the following five components:[12]

— There must be a **digital activity**, which essentially means the provision of a service by means of the internet or of digital content.[13]

— The firm must have **substantial and entrenched market power** in respect of the digital activity.[14] This means that the digital activity lacks good alternatives, there is limited threat of entry or expansion, and the firm's position is likely to persist over time. Under the Bill, the DMU must "*carry out a forward-looking assessment of a period of at least 5 years, taking into account developments that (a) would be expected or foreseeable if the CMA did not designate the undertaking as having SMS [...], and (b) may affect the undertaking's conduct in carrying out the digital activity.*"[15]

[10] Government Consultation Response, para 5.

[11] By contrast, under the German laws applicable to digital firms (Section 19a of the Act Against Restraints of Competition), the Federal Cartel Office can designate an undertaking as a whole as having "*paramount cross-market significance*," then implement rules that apply across the entire firm. *See further* the Germany chapter.

[12] Government Consultation Response, paras. 44-48.

[13] Bill, ss. 2 and 3.

[14] Bill, ss. 2(2)(a); 5.

[15] Bill, s. 5.

— The firm must have a **position of strategic significance** in respect of a digital activity.[16] This requirement will be satisfied if the DMU establishes that: (i) the undertaking has achieved a position of significant size or scale in respect of the digital activity; (ii) a significant number of other undertakings use the digital activity in carrying on their business; (iii) the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities; or (iv) the undertaking's position in respect of the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves.[17]

— The digital activity must have a **UK nexus**.[18] The activity's link to the UK will be defined according to whether it has a significant number of UK users, the undertaking carries out business in the UK in relation to the digital activity, or the digital activity or the way it is carried out is likely to have an immediate, substantial, and foreseeable effect on trade in the UK.[19] The regime therefore captures conduct implemented outside the UK as long as it has an effect in the UK.

— The undertaking's **annual turnover** must exceed £25 billion globally or £1 billion in the UK[20].

Procedure for SMS Designation

The procedure for SMS designation will be as follows:

— **Initial SMS investigation**. When an undertaking has not been designated as having SMS in respect of a particular activity, the DMU may begin an "initial SMS investigation" if it has reasonable grounds to consider that it may be able to designate an undertaking as having SMS in respect of a digital activity.[21] It can do so even if it has previously decided not to designate the firm in respect of the activity in question.[22]

— **Further SMS investigation**. The DMU can undertake a "further" SMS investigation in respect of an already-designated activity, not later than 9 months before the end of the designation period.[23] The purpose of a further SMS investigation is to assess whether to revoke the designation, designate the undertaking in respect or a similar or connected digital activity, or put measures in place to manage the impact of a revocation on third parties or users.[24]

— **Length of investigation**. An SMS investigation will have a statutory deadline of 9 months, extendable by 3 months in exceptional circumstances.[25]

— **Duration of designation**. A designation order will last 5 years from the day an SMS decision notice is given.[26]

[16] Bill ss. 2(2)(b); 6.

[17] Bill, s. 6(1).

[18] Bill, s. 2(1)(a).

[19] Bill, s. 4.

[20] Bill, ss. 7 and 8.

[21] Bill, s. 9.

[22] Bill, s. 9(3).

[23] Bill, s. 10.

[24] Bill, ss. 10 and 17.

[25] Bill, ss. 14(2); 104.

[26] Bill, s. 18.

— **Consultation**. The DMU must consult publicly on any decision it is considering making as a result of its SMS decision.[27]

The CMA's final report in its Mobile Ecosystems market study gives some indication as to its anticipated approach to SMS designation once the new regime is in place.[28] The CMA concluded that Apple and Google would both meet the then proposed test for SMS in relation to the supply of mobile operating systems (and, in Apple's case, the devices on which they are installed), native app distribution, mobile browsers, and browser engines.

5. What are the main substantive rules that will govern firms covered by the pro-competition regime for digital markets

SMS firms will be required to follow legally enforceable conduct requirements, which would set out how they are expected to behave. In particular, the rules governing SMS firms will consist of the following elements:

— **Overarching objectives**. The Bill sets out three overarching objectives to guide the aims and scope of SMS firms' conduct requirements.[29] These objectives are:

- ***Fair dealing:*** users should be treated fairly and be able to interact, directly or indirectly, on reasonable terms with SMS firms.[30]
- ***Open choices:*** users should be able to choose freely and easily between services provided by firms designated with SMS and other firms.[31]
- ***Trust and transparency:*** users should have access to clear and relevant information to understand the services SMS firms are providing (including their terms), and to make informed decisions about whether and how they interact with the firm.[32]

— **Permitted conduct requirement types**. Conduct requirements developed by the DMU must belong to a permitted type, as set out in legislation.[33] The Bill includes types of requirements such as trading on fair and reasonable terms, having effective processes for handling complaints by and disputes with users, presenting default choices in ways that allow users to make informed and effective decisions, not using the firm's position to favor its own products, and not restricting interoperability between the relevant service and rivals' services.[34]

— **Firm-specific conduct requirements**. The DMU will specify legally binding, tailored conduct requirements. These requirements will set out how an SMS firm must conduct

[27] Bill, s. 13.

[28] *See* CMA, Mobile Ecosystems Final Report, Appendix L: Assessment of strategic market status (June 10, 2022).

[29] Bill, s. 19(5).

[30] Bill, s. 19(6).

[31] Bill, s. 19(7).

[32] Bill, s. 19(8).

[33] Bill, ss. 19(9) and 20.

[34] For a full list, *see* Bill, s. 20.

itself in relation to a relevant digital activity.[35] The DMU may only implement a conduct requirement if it is proportionate to do so for the purposes of achieving the fair dealing, open choices, or trust and transparency objectives.[36] It must also have regard to the likely consumer benefits that will result from the conduct in question.[37] The DMU will also have the power to remove or amend conduct requirements. Under the Bill, the DMU will have a duty to carry out a public consultation on the proposed conduct requirements and a duty to keep the conduct requirements imposed under review.[38]

In the CMA's final report in the Mobile Ecosystems market study, it identified examples of Apple's and Google's practices that it anticipated could be addressed by conduct requirements.[39] For example, responding to concerns that Apple prevents users switching from iOS mobile devices to Android mobile devices, the CMA considered that rules preventing Apple from denying or restricting interoperability between its software and hardware with Android devices could be appropriate.

The publication of conduct requirements will not be subject to a statutory deadline, but the DMU is expected normally to publish conduct requirements along with its SMS designation decisions.

— **Firm-specific guidance**. The DMU will have the ability to develop guidance to explain how the firm-specific conduct requirements apply to that firm. The guidance would not itself be legally binding.

— **Pro-competitive interventions ("PCIs")**. Separate from firm-specific conduct requirements, the DMU will have the power to impose PCIs to address SMS firms' market power and undermine it over time.[40] The remedies available to the DMU through PCIs — and the process of imposing them — will resemble the existing market investigations regime under the Enterprise Act 2002. Potential remedies will include behavioral, structural, and informational interventions. Before imposing PCIs, the DMU will have to establish that a factor or combination of factors relating to a relevant digital activity is having an adverse effect on competition (**AEC**).[41] The DMU can only impose PCIs if it would be proportionate for the purposes of remedying, mitigating, or preventing the AEC it has identified.[42]

  PCI investigations will have a statutory deadline of nine months, extendable by up to 3 months.[43]

Conduct Requirements vs. PCIs

The Bill does not make clear the precise relationship between conduct requirements and PCIs.

[35] Bill, s. 19.

[36] Bill, s. 19(5).

[37] Bill, s. 19(10).

[38] Bill, ss. 24 and 25.

[39] *See* CMA, Mobile Ecosystems Final Report, Appendix M: Examples of practices that could be addressed by SMS Conduct Requirements Introduction (June 10, 2022).

[40] Bill, s. 46.

[41] Bill, s. 46(1).

[42] Bill, s. 46.

[43] *See* Bill, ss. 50(1) and (5); 104.

The Government has explained that conduct requirements seek to prevent the *exploitation* of existing market power rather than address the *source* of market power.[44] By contrast, PCIs are designed to "*tackle the root causes of entrenched market power.*"[45] According to the CMA's vision for the regime, PCIs could be used to address competition issues that do not involve changing a firm's existing behavior (in which case conduct requirements would be a better instrument).[46] Given the potentially intrusive actions that could be imposed through PCIs, such as structural remedies or mandating interoperability, the Bill proposes that PCIs are subject to a higher legal threshold: the DMU must establish an AEC before imposing a PCI.[47]

The Government's explanation of the delineation between conduct requirements and PCIs makes sense. But this delineation does not seem to be reflected in the wording of the Bill, which does not explain the circumstances in which PCIs or conduct requirements should be used. The confusion is illustrated by the example of interoperability: both the Government[48] and CMA[49] identify mandating interoperability as an example of a PCI. But the Bill would enable the DMU to implement conduct requirements that prevent a SMS firm from "*restricting interoperability between the relevant services or digital content and products offered by other undertakings.*"[50] It is not clear whether this conduct category could be used by the DMU to require an SMS firm to offer interoperability for the first time or whether it only applies to restrictions on interoperability that are already in place. The Government's intention appears to have been the latter.

6. Are there specific rules governing digital platforms' relationships with publishers in the UK?

There are no specific rules in the Bill regarding digital platforms' relationships with publishers in the UK. The Bill includes a final-offer mechanism for resolving disputes regarding transactions between platforms and third parties, but this is not specific to publishers (*see further* Question 10 below).[51]

7. Does the DMU need to establish the anticompetitive effects in order to establish a breach of the rules?

The Bill does not require the DMU to demonstrate the competitive effects of SMS firms' conduct in order to establish a breach of their conduct requirements. The DMU will, however, need to consider (i) whether imposing a conduct requirement is proportionate to achieve its intended objective; (ii) the likely consumer benefits that would result from imposing the requirement; and (iii) firms' arguments that their conduct is justified by reference to consumer benefits when it investigates breaches of conduct requirements (*see* Question 8). Whether conduct creates anticompetitive effects may therefore be considered as part of the overall assessment of whether an alleged breach results in a net adverse impact on competition.

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[44] Government Consultation Response, ¶50.

[45] Ibid., ¶79.

[46] CMA, Online platforms and digital advertising market study: final report (1 July 2020), ¶7.103.

[47] Bill, s. 46(1).

[48] Government Consultation Response, ¶79. *See also* Bill, Explanatory Notes, ¶253(b).

[49] CMA, A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce, CMA135 (December 2020) (hereinafter *Digital Markets Taskforce Advice*), ¶13.

[50] Bill, s. 20(3)(e). The Government gives the example of preventing a designated undertaking from "*restricting an application developer's access to important information about mobile phone software which prevents the developer from creating new and more effective mobile applications.*" *See* Bill, Explanatory Notes, ¶173.

[51] *See* Bill, ss. 38-45.

In addition, the Government has emphasized that SMS designations and conduct requirements will be implemented "*according to the evidence.*"[52] There is therefore expected to be scope for engagement with the DMU as it develops conduct requirements, during which firms will be able to adduce evidence about the effects of their conduct.

THE GOVERNMENT HAS EMPHASIZED THAT SMS DESIGNATIONS AND CONDUCT REQUIREMENTS WILL BE IMPLEMENTED "ACCORDING TO THE EVIDENCE."

In order to impose PCIs, the DMU will need to demonstrate an adverse effect on competition.[53] This standard of proof is well developed as a measure of anticompetitive effects in the market investigations regime under the Enterprise Act 2002.

8. Can firms defend or objectively justify their conduct under the pro-competition regime for digital markets?

Conduct Requirements

The Bill contains an exemption[54] to ensure that conduct which results in net consumer benefits will not breach conduct requirements. This reflects the recognition, as stated by the CMA, that "*conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces sufficient countervailing benefits.*"[55] Similarly, the Government stressed that SMS firms must be able to bring forward evidence that their conduct creates benefits to consumers and that the "*DMU will not be able to take action against conduct that on balance benefits consumers.*"[56] This is a notable point of distinction from the EU's Digital Markets Act, which contains no express consumer benefit defense (and which the Government has sought to distance the Bill from[57]) (*see* European Union chapter).

Accordingly, SMS firms will be exempted from conduct requirements where the following four conditions are satisfied:[58]

1. The conduct gives rise to benefits to users or potential users of the relevant digital activity;
2. Those benefits outweigh any actual or likely detrimental impact on competition resulting from a breach of the conduct requirement;
3. Those benefits could not be realized without the conduct;
4. The conduct is proportionate to the realization of those benefits; and
5. The conduct does not eliminate or prevent effective competition.

In addition, two other mechanisms in the Bill would ensure that the DMU does not impose conduct requirements that could sacrifice important consumer benefits. First, the DMU must take account of consumer benefits when it develops and imposes conduct requirements in the first place.[59] Second, the DMU may only

[52] Government Consultation Response, paras. 7; 44.

[53] *See* Bill, s. 46(1).

[54] Bill, s. 29.

[55] CMA, A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce (December 2020), para. 4.40 ("**Digital Markets Taskforce Advice**").

[56] Ibid., ¶64.

[57] *See, e.g.*, Michelle Donelan MP, The Times, Digital Markets, Competition and Consumers Bill: ensuring fairness and free markets in the digital age (April 25, 2023).

[58] Bill, s. 29.

[59] Bill, s. 19(10).

impose conduct requirements if it would be proportionate to do so to achieve the objectives of fair dealing, open choices, or trust and transparency.[60]

PCIs

Before imposing PCIs, the DMU may take into account any countervailing benefits when considering whether an AEC exists.[61] The DMU must only impose a PCI if it is proportionate to do so to resolve the AEC the DMU has identified.[62]

9. What procedural safeguards does the pro-competition regime for digital markets include?

Investigatory safeguards. The Bill grants the DMU broad investigatory powers, including the power to enter business premises without a warrant and interview individuals.[63] However, the DMU's range of information gathering tools are "*subject to appropriate safeguards*."[64] These safeguards include limitations to the use of interview statements in prosecution[65] and the protection of privileged information.[66]

Consultations. The DMU will have a duty to consult publicly before taking SMS designation decisions,[67] imposing remedies following a PCI investigation,[68] imposing conduct requirements,[69] and on the guidance that it publishes.[70] Affected parties and third parties therefore have an opportunity to provide input on the DMU's proposed decisions.

Appeals. Firms will be able to appeal decisions of the DMU (including SMS designation decisions, decisions finding violations of conduct requirements, and PCIs) to the Competition Appeal Tribunal.[71] The standard of appeal will be ordinary judicial review grounds,[72] as in the UK mergers and markets regimes (as opposed to full merits appeals, as in Competition Act 1998 investigations), except for DMU penalty decisions, which are subject to a full merits appeal.[73]

Guidance. Under the Bill, the DMU must publish guidance on how it proposes to exercise its functions under the new regime.[74] Before it does so, it must consult such persons as it considers appropriate and obtain the Secretary of State's approval.

Reserved decisions. Under the Bill, certain decisions are reserved to be taken by the CMA Board or delegated by them to a committee or subcommittee of the Board.[75] In particular:

— Decisions on whether to begin an initial or further SMS investigation or PCI investigation

[60] Bill, s. 19.
[61] Bill, s. 46(2).
[62] Bill, s. 46(1)(b).
[63] Bill, Chapter 6.
[64] Government Consultation Response, para. 100.
[65] Bill, s. 73.
[66] Bill, s. 77.
[67] Bill, s. 13.
[68] Bill, s. 54.
[69] Bill, s. 24.
[70] Bill, s. 114.
[71] Bill, s. 103(1).
[72] Bill, s. 103(6).
[73] Bill, s. 89(1).
[74] Bill, s. 114.
[75] Bill, s. 106.

are reserved for the CMA Board and cannot be delegated.

— Certain other decisions can be delegated to a committee or sub-committee of the Board, but not to an individual Board or CMA staff member. Such decisions include whether to make an SMS designation; impose or revoke conduct requirements; order, replace, or revoke a remedy imposed under a PCI; make enforcement orders (except interim orders); adopt the final offer mechanism (*see* Question 10 below); accept commitments; or impose penalties.

10. What kinds of penalties or remedies can be imposed following a breach of the rules?

A UK government official has stressed that the DMU should prioritize "*constructive engagement*" with SMS firms over enforcement measures like penalties and court orders.[76] The CMA has for its part stated that, where "*evidence is clear that intervention is needed,*" the DMU will always act "*in a way that is proportionate to the harms to businesses and consumers.*"[77] Indeed, the Bill contains an express duty for the DMU to consider the proportionality of its actions before imposing conduct requirements or remedies following pro-competitive intervention investigations.

Nonetheless, the Bill includes powers for the DMUs to impose far-reaching fines and remedies.

Fines

SMS firms in breach of DMU decisions will face financial penalties of up to 10% of global annual turnover for the most serious offenses, and up to 5% of daily worldwide turnover for continued breaches. A lower level of 1% of global annual turnover (and up to 5% for each day of ongoing non-compliance) will apply to information offenses.

SMS FIRMS IN BREACH OF DMU DECISIONS WILL FACE FINANCIAL PENALTIES OF UP TO 10% OF GLOBAL TURNOVER FOR THE MOST SERIOUS OFFENSES, AND UP TO 5% OF DAILY WORLDWIDE TURNOVER FOR CONTINUED BREACHES.

Remedies

Where the DMU finds that an SMS has breached a conduct requirement, it will be able to make an order imposing such obligations as it considers appropriate to stop the breach, prevent it happening again, or address damage caused by it.[78] It will have a similar power to impose interim order in respect of suspected breaches.[79] In addition, as explained at Question 5, the DMU will be able to impose targeted PCIs on firms.

Personal Liability

The DMU will be able to apply to the court to disqualify individuals from holding company directorships in the UK and also to impose civil penalties on named senior managers who fail to ensure that their firms comply with information requests. It will also be empowered to apply criminal penalties where false or misleading information is provided (as is already the case for other CMA functions).

Final-Offer Mechanism

Following a breach of a conduct requirement and enforcement order relating to payment terms for a

[76] Victoria Ibitoye, MLex, UK digital markets watchdog will stress dialogue over heavy enforcement, government official says (December 15, 2022) (citing remarks by Francesca Hill, head of the Digital Markets Regime at the Department of Digital, Culture, Media, and Sport at the Westminster eForum policy conference on December 15, 2022).

[77] Sarah Cardell, Ensuring digital market outcomes that benefit people, businesses and the wider UK economy, keynote speech at the British Institute Of International & Comparative Law and Linklaters Tech Antitrust Roundtable (December 6, 2022).

[78] Bill, s. 31.

[79] Bill, s. 32.

transaction between the parties, the DMU will be able to adopt a so-called "final offer mechanism" if it considers that it could not satisfactorily resolve the breach using any of its other digital markets functions.[80] Under this mechanism, the parties would submit to the DMU final offer payment terms, with the DMU deciding which terms should be applicable to the relevant transaction.[81] Parties can appeal the outcome of the final-offer mechanism to the Competition Appeal Tribunal on judicial review grounds.[82]

Under the Bill, the CMA can invite "*joined third parties*" to make a "*single submission*" to the DMU of final offer payment terms that the third parties "*collectively regard as fair and reasonable*".[83] The CMA may then decide the terms that should be applicable to the grouped transaction.

Although this mechanism appears to draw on proposals by the DMU and the UK telecommunications regulator, Ofcom, regarding digital platforms and online publishers,[84] the mechanism is not limited to SMS firms dealings with online publishers: it could apply to any transactions with SMS firms involving payment transactions.

11. Has the CMA or Digital Markets Unit issued any guidance or reports regarding the pro-competition regime for digital markets?

The Bill[85] and the Government's response to the consultation regarding the proposed pro-competition regime for digital markets represent the most up-to-date guidance on how the new regime will operate. They build on the recommendations of the Digital Competition Expert Panel led by Professor Jason Furman[86] and advice from the CMA's Digital Markets Taskforce.[87]

The CMA's final reports in the Online Platforms and Digital Advertising and Mobile Ecosystems market studies, include recommendations on how the new regime might apply to the markets considered in those studies.[88]

12. Is the pro-competition regime for digital markets competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

The proposed regime is principally competition based. It does, however, touch on conduct relating to a range of related issues, such as data usage, consumer protection (*e.g.*, in relation to online choice architecture), and online privacy. The Government has separately introduced an Online Safety Bill that would apply to firms which host user-generated content.[89]

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[80] *See* Bill, s. 38.

[81] *See* Bill, s. 41.

[82] *See* Bill, s. 102.

[83] Bill, s. 39.

[84] *See* CMA and Ofcom, Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct (May 6, 2022).

[85] *See also* the Bill's accompanying Explanatory Notes (22 November 2023).

[86] *See* Digital Competition Expert Panel, Unlocking digital competition (March 2019).

[87] *See* Digital Markets Taskforce Advice.

[88] *See* CMA, Online Platforms and Digital Advertising Final Report (July 1, 2020), and CMA, Mobile Ecosystems Final Report (June 10, 2022).

[89] *See* UK Government, Online Safety Bill: factsheet (April 19, 2022).

13. What is the current enforcement practice with respect to conduct that is expected to be addressed by the pro-competition regime for digital markets?

The CMA has doubled down on its use of existing enforcement tools in digital markets in recent years, including because of previous delays to introducing digital regulation. Investigations into companies expected to be covered by the proposed regime include:

— **Apple App Store (opened in March 2021, ongoing)**. The CMA is investigating suspected breaches of UK competition law by Apple in relation to the distribution of apps on iOS and iPadOS devices, in particular the terms and conditions governing app developers' access to the App Store.[90] The investigation is ongoing.

— **Meta's collection and use of ad data (opened in June 2021, closed November 2023)**. The CMA investigated Meta's conduct in relation to the collection and use of data in the context of providing online advertising services and Facebook's single sign-on function, and whether this resulted in a competitive advantage over downstream competitors.[91] On November 3, 2023, the CMA accepted commitments from Meta. Under the commitments, Meta will allow businesses that advertise on Meta platforms to opt out of their data being used to improve Facebook Marketplace.[92]

— **Google's conduct in ad-tech (opened in May 2022, ongoing)**. The CMA is investigating whether Google's practices in three parts of the ad-tech chain (demand-side platforms, ad exchanges, and publisher ad servers) distort competition.[93] In March 2023, the CMA combined this investigation with a separate investigation it had been carrying out into whether Google abused a dominant position through its conduct in relation to header bidding services.

— **Google's conduct in the distribution of apps on Android devices (opened in June 2022, ongoing)**. The CMA is investigating Google's conduct in relation to distribution of apps on Android devices in the UK, in particular Google's Play Store rules which require certain app developers to use Google's own payment system for in-app purchases.[94] In April 2023, the CMA published a notice of intention to accept binding commitments.[95]

— **Amazon's Marketplace (opened in July 2022, closed November 2023)**. The CMA investigated Amazon's conduct in relation to the way non-public third party seller data may be used within Amazon's retail business, how Amazon set criteria for selecting which product offer was placed in the "Buy Box", and which sellers could list products under Amazon's "Prime label" on its Marketplace in the UK.[96] On November 3, 2023, the CMA accepted commitments from Amazon.[97] The commitments require Amazon to (i) refrain from using data received from merchants through their use of Amazon's Marketplace to compete with those merchants; and (ii) apply objective and non-discriminatory criteria in

[90] *See* CMA, Press release: CMA investigates Apple over suspected anti-competitive behaviour (March 4, 2021).

[91] *See* CMA, Press release: CMA investigates Facebook's use of ad data (June 4, 2021).

[92] *See* CMA, Press release: CMA secures improvements in ways Amazon and Meta treat competitors, benefitting customers (November 3, 2023).

[93] See CMA, Press release: Google probed over potential abuse of dominance in ad tech (May 26, 2022).

[94] *See* CMA, Investigation into suspected anti-competitive conduct by Google (June 10, 2022).

[95] CMA, Press release: App developers on Google Play store offered payment choices following CMA probe (April 19, 2023).

[96] *See* CMA, Press release: CMA investigates Amazon over suspected anti-competitive practices (July 6, 2022).

[97] *See* CMA, Press release: CMA secures improvements in ways Amazon and Meta treat competitors, benefitting customers (November 3, 2023).

determining which offers appear in Amazon's "Buy Box".

— **Market investigation reference into mobile browsers and cloud gaming (opened in November 2022, on hold)**. Following its Mobile Ecosystems market study,[98] the CMA launched a market investigation into mobile browsers and cloud gaming.[99] The decision to launch a market investigation reference was driven in part by the delays to the legislation introducing the pro-competition regime.[100] In March 2023, the CAT quashed the CMA's decision to open the investigation as the CMA was out of time to make the reference and so the investigation is currently on hold.[101] The CMA appealed the CAT's ruling, and the Court of Appeal found in favor of the CMA on 30 November 2023.[102] The CMA has indicated that it stands ready to reopen the investigation once the legal process is complete (following any further appeal by Apple).

The CMA has also carried out several consumer protection investigations into digital firms under UK consumer legislation, including:

— **Anti-virus software (opened in December 2018)**. Following an investigation into the anti-virus software sector, in particular the automatic renewal of anti-virus subscriptions, the CMA agreed commitments with McAfee and Norton.[103]

— **Online console video gaming (opened in April 2019)**. Following an investigation into auto-renewal practices in respect of Nintendo Switch, PlayStation, and Xbox, the CMA agreed commitments with Sony, Nintendo, and Microsoft.[104]

— **Fake reviews (opened in June 2019)**. The CMA is currently investigating whether Amazon and Google took sufficient action to protect users from fake reviews.[105] This investigation follows an initial investigation into several other digital businesses (*e.g.*, eBay and Meta) on the same topic.[106]

— **Use of 'urgency claims' by Wowcher Group (opened March 2023)**. The CMA is investigating whether Wowcher Group used so-called 'urgency claims' (such as countdown timers) to mislead consumers.[107] The CMA announced on November 16, 2023 that it had found evidence that Wowcher had misled consumers and invited Wowcher to offer undertakings to avoid court action.[108]

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[98] *See* CMA, Mobile ecosystems market study (June 10, 2022).

[99] *See* CMA, Mobile browsers and cloud gaming.

[100] CMA, Mobile Ecosystems Final Report (June 10, 2022), para. 9.14.

[101] *Apple Inc and ors. v. CMA* [2023] CAT 21.

[102] *CMA v. Apple Inc and ors.* [2023] EWCA Civ 1445.

[103] *See* CMA, Press release: CMA secures refund rights for McAfee customers (May 25, 2021); and CMA, Press release: Norton extends refund rights after CMA action (June 14, 2021).

[104] *See* CMA, Press release: CMA to investigate online gaming companies' roll-over contracts (April 5, 2019).

[105] *See* CMA, Press release: CMA to investigate Amazon and Google over fake review (June 25, 2021).

[106] *See* CMA, Press release: Facebook and eBay pledge to combat trading in fake reviews (January 8, 2020).

[107] *See* CMA, Press release: Wowcher investigated over online 'urgency' claims (March 31, 2023).

[108] *See* CMA, Press release: CMA calls on Wowcher to change its online sales practices (November 16, 2023). See CMA, Online Choice Architecture: How digital design can harm competition and consumers (April 2022). The CMA is also investigating Emma Sleep in relation to its online sales practices (see CMA, Press release: CMA calls on Emma Sleep to change its online sales practices (July 7, 2023).

14. Are there merger rules specific to for digital platforms in the UK?

The Bill contains a mandatory reporting regime for certain mergers before the relevant transaction can be completed. SMS firms will have to report any transaction where:[109]

— The SMS firm acquires an equity or voting share in the target that increases from less than 15% to 15% or more, from 25% or less to more than 25%, or from 50% or less to more than 50%;

— The value of the consideration provided by the SMS firm is over £25 million; and

— The transaction meets a UK nexus test.

The format and content of the report that must be provided will be set by the CMA. When the CMA receives a report, it must within 5 working days give notice to the reporting firm that the CMA accepts the report is sufficient.[110]

A SMS firm will not be able to complete its transaction without submitting a report or before 5 working days after the CMA accepts that the report is sufficient.[111]

In addition, the Bill introduces changes to its merger notification thresholds for all firms under a wider set of reforms to competition law. These changes, intended to capture so-called "killer acquisitions", will result in the CMA having jurisdiction to review transactions where the acquirer has both:[112]

— An existing 33% share of supply of goods or services of any description in the UK; and

— Over £350 million of UK turnover.

[109] *See* Bill, Chapter 5.

[110] Bill, s. 63.

[111] Bill, s. 63.

[112] *See* Bill, Schedule 4.

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USA

Rules Under Development

There are currently no digital-specific competition laws in the US. Two pieces of pending legislation could change that: the American Innovation and Choice Online Act and the Open App Markets Act. Both bills target so-called "self-preferencing" by large digital platforms. As of January 2024, neither bill has passed. Overall, passage seems unlikely at this stage, but cannot be ruled out.

Authored by Bruce Hoffman, Brian Byrne, Elaine Ewing, George Cary, Molly Ma and Alexi T. Stocker

Updated as of January 2024

1. What rules govern competition in digital markets in the US?

There are currently no digital-specific competition laws in the US. Like virtually all firms, digital firms are subject to the Sherman Act (which regulates agreements and single-firm conduct), and the Clayton Act (which primarily regulates mergers), the FTC Act (which largely runs in parallel to the other statutes, though may have a slightly broader reach), and similar state laws. In recent times, case law has expanded in ways that are particularly relevant to digital markets. For example, the Supreme Court in *Ohio v. American Express* held that both sides of a two-sided platform must be taken into account when assessing competitive harm, in certain circumstances.[1]

However, there are at least two relevant pieces of pending legislation—the American Innovation and Choice Online Act ("**AICOA**") and the Open App Markets Act ("**OAMA**"). If passed, the AICOA and OAMA would introduce sweeping changes to the regulation of competition in digital markets in the US, targeting companies such as Google, Apple, Meta, Amazon, Microsoft, and likely TikTok. Various states, including New York, have also considered legislation that would either specifically target digital firms, or would likely have significant effects on them.

[1] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018) (*"Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."*).

2. What is the status of any forthcoming digital regulation in the US?

The AICOA and OAMA are currently stalled. In early 2022, drafts of the bills were voted out of committee in a bipartisan manner (through a 16-6 vote and 20-2 vote respectively). However, despite high-profile campaigns calling for a full vote, neither bill was ultimately brought up for one during the last Congress.

Still, passage is possible in this Congress. Since taking office, President Biden has stated that he supports the legislation,[2] and in June 2023, the AICOA was reintroduced in the Senate.[3] Ultimately, though, passage of either bill is unlikely at this stage. If passed, the AICOA would take effect in one year and the OAMA would take effect in 180 days.

IF PASSED, THE AICOA WOULD TAKE EFFECT IN ONE YEAR AND OAMA WOULD TAKE EFFECT IN 180 DAYS.

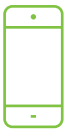
3. How are the rules expected to be enforced?

If passed, the AICOA and OAMA would be enforceable by the FTC, DOJ, and State Attorneys General. As currently drafted, the OAMA would also create private rights of action for developers.[4] All these groups have demonstrated their strong appetite for litigation against large digital platforms. Should either or both bills enter into force, investigations and litigation should be expected.

Injunctive relief would be available under both bills. Further, under the AICOA, enforcers would be able to seek penalties up to 10% of the defendant's global annual turnover.[5] Under the OAMA, app developers could bring private suits for treble damages and State Attorneys General could sue for such damages in the name of developers from their states.[6]

4. Which firms will the rules apply to?

If passed, the OAMA would apply to companies that own app stores with over 50 million US users. The OAMA is intended to regulate iOS and the Apple App Store and Google Play and Android. It would also likely cover the Microsoft Store on Windows.



50 million

IF PASSED, THE OAMA WOULD APPLY TO COMPANIES THAT OWN APP STORES WITH OVER 50 MILLION US USERS.

The AICOA would apply to a broader set of "*covered platforms*." In simple terms, these are online services, owned by large companies, that have a significant number of active users or business users. In practice a significant number of popular products and services supplied by companies like Google, Apple, Meta, Amazon, Microsoft, and TikTok will qualify as covered platforms.

Covered platforms under the AICOA are defined using the following criteria:

[2] Joe Biden, WSJ, *Republicans and Democrats, Unite Against Big Tech Abuses* (January 11, 2023) ("*We recently secured a significant funding boost for our antitrust enforcers, so they can continue to meet the tech sector's new challenges. But our existing authority has limits. We need bipartisan action from Congress to hold Big Tech accountable.*").

[3] Klobuchar, Grassley, Colleagues Introduce Bipartisan Legislation to Boost Competition and Rein in Big Tech (June 15, 2023).

[4] OAMA Sec. 5(b).

[5] AICAO Sec. 3(c)(6)(B).

[6] OAMA Sec. 5(a)(3), (b).

— The product or service must be a website, online or mobile app, operating system, digital assistant, or online service.

— The product or service must (1) allow users to generate, share, or interact with content; (2) allow users to perform broad searches; or (3) facilitate offering, selling, shipping, or advertising of goods or services between entities not controlled by the platform.

— The product or service must have at least 50,000,000 US monthly active end users *or* at least 100,000 US monthly active business users.

— The product or service must be a "*critical trading partner*" for the sale or provision of any product "*offered on or directly related to*" the platform. In other words, the product or service could be used either to: (1) restrict or impede access of a business user to its end users; or (2) restrict or impede access of a business user to a tool or service it "*needs to effectively serve*" its end users.

— The product or service must be at least 25% owned by a company with (1) a market cap greater than USD 550 billion; (2) US revenue greater than USD 550 billion; *or* (3) greater than 1 billion global monthly active users.

5. What are the main substantive rules that would govern firms covered by the proposed digital regulation?

If passed, the AICOA would broadly prohibit covered platforms from self-preferencing (*i.e.*, preferencing first-party products and services over those of other business users on a covered platform in a manner that materially harms competition).[7]

The AICOA also contains a number of more specific prohibitions:

— **Terms of service discrimination**. Covered platforms cannot discriminate among similarly situated business users in the application or enforcement of their terms of service in a manner that materially harms competition.[8]

— **Interoperability**. Covered platforms cannot materially restrict or impede business users from interoperating with the same features available to first-party products and services that compete with products or services offered by business users on the covered platform.[9]

— **Tying**. Covered platforms cannot condition covered platform access or preferential placement on the use of other first-party products that are not part of or intrinsic to the covered platform.[10]

— **Use of data to compete**. Covered platforms cannot use non-public data generated by business users, or their users, to support first-party products that compete against business users on the covered platform.[11]

— **Data access**. Covered platforms cannot materially impede business users from accessing data generated on the platform by them or their customers' interactions with them.[12]

— **Defaults and uninstallation**. Covered platforms cannot impede platform users from uninstalling preinstalled software or changing

[7] AICOA Sec. 3(a)(1),(2).

[8] AICOA Sec. 3(a)(3).

[9] AICOA Sec. 3(a)(4).

[10] AICOA Sec. 3(a)(5).

[11] AICOA Sec. 3(a)(6).

[12] AICOA Sec. 3(a)(7).

default settings that steer users to first-party products.[13]

— **User interface**. Covered platforms cannot treat first-party products more favorably than those of other business users within any platform user interface, including search or ranking functionality. [14]

— **Retaliation**. Covered platforms cannot retaliate against users that raise good faith concerns with law enforcement about legal violations.[15]

The OAMA contains a number of prohibitions specific to covered app stores and operating systems, some of which mirror the AICOA:

— **Obligatory first-party payment systems**. Covered companies cannot condition use of their app stores or operating systems on use of first-party in-app payment systems.

— **Most-favored nation clauses**. Covered companies cannot employ most-favored nation clauses in app store terms of service, *i.e.*, covered app stores could not prohibit developers from offering better terms to users on rival app stores.

— **Anti-steering provisions**. Covered companies cannot discriminate against developers that offer different terms of sale for use of third-party payment systems or app stores and cannot restrict developers from communicating legitimate business offers.

— **Use of data to compete**. Covered companies cannot use non-public data from third-party apps to compete against them.[16] This provision is narrower in scope than the AICOA's equivalent prohibition, which prohibits the use of such data entirely in any first-party app that generally competes on the covered platform.

— **Defaults**. Covered companies must provide "*readily accessible means*" for operating system users to choose third-party apps and app stores as defaults.[17] This provision does not prevent covered companies from setting first-party apps as default. For example, unlike the EU Digital Markets Act, the OAMA does not contain an express requirement to show users default choice screens.

— **"Sideloading**." Covered companies must provide "*readily accessible means*" for operating system users to install third-party apps and app stores outside of the covered companies' first-party app stores (*i.e.*, must enable "sideloading").[18]

— **Self-preferencing**. Covered companies cannot unreasonably preference first-party or business partners' apps in their app stores.[19]

— **Interoperability**. Covered companies must provide developers access to the same operating system features that are available to first-party products and services, as well as to those that are available to business partners.[20]

[13] AICOA Sec. 3(a)(8).

[14] AICOA Sec. 3(a)(9).

[15] AICOA Sec. 3(a)(19).

[16] OAMA Sec. 3(c).

[17] OAMA Sec. 3(d)(1).

[18] OAMA Sec. 3(d)(2).

[19] OAMA Sec. 3(e)(1).

[20] OAMA Sec. 3(f).

6. Are there specific rules governing digital platforms' relationships with publishers?

No. The AICOA and OAMA do not contain specific rules governing digital platforms' relationships with publishers. Senator Amy Klobuchar has introduced a separate bill, the Journalism Competition and Preservation Act, which would give publishers a six year safe-harbor from antitrust law in order to negotiate collectively against covered online platforms.[21]

7. Will the authority need to establish the effects of certain conduct in order to establish a breach of the proposed rules?

If passed, the AICOA's general self-preferencing and terms of service discrimination provisions would require plaintiffs to show "*material harm to competition*." The remaining provisions do not contain affirmative effects requirements, but would not apply if the defendant shows a lack of "*material harm to competition*." In order words, the burden would be shifted from the plaintiff to the defendant for these provisions. As a matter of general antitrust law, harm to competition typically means that prices are rising, output is falling, or innovation or quality is decreasing; it is not sufficient to show that the challenged conduct harms competitors.

The OAMA would not require plaintiffs to establish the effects of challenged conduct.

8. Will firms be able to defend or objectively justify their conduct under the proposed rules?

The AICOA would take into account the overall competitive effect of conduct when determining liability. In particular, the self-preferencing and discrimination provisions require plaintiffs to show "*material harm to competition*."[22] And under the other prohibitions, defendants can avoid liability by showing, by a preponderance of the evidence (>50%), that conduct did not materially harm competition.[23]

The AICOA also provides specific affirmative defenses where a defendant can show that conduct was "*reasonably tailored*," and "*reasonably necessary*" to: (1) prevent a violation of law; (2) protect safety, privacy, or security; or (3) maintain or enhance core platform functionality.[24]

THE AICOA PROVIDES SPECIFIC AFFIRMATIVE DEFENSES WHERE A DEFENDANT CAN SHOW THAT CONDUCT WAS "REASONABLY TAILORED," AND "REASONABLY NECESSARY" TO:

1. **Prevent a violation of law;**
2. **Protect safety, privacy, or security; or**
3. **Maintain or enhance core platform functionality.**

The OAMA contains affirmative defenses, albeit on fairly narrow grounds. In particular, covered companies can defend actions by showing they were necessary to: (1) achieve user privacy, security, or digital safety; (2) prevent spam or fraud; or (3) prevent a violation of, or comply with, Federal or State law.[25] However, the covered

[21] JCPA Sec. 5(b)(1). The JCPA applies to "*covered platforms*." Similar to the AICOA, covered platforms are online platforms with over 50 million US monthly active users that either: (1) are owned by a company with market cap greater than USD 550 billion; or (2) have over 1 billion global monthly active users. JCPA Sec. 2(2).

[22] AICOA Sec. 3(a)(1)-(3).

[23] AICOA Sec. 3(b)(2).

[24] AICOA Sec. 3(b)(1).

[25] OAMA Sec. 4

company must also show "*by a preponderance of the evidence*" (>50%) that such actions were:

— Applied on a demonstrably consistent basis to the covered platform's apps, its business partners' apps, and other apps;

— Not used as a pretext to exclude, or impose unnecessary or discriminatory terms on, third-party apps, in-app payment systems, or app stores; and

— Narrowly tailored and could not have been achieved through a less discriminatory and technically possible means.

The OAMA substantially shifts the burden of proof on these issues. Under current doctrine, protecting user privacy or security is considered a permitted procompetitive justification that defendants can avail themselves of. If a defendant takes an action to protect user privacy or security, it is not required to demonstrate that its action eas the least restrictive option available.[26] By contrast, under the OAMA, if a defendant takes an action to protect user privacy or security, the defendant is liable unless it can show, by clear and convincing evidence, that no less discriminatory alternative existed.

9. What procedural safeguards would the proposed rules include?

If passed, the AICOA and OAMA would be enforced in the same manner as existing antitrust laws. In particular, both bills could be enforced through the courts, where Defendants would have all the rights available within the American legal system. Further, as is true today, the FTC could bring cases through its internal administrative system.[27] In the FTC's administrative system, claims are initially presided over by an FTC administrative law judge and then must be appealed to the FTC Commission (which decided to bring the claims) before they can be appealed to a Federal appellate court.[28]

Both bills could also be enforced through agency investigations.[29] Specifically, in addition to bringing claims, enforcers could issue broad subpoenas to investigate potential infringements. Responding to such subpoenas can often be quite burdensome, and can potentially take years.

Separately, when the agencies designate an online service as a covered platform, the owner of that service would have the right to challenge that designation in the DC Circuit within 30 days (whether or not the service was subject to an enforcement action in court).[30]

The agencies would also be tasked with publishing enforcement guidelines within 270 days of passage detailing how they would assess "*material harm to competition*," affirmative defenses, and fines under the Act.[31]

10. What kinds of penalties or remedies will the authority be able to impose following a breach of the proposed rules?

If passed, under the AICOA, enforcers could seek to impose penalties of up to 10% of a covered platform operator's total global annual turnover.[32] To provide further transparency, the Act

[26] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2161 (2021) ("*We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency.*").

[27] AICOA Sec. 3(c)(1)(A); OAMA Sec. 5(a)(2).

[28] There are currently cases pending in the US that challenge the constitutionality of the administrative litigation process used by the FTC and other administrative agencies.

[29] AICOA Sec. 3(c)(1); OAMA Sec. 5(a).

[30] AICOA Sec. 3(d)(3).

[31] AICOA Sec. 4(a).

[32] AICAO Sec. 3(c)(6)(B).

requires the agencies within 270 days to draft enforcement guidelines detailing how they will assess penalties.[33] Injunctive relief would also be available.

10%

UNDER THE AICOA, ENFORCERS WOULD BE ABLE TO SEEK PENALTIES UP TO 10% OF THE DEFENDANT'S GLOBAL ANNUAL TURNOVER.

Under the OAMA, app developers could bring private suits for treble damages and State Attorneys General could sue for such damages in the name of developers from their states.[34] The OAMA does not include penalty provisions. It would be enforced by the FTC and DOJ in the same manner as the current antitrust laws in the civil context.[35] In short, Federal enforcement would mostly be limited to injunctive relief, though in rare cases the DOJ may also seek equitable monetary remedies (*e.g.*, disgorgement and restitution).[36]

11. Have any guidance or reports been issued regarding the proposed rules?

No, as neither the AICOA nor OAMA have been passed into law. However, the agencies would have to produce enforcement guidelines within 270 days if the legislation is passed.[37]

270 days

TO PROVIDE FURTHER TRANSPARENCY, THE ACT REQUIRES THAT WITHIN 270 DAYS THE AGENCIES DRAFT ENFORCEMENT GUIDELINES DETAILING HOW THEY WILL ASSESS PENALTIES.

12. Will the new regime be competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

As a general matter, the AICOA and OAMA are competition-based. However, there is debate over whether the AICOA would have second order effects on content moderation by covered platforms (*e.g.*, whether the prohibition on terms of service discrimination against business users would limit the ability of platforms to take down misinformation posted by fringe media outlets).

This debate has become a serious barrier to the bills' passage. Progressives are pushing for amendments to explicitly prevent the AICOA from becoming a tool to punish platforms that moderate politically sensitive speech.[38] However, some Republicans have stated that such an amendment would be a non-starter if they are to support the bill's passage.[39] For the AICOA to become law, it would need sixty votes in the Senate, which requires bipartisan support. Given the debate on content moderation, it is unclear whether such bipartisan support is possible.

[33] AICOA Sec. 4(a).

[34] OAMA Sec. 5(a)(3), (b).

[35] OAMA Sec. 5(a)(1).

[36] Antitrust Monetary Remedies, Practical Law Practice Note (citing Antitrust Division Manual, Fifth Ed. IV-88-89) ("*The DOJ may seek equitable monetary remedies, including disgorgement and restitution, in civil and criminal matters. Generally, the DOJ only seeks equitable monetary remedies for criminal antitrust violations and in criminal and civil contempt cases, rather than for civil violations.*"; "*The FTC cannot obtain equitable monetary relief or civil penalties under its administrative procedures and, in the past, had brought these cases in a separate action in federal court under Section 13(b) of the FTC Act. However, on April 22, 2021, the Supreme Court held that the FTC does not have the power to seek monetary remedies under Section 13(b) of the FTC Act directly in court.*").

[37] AICOA Sec. 4(a).

[38] Rebecca Klar, The Hill, Four Senate Democrats push Klobuchar to revise antitrust bill over hate speech concerns (June 15, 2022).

[39] Mike Masnick, TechDirt, Republicans Announce That If Content Moderation Is Written Out Of Antitrust Bills, They'll Pull Their Support (June 23, 2022).

13. What is the current enforcement practice with respect to conduct that is expected to be addressed by the digital regulation?

Unlike in other jurisdictions, US agencies have not historically challenged self-preferencing by tech companies. This is likely because self-preferencing, while subject to US antitrust law, would rarely rise to the level that would trigger a potential law violation, for three main reasons. First, under US antitrust law, dominant companies are only required to do business with competitors in specific narrow circumstances, and do not have a general obligation to give competitors the same treatment they give themselves.[40] Second, self-preferencing would only be actionable if engaged in by a monopolist and if it is likely to result in acquiring or maintaining monopoly power. Third, the effects of the self-preferencing would have to result in net harm to consumers, so courts would weigh the benefits of self-preferencing against its harms. This would change under the AICOA and OAMA, and greater enforcement would be expected accordingly.

Generally, however, enforcement of antitrust law in digital markets by the FTC, DOJ, and State Attorneys General has ramped up in recent years. For example, the following cases are currently pending before the courts:

— The DOJ and a coalition of State Attorneys General are challenging Google's distribution agreements with mobile carriers and Apple, alleging that the agreements are exclusionary and have allowed Google to maintain a monopoly in general search services and search advertising. The State Attorneys General had also challenged restrictions on certain specialized vertical search providers' access to Google's Search results page,[41] but those claims were denied by the judge in August 2023 due to plaintiffs' failure to demonstrate harm in the relevant antitrust markets.[42] The DOJ pressed its claims against Google in a 12-week trial in the U.S. District for the District of Columbia, concluding on November 16, 2023.[43] District Court Judge Amit Mehta is expected to issue a ruling sometime in 2024.[44]

— A coalition of State Attorneys General led by Texas is challenging practices on Google's ad-exchange that the coalition alleges coerce publishers on the exchange into also using Google's ad-serving tools. At the beginning of 2023, the DOJ and a separate coalition of State Attorneys General filed a similar lawsuit, which included a challenge to Google's 2008 acquisition of DoubleClick.

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[40] Brief for the DOJ as Amicus Curiae, p. 6, *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020) (noting that a duty to deal only exists where there is "*1) a unilateral termination of a voluntary and profitable arrangement; 2) a refusal to deal that would be considered irrational, but for anticompetitive malice; and 3) an administrable remedy that does not require a court to delineate the defendant's sharing obligations*.").

[41] Complaint at 61, *Colorado et al vs. Google* D.D.C (Dec. 17, 2020) ("*Google selects particular commercial segments, like local home services, in which it denies specialized search providers the ability to: (a) purchase specialized advertisements in their own name in its specialized-advertising carousel; and/or (b) appear on the Google search results page in the so-called OneBox feature that typically provides a map and associated listings for a specific commercial segment (e.g., a listing of local electricians or hotels).*").

[42] Reuters, *Judge allows key US antitrust Google search claims to go to trial* (August 4, 2023) ("*Mehta tossed out accusations brought by the states that Google made it harder for internet users to find specialized search engines, like Expedia for travel or OpenTable for restaurants, saying the states 'have not demonstrated the requisite anticompetitive effect in the relevant market.'*").

[43] Reuters, *US wraps up antitrust case against Google in historic trial* (November 16, 2023).

[44] Reuters, *What's next in Google's court battle with the US Justice Department?* (November 16, 2023).

— The FTC and 17 State Attorneys general filed an antitrust suit against Amazon in September 2023.[45] The FTC alleges that Amazon uses algorithms to detect and punish third-party sellers who offer products at lower prices elsewhere online and to discipline rival online stores who undercut Amazon's prices. It also alleges that Amazon anticompetitively bundles access to Prime eligibility for sellers with use of its logistics services, such as shipping and warehousing.[46]

14. Are there merger rules specific to digital platforms in the US?

No. Neither the AICOA nor the OAMA would create new merger rules for digital platforms. A separate piece of potential legislation, the Platform Competition and Opportunity Act, would substantially limit acquisitions over USD 50 million by Google, Apple, Meta, Amazon, and Microsoft.[47] However, given its lack of any progress, the PCOA is not expected to pass.

$50 million

A SEPARATE PIECE OF LEGISLATION PENDING IN CONGRESS WOULD SUBSTANTIALLY LIMIT ACQUISITIONS OVER USD 50 MILLION BY GOOGLE, APPLE, META/FACEBOOK, AMAZON, AND MICROSOFT.

[45] NYT, *Amazon to Meet Regulators as U.S. Considers Possible Antitrust Suit* (August 7, 2023) ("*Amazon's meetings with the Federal Trade Commission, known as 'last rites' meetings, are typically a final step before the agency votes on filing a lawsuit.*").

[46] Politico, *FTC's Amazon antitrust lawsuit: Five takeaways* (Sep 28, 2023) ("*The complaint alleged Amazon uses a sophisticated network of web crawlers that identify which of its sellers offer their products more cheaply on other platforms. Amazon allegedly punishes those sellers, who make up about 60% of Amazon's sales, by making them harder to find on its platform [. . .] Amazon requires sellers under Amazon's Prime feature to use the company's logistics and delivery services even though many would allegedly prefer to use a cheaper service or one that would also service customers from other platforms where they sell [. . .]* ").

[47] Among other things, the PCOA prohibits reportable acquisitions over USD 50M that would allow a GAFAM to maintain or enhance its market position with respect to a product sold on or related to a covered platform (which covers most GAFAM products). PCOA Sec. 2(b)(3). Functionally, this would prohibit GAFAM from making large acquisitions that could make their products more successful. It is unclear what acquisitions over USD 50 million would not fall into this category.

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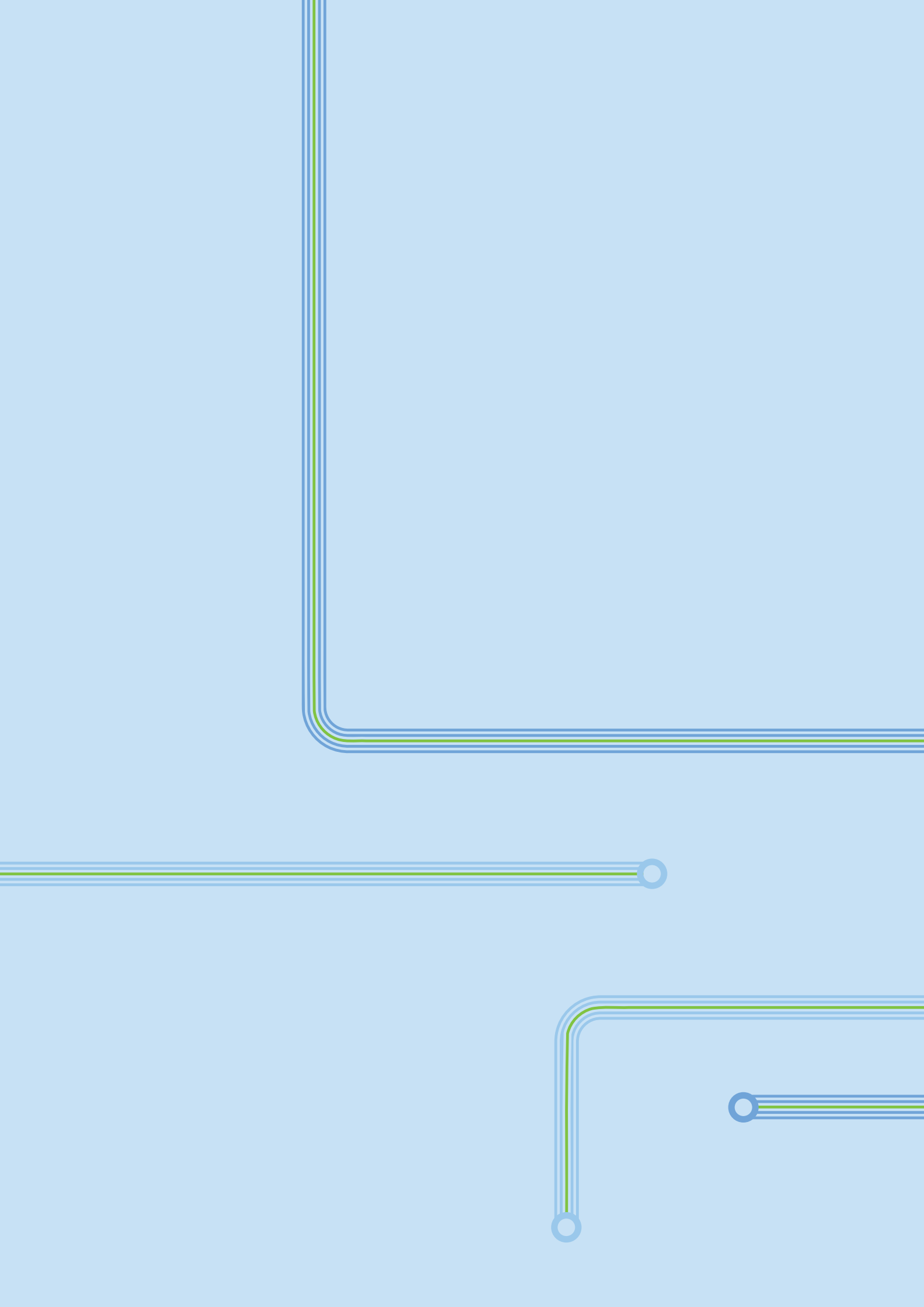

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