

# COMPETITION ISSUES IN THE DIGITAL ERA – EU DEVELOPMENTS



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## I. INTRODUCTION

*“When we look to the future, we see one big change that overshadows everything else [...]...There are really only two types of industry today – those that have been transformed by digitisation, and those that will be.”<sup>2</sup>*

There is debate among the competition law community as to whether such statements are exaggerated. Indeed, many commentators argue that competition law may be flexible enough to deal with issues in the digital sector without any significant amendments in approach but rather by simply applying the existing rules in a flexible and appropriate manner without abandoning legal and economic rigor. Others caution that stretching competition law to protect interests such as privacy has its own limitations.<sup>3</sup>

Nonetheless, the above comments of Competition Commissioner, Margrethe Vestager, are a clear indication of the impact and influence the European Commission (“EU Commission”) anticipates digital markets will have on society in the years to come. The importance placed on this sector by the EU Commission, along with many other competition authorities across the globe, is demonstrated by the considerable resources they are allocating to ensuring effective competition in digital markets – both in the form of specific enforcement actions against major tech players, and market studies/inquiries intended to enhance their understanding of the intricacies of digital markets and the competition law tools needed to govern them.

### A. Enforcement Actions

During the first half of 2019 alone, we have seen, *inter alia*, the opening of numerous abuse of dominance investigations at EU and Member State level against both Apple and Amazon;<sup>4</sup> a worldwide first-of-its-kind decision of the German FCO finding that Facebook abused its dominant position through its use of unfair business terms;<sup>5</sup> the opening of a formal investigation under Article 101 TFEU into Insurance Ireland’s alleged ex-

<sup>2</sup> See Margrethe Vestager, Competition Commissioner, European Commission, Speech at the OECD/G7 Conference: Competition and the digital economy (Jun. 3, 2019), [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en).

<sup>3</sup> See the comments (as reported by the New York Times) of Eline Chivot, Senior Policy Analyst for the Centre for Data Innovation, who reportedly stated that using competition policy to pursue objectives that are unrelated to competition “introduces uncertainty.” Adam Satariano, *Big Tech ‘Knows You Better Than Your Wife.’ He Plans to Rein It In*, *NEW YORK TIMES* (Jul. 7, 2019), <https://www.nytimes.com.cdn.ampproject.org/c/s/www.nytimes.com/2019/07/07/business/facebook-google-antitrust-germany.amp.html>.

<sup>4</sup> Discussed further in Section Three below.

<sup>5</sup> See Herbert Smith Freehills LLP, *German FCO forces Facebook to change its data collection policy*, <https://sites-herbertsmithfreehills.vutvrex.com/46/19286/compose-email/german-fco-forces-facebook-to-change-its-data-collection-policy.asp>.

clusionary data sharing practices;<sup>6</sup> and a fine of €1.49 billion imposed on Google following the EU Commission's finding that it had abused its dominant position in the online advertising market<sup>7</sup> (taking the cumulative total of fines imposed on Google for antitrust infringements beyond €8 billion). Merger deals involving some aspects of data have also been looked at closely – even where, upon closer investigation, they did not, in fact, raise substantive antitrust concerns (e.g. see the EU Commission's review of Apple's acquisition of Shazam<sup>8</sup>).

## B. Market Studies/Inquiries

Competition regulators are also increasingly focusing on understanding the challenges they consider digital markets to pose as a result of certain characteristics that these markets possess (including extreme returns to scale, the impact of network externalities, and the central role of data (explained in greater detail in section two below)). Because the enforcement tools competition authorities have at their disposal were (generally speaking) not designed with the dynamics of digital markets in mind, widespread debate has been triggered as to whether reform is needed or whether pre-existing regimes simply need to be interpreted and applied in a manner that considers the specificities of digital markets.

Director General of DG COMP, Johannes Laitenberger, has expressed a desire “to revisit assumptions and theories in light of new facts,” emphasizing that “the complexity and novelty of digitized markets and practices means that we need to place even more importance on understanding markets”;<sup>9</sup> UK chancellor, Philip Hammond, has recently labelled the UK's competition regime “unfit for purpose” given the rise in online platforms;<sup>10</sup> while Germany is currently in the process of amending its national competition law in order to address the dynamics of digital markets (reform is likely to be agreed in Autumn 2019).<sup>11</sup>

In recent years a number of reports, inquiries, and studies have been published with the aim of further informing the debate. In May 2016, the French and German competition authorities published a joint study on data and its implications for competition law;<sup>12</sup> in 2017, the EU Commission issued its e-Commerce sector inquiry<sup>13</sup> which, *inter alia*, resulted in antitrust investigations into a number of companies' online sales strategies and concluded with several decisions imposing fines on companies that were found to be in breach of the rules;<sup>14</sup> in March 2018, the French Competition Authority concluded its inquiry into display online advertising;<sup>15</sup> and in July 2019, Italy's competition authority, communications authority, and data protection authority published joint policy recommendations following their digital sector inquiry (the final report is expected to be published this year, however, no specific date has been set).<sup>16</sup>

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6 See EU Commission, Press Release, *Antitrust: Commission opens investigation into Insurance Ireland data pooling system* (May 14, 2019), [http://europa.eu/rapid/press-release\\_IP-19-2509\\_en.htm](http://europa.eu/rapid/press-release_IP-19-2509_en.htm); see also Herbert Smith Freehills LLP, *The next step in the battle for data? EU Commission opens formal investigation into Ireland's insurance market*, (May 20, 2019).

7 See EU Commission, Press Release, *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising* (March 20, 2019), [http://europa.eu/rapid/press-release\\_IP-19-1770\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1770_en.htm).

8 See EU Commission, Press Release, *Mergers: Commission clears Apple's acquisition of Shazam* (Sept. 6, 2018), [http://europa.eu/rapid/press-release\\_IP-18-5662\\_en.htm](http://europa.eu/rapid/press-release_IP-18-5662_en.htm).

9 Johannes Laitenberger, Directorate General for Competition, European Commission, *Closing remarks at the “Shaping competition policy in the era of digitisation” conference* (Jan. 17, 2019), [http://ec.europa.eu/competition/speeches/text/sp2019\\_01\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2019_01_en.pdf).

10 See *UK competition laws may be ‘unfit for purpose’ in digital era, says Hammond*, MLEX (Jun. 12, 2019).

11 See *Germany targets digital competition rule overhaul for autumn 2019 - FIW Innsbruck*, PARR (Mar. 11, 2019).

12 See Autorité de la Concurrence & Bundeskartellamt, *Competition Law and Data* (May 10, 2016), <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>.

13 See European Commission, *Final report on the E-commerce Sector Inquiry*, COM (2017) 229 final (Oct. 5, 2017).

14 For example, the EU Commission imposed fines on *Asus* (AT.40465), *Denon & Marantz* (AT.40469), *Philips* (AT.40181), *Pioneer* (AT.40182), *Guess* (AT.40428), *Nike* (AT.40436), and *Sanrio* (AT.40432); accepted commitments from *Hollywood Studios* (AT.40023); and is conducting an ongoing investigation into *Universal Studios* (AT.40433).

15 See Autorité de la Concurrence, *Avis n° 18-A-03 du 6 mars 2018 portant sur l'exploitation des données dans le secteur de la publicité sur internet* (Mar. 6, 2019), <http://www.autoritedelaconcurrence.fr/pdf/avis/18a03.pdf>.

16 The policy recommendations are available in Italian; AGCM, AGCOM & Granteprivacy, *Big Data, indagine conoscitiva congiunta – linee guida e raccomandazioni di policy* (2019), <https://www.garanteprivacy.it/documents/10160/0/Big+Data.+Linee+guida+e+raccomandazioni+di+policy.+Indagine+conoscitiva+congiunta+di+Agcom%2C+Agcm+e+Garante+privacy.pdf/563c7b0e-adb2-c26c-72ee-fe4f88adbe92?version=1.1>.

In 2019 alone we have seen the publication of the Furman Report<sup>17</sup> in the UK (commissioned by HM Treasury) which recommends an *ex ante* regulatory approach for digital markets as well as a number of wide-ranging changes to the UK competition regime; publication by the UK CMA of a report on *ex post* evaluation of merger control decisions in digital markets;<sup>18</sup> the launch by the CMA of a market study into online platforms and digital advertising;<sup>19</sup> and in the U.S., publication by the Committee for the Study of Digital Platforms, chaired by Professor Fiona Scott Morton, of a report calling for greater competition among digital platforms<sup>20</sup> and the announcement that the U.S. Department of Justice is reviewing the practices of market leading online platforms.<sup>21</sup>

The EU Commission has always been at the forefront of enforcement in the digital sector, going back to its pursuit of Microsoft in the 2000s. However, it has not been as active as national competition authorities in conducting market inquiries into digital platforms and big data issues (with the exception of the aforementioned e-commerce inquiry which was much more specific to vertical restraints concerning the sale of goods online). The EU Commission has finally weighed in with a report.<sup>22</sup> On April 4, 2019, the EU Commission published an in-depth report on “*Competition policy for the digital era.*” Competition Commissioner, Margrethe Vestager appointed a panel of three special advisers to prepare the report, which is intended to contribute to the EU Commission’s ongoing deliberations on how competition policy should develop to ensure pro-consumer innovation in digital markets (the “Special Advisers’ Report”).<sup>23</sup>

We look at this report in section two of this article which outlines the key findings of the Special Advisers’ Report. In section three, we focus on one of the principle issues regulators are focusing on in the context of digital markets: that is, ensuring effective competition in situations where a platform business also competes in other markets with companies that depend on that platform.<sup>24</sup> In other words, where “*the very same business becomes both player and referee, competing with others that rely on the platform, but also setting the rules that govern that competition.*”<sup>25</sup>

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17 See J. Furman, D. Coyle CBD, D. McAuley, A. Fletcher OBE & P. Marsden, *Unlocking digital competition, Report of the Digital Competition Expert Panel* (Mar. 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).

18 Competition and Markets Authority, *Ex-post Assessment of Merger Control Decisions in Digital Markets Final Report* (May 3, 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803576/CMA\\_past\\_digital\\_mergers\\_GOV.UK\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf).

19 Further information on the UK CMA’s *online platforms and digital advertising market study* is available via the following link: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

20 *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee Report*, George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business (May 15, 2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-15-may-2019.pdf?la=en&hash=B2F11FB118904F2AD701B78FA24F08CFF1C0F58F>.

21 See The United States Department of Justice, *Justice Department Reviewing the Practices of Market-Leading Online Platforms* (Jul. 23, 2019), <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms>.

22 We note that the report reflects the views of the independent experts that prepared the report, rather than the official position of the EU Commission.

23 See J. Cremer, Y. A. de Montjoye & H. Schweitzer, *Competition policy for the digital era* (Apr. 4, 2019), <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

24 For a number of other competition law issues which arise in the context of digital markets elsewhere, see, e.g. Herbert Smith Freehills LLP, *German FCO forces Facebook to change its data collection policy* (Feb. 11, 2019), <https://sites-herbertsmithfreehills.vutuevx.com/46/19286/compose-email/german-fco-forces-facebook-to-change-its-data-collection-policy.asp>; Herbert Smith Freehills LLP, *Data Assets: Protecting and Driving Value in a Digital Age* (2019), <https://www.herbertsmithfreehills.com/file/34571/download?token=TIH6MmgN>.

25 Margrethe Vestager, Competition Commissioner, Address at the OECD/G7 Conference: Competition and the digital economy (Jun. 3, 2019), [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en).

## II. EU COMMISSION SPECIAL ADVISERS' REPORT ON “*COMPETITION POLICY FOR THE DIGITAL ERA*”

The wide-ranging Special Advisers' Report addresses, among other things:

- The way digital markets work and the implications for competition law analysis.
- The aim of EU competition law in the context of digital markets.
- The possibility of revising the thresholds under the EU Merger Regulation (“EUMR”) to capture “killer acquisitions” by dominant platforms of early-stage, low-revenue, high-value innovators.
- How competition law should be applied to digital platforms and data.

### ***A. How Digital Markets Work and Implications for Competition Law Analysis***

The Special Advisers' Report starts by focusing on what it considers to be the key characteristics of the digital economy.

It finds that the way digital markets function can make markets work in favor of incumbents whose position can become entrenched and difficult to dislodge. This is because of effects such as extreme returns to scale (i.e. that the cost of producing digital services is proportionally much less than the number of customers served); network externalities (i.e. that the number of users on a platform is a very important factor making it more difficult for smaller entrants to migrate); and data, which can be a crucial input to many online services, production processes, and logistics.

All these factors heavily influence competition law analysis in this sector.

### ***B. Aim of EU Competition Law in the Context of Digital Markets***

The Special Advisers' Report does not suggest a fundamental rethink to the goals of competition law in the context of digital markets, pointing out that the current rules, concepts, and methodologies are sufficiently flexible to adapt to the specific challenges they pose and that “*vigorous competition policy enforcement is still a powerful tool to serve the interests of consumers and the economy as a whole.*”

Nonetheless, the Special Advisers' Report identifies “under-enforcement” as a problem in the digital world and proposes a re-think of the standard of proof. Where consumer harm cannot be measured, it suggests that platforms' strategies to reduce competition should be forbidden in the absence of clear benefits to consumers. Further, in highly concentrated markets with high barriers to entry, the Special Advisers' Report suggests erring on the side of disallowing potentially anticompetitive conduct, with the burden of proof reversed and placed on the incumbent to demonstrate the pro-competitive effects of the behavior. This may include presumptions in favor of a duty to ensure interoperability. This rethink of the standard/burden of proof could have important implications as it could make it easier for a regulator to find an infringement and adopt a decision prohibiting potentially abusive conduct.

Furthermore, the Special Advisers' Report proposes reducing competition policy's emphasis on market definition. Due to the rapidly evolving nature of market boundaries in the digital sphere, it is suggested that more emphasis should be placed directly on theories of harm and identification of anticompetitive strategies rather than market definition.

With regard to the measurement of market power, the Special Advisers' Report suggests analyzing whether platforms are (1) unavoidable trading partners with “intermediation power” – even where a market may seemingly look fragmented and (2) possessors of data that is not available to market entrants.

Finally, the report addresses the interplay between competition law enforcement and regulation and notes that the two can go hand in hand, with competition law analysis informing the public and legislative debate (we discuss this possibility further in section three below).

### **C. Review of EUMR Thresholds**

A growing concern for the EU Commission (and other regulators) in recent years has been acquisitions by dominant platforms of innovative start-ups with quickly growing user bases and significant competitive potential. These transactions may be carried out by larger players with the aim of early elimination of potential rivals (also known as “killer acquisitions”).

Under the current EUMR thresholds, despite their competitive potential, the low turnover of such targets often means that these transactions fall outside the EU Commission’s jurisdiction.

While certain Member States (e.g. Austria and Germany) have already introduced alternative thresholds based on transaction value, the Special Advisers’ Report concludes that it is too early at this stage for similar amendments to be made to the EUMR. However, the authors display an openness to introducing appropriate amendments to the EUMR thresholds in the future depending on the performance of the transaction value-based thresholds recently introduced in some Member States.

### **D. Changes to the Substantive Analysis of Mergers under the EUMR**

The Special Advisers’ Report notes that the current significant impediment to effective competition test (“SIEC”) is flexible enough to deal with mergers involving digital incumbents buying smaller rivals. However, it stresses that there is a need to revisit the substantive theories of harm to properly assess certain specific cases. The Special Advisers’ Report proposes a heightened degree of control for acquisitions of small start-ups by dominant platforms and/or ecosystems. In particular, the following questions will be important: (i) does the acquirer benefit from barriers to entry linked to network effects or use of data? (ii) is the target a potential or actual competitive constraint within the technological/users’ space or ecosystem? (iii) does its elimination increase market power within this space, notably through increased barriers to entry? (iv) if so, can the merger be justified by efficiencies?

### **E. How Competition Law Should be Applied to Digital Platforms and Data**

When it comes to platforms, the Special Advisers’ Report focusses on ensuring that both competition “for the market” (i.e. keeping the market contestable so that new entrants can come in) and competition “in the market” (i.e. on the dominant platform itself) remain vibrant.

To protect competition for the market, the possibility of multi-homing and switching as well as interoperability and data portability are seen as key for allowing market entrants to attract customers. Dominant platforms that restrict these practices should be required to justify their conduct on grounds of efficiencies.

While the Special Advisers’ Report recognizes that the use of most favored nation (“MFN”) clauses can have both pro- and anticompetitive effects, it suggests that the use of wide MFNs (restricting price competition between platforms) should be prohibited. Narrow MFNs (restricting price competition between the seller’s own website and the platform provider) may be permitted, but only in circumstances where there is sufficiently strong competition between platforms.

When it comes to competition in the market/on the platform, the Special Advisers’ Report stresses that dominant platforms “*have a responsibility to ensure that their rules do not impede free, undistorted, and vigorous competition without objective justification*” and must ensure a “*level-playing field*” for competition on the platform. The report discusses specific issues such as leveraging and self-preferencing by a dominant platform that competes with goods or services provided by competing suppliers on the platform (we discuss this issue further in section three below). Self-preferencing is not seen as abusive *per se* but must be analysed under an effects-based test. Importantly the Special Advisers’ Report notes that intervention may be necessary not only where the platform meets all the criteria under the “essential facility” doctrine (access to the platform is essential to compete), but also wherever the conduct is likely to result in a leveraging of market power and is not justified by a pro-competitive rationale. Remedies in such situations may be challenging and where the self-preferencing has significantly benefitted the platform’s market position *vis-à-vis* its competitors, they may need to include a restorative element.

Regarding data, the Special Advisers’ Report looks at the interplay with the GDPR, access to personal data, data portability, data sharing, and access to data for competitors.

As regards access to data under Article 102 TFEU, the report is cautious and does not recommend lowering the threshold for mandating data sharing. On the contrary, it stresses that a thorough analysis will be required as to whether access to the data in question is truly indispensable and where it is not, authorities should not intervene. The Special Advisers' Report also draws attention to other means of controlling data access, e.g., via sector-specific regulation<sup>26</sup> and judicial or administrative measures.

While this falls short of recommending a data-focused overhaul of EU competition rules, following the publication of the Special Advisers' Report, Commissioner Vestager emphasized that "*as data becomes the key to success, the huge quantities of information that some big businesses have can give them an edge that rivals cannot match.*"<sup>27</sup>

It is therefore clear that the increasingly data-driven nature of business in the digital sector continues to be under the EU Commission's scrutiny and that the EU Commission will be looking to intervene where it considers access to data as indispensable for competition to function in a particular market.

## **F. Concluding Remarks**

The Special Advisers' Report contains a number of important (and controversial) points suggesting increased scrutiny of platforms, increased vetting of acquisitions by digital players and a focus on the use of data.

As tweeted by Chief Economist at DG COMP, Tommaso Valletti, the Report was written on a pro bono basis by independent academics and therefore does not reflect the EU Commission's official position. Nevertheless, it is envisaged that the Report will be an important reference point for the EU Commission as it continues to deliberate its approach to competition policy in the digital era.

## **III. PLATFORMS AS "PLAYER AND REFEREE" – COMPETITION "ON THE PLATFORM"**

As is clear from the Special Advisers' Report, there are many issues that competition regulators are grappling with in order to ensure effective competition in digital markets. However, Commissioner Vestager has stated that "*one of the most important messages from [the Special Advisers' Report] is that we need to address the power of digital platforms.*"<sup>28</sup> Against this backdrop, the second part of this article focuses on one particular matter that has come to prominence in recent months: that is, the competition law issues that arise in circumstances where a platform business also competes in other markets with the companies that depend on that platform.<sup>29</sup>

On June 3, 2019, at the OECD conference on Competition and the Digital Economy, Commissioner Vestager stated that:

*one of the biggest issues we face is with platform businesses that also compete with companies that depend on the platform [...] competing with others that rely on the platform but also setting the rules that govern that competition. It's easy to see how this sort of double role can bring a risk of conflict of interest; a risk that the operator of a platform will be tempted to tweak the rules and features of the platform to benefit its own services.*

These concerns are reflected by the fact that, in recent times, we have seen a number of complaints, investigations, and decisions being made against platforms operating in this type of dual role – notably, against Google, Amazon, and Apple.

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26 We note that there is precedent for regulatory attempts at EU level to enable the pro-competitive sharing of data. For example, access to vehicle repair and maintenance information under Regulation (EC) 715/2007; access to trading data under Directive 2014/65/EU ("MiFID2"); and the sharing of customer data under Directive (EU) 2015/2366 ("Payment Services Directive" ("PSD2")).

27 Margrethe Vestager, Competition Commissioner, Speech at the European Consumer and Competition Day, Bucharest (Apr. 4, 2019), [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-digitised-world\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-digitised-world_en).

28 Margrethe Vestager, Speech, *supra* note 2.

29 For further discussion of a number of other competition law issues that arise in the context of digital markets, see our previous publications as listed at footnote 24 above.

In June 2017, the EU Commission fined Google €2.42 billion for systematically prioritizing its own comparison shopping service in its search results at the expense of the offerings of rival comparison shopping services.<sup>30</sup> The EU Commission found that when a consumer entered a query into the Google search engine, Google's comparison shopping service would appear at the top of the search results, whereas the results of competitors would be ranked much lower and would be much less visible to customers. The EU Commission held these practices to have "*stifled competition on the merits in comparison shopping markets*" and ordered Google to grant equal treatment to rival comparison shopping services and its own service. The decision has been attacked before the EU General Court and this appeal is currently pending.<sup>31</sup>

More recently, the EU Commission has launched a formal investigation into the way Amazon performs its dual role as an online sales platform and a competitor of third-party retailers that make sales on Amazon. In the wake of the investigation, Commissioner Vestager stated that "*E-commerce has boosted retail competition and brought more choice and better prices. We need to ensure that large online platforms don't eliminate these benefits through anti-competitive behaviour.*" Amazon is facing allegations that it misuses the data it obtains from third party retailers (in its capacity as a platform), to improve its competitive position in other markets *vis-à-vis* such third party retailers.<sup>32</sup> As part of its investigation, the Commission will review the standard agreements Amazon has in place with its marketplace sellers (which allow Amazon's retail business to utilize third party data); as well as the role of data in the selection of the winners of the "Buy Box," a prominent feature on Amazon allowing customers to add items from a specific retailer directly into their shopping carts.<sup>33</sup> Amazon has also had to face a number of investigations by national competition authorities, also in relation to the way in which it uses its position as a platform to leverage its competitive position in other markets on which the users of its platform are active. While Amazon has now reached settlement with the German and Austrian competition authorities,<sup>34</sup> the investigations of the authorities in Luxembourg and Italy are ongoing.<sup>35</sup>

Apple has also been subject to a series of complaints at both EU and Member State level.<sup>36</sup> Spotify complained to the EU Commission that by forcing Spotify to use the Apple payment system and to pay a 30 percent commission fee, Apple inhibits Spotify's ability to compete on fair terms with Apple Music.<sup>37</sup> Separately, two parental control software companies, Qustodio and Kidslox have complained that Apple blocked parental control apps from the App Store because they compete with Apple's Screen Time. In a press release, Qustodio stated that its app "*had been available and coexisting peacefully on the App Store for years until Apple moved into the space as a competitor in September 2018 by pre-installing its own Screen Time service on all iOS 12 devices, activating it by default, and making it non-removable from those devices in any way.*"<sup>38</sup>

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30 EU Commission, Press Release, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (Jun. 27, 2017), [http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm).

31 See Case T-612/17, Action brought on 11 September 2017 -- *Google and Alphabet v. Commission*, OJ 2017 C 369/37. For disclosure purposes, we note that one of the authors of this article, Kyriakos Fountoukakos, represents Google in its appeal before the General Court.

32 See for example the comments of Oliver Prothmann (President of the German association of e-commerce, BVOH) relating to insights he received from traders informing him that Amazon Retail "*can react better than individual traders*" because it has "*access to all marketplace data.*" See Aoife White, *Amazon Merchants' Fears Fuel European Union Antitrust Probe*, BLOOMBERG (Jul. 17, 2019), <https://www.bloomberg.com/news/articles/2019-07-17/amazon-faces-eu-battle-as-vestager-opens-antitrust-probe>.

33 See EU Commission, Press Release, *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon* (Jul. 17, 2019), [https://europa.eu/rapid/press-release\\_IP-19-4291\\_en.htm](https://europa.eu/rapid/press-release_IP-19-4291_en.htm).

34 See German Competition Authority, *Case summary: Amazon amends its terms of business worldwide for sellers on its marketplaces – Bundeskartellamt closes abuse proceedings* (Jul. 17, 2019), [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=4); see also Austrian Competition Authority, *Case summary: Amazon.de – Marktplatz* (Jul. 19, 2019) (available in German), [https://www.bwb.gv.at/fileadmin/user\\_upload/Downloads/standpunkte/BWB\\_Amazon-Fallbericht\\_20190717.pdf](https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB_Amazon-Fallbericht_20190717.pdf).

35 See *EC closely coordinating with US FTC, Luxembourg, Italy on Amazon abuse probe*, PARR (Jul. 19, 2019).

36 The Dutch competition authority has also opened an investigation into whether Apple favors its own news app over other apps for news media that are available on the Apple App Store.

37 *Brussels poised to probe Apple over Spotify's fees complaint*, FINANCIAL TIMES (May 5, 2019), <https://www.ft.com/content/1cc16026-6da7-11e9-80c7-60ee53e6681d>.

38 *Qustodio & Kidslox File a Complaint Against Apple with the European Commission over Abuse of Dominant Position*, GLOBENEWSWIRE (Apr. 30, 2019), <http://www.globenewswire.com/news-release/2019/04/30/1812192/0/en/Qustodio-Kidslox-File-a-Complaint-Against-Apple-with-the-European-Commission-over-Abuse-of-Dominant-Position.html>.



## Competition law enforcement or regulation? – The EU Platform Regulation

This significant increase in actions against platform companies performing the dual role of both platform and competitor demonstrates the focus that competition authorities are placing on this issue. How they deal with these scenarios going forward is something that will need to be closely monitored.

In the first instance, Commissioner Vestager has indicated that we can expect to see further decisions taking a similar approach to that seen in the Google Shopping case (as explained above) i.e. where the EU Commission required the platform to treat other companies' services equally to its own. However, interestingly, Commissioner Vestager has also suggested that these concerns could also be addressed through regulation:

*we shouldn't assume that the competition rules are the only answer to this issue. [...] [A] regulatory approach could be a useful model, to tackle other problems which the platform economy creates.*

*...it may even be necessary for governments to reassert control of parts of the digital world, when they find that commercial interests alone don't provide the services we need.<sup>39</sup>*

Commissioner Vestager pointed to the regulation on platform-to-business trading (the "Platform Regulation") as an example of how a regulatory approach may be a fitting response to some of the challenges competition enforcers see as being posed by digital markets. The text of the Platform Regulation was adopted by the Council on June 14, 2019 and will take effect 12 months after its publication in the Official Journal of the EU.<sup>40</sup>

The Platform Regulation will apply to online market places, online software application stores, social media, and search engines, and seeks to create a body of rules which "*provide businesses with a more transparent, fair and predictable online business environment, as well as an efficient system for seeking redress.*"<sup>41</sup> Among other things, the Platform Regulation requires platforms to provide a statement of reasons when they decide to restrict a business' use of its services, and to disclose publicly (i) the parameters by which they determine how business users are ranked in their search results and (ii) any differentiated treatment they grant to goods/services they offer directly.

While these provisions in the Platform Regulation are clearly targeted at behaviors deemed by the EU Commission in both past decisions and current investigations to be problematic, it is possible that the EU Commission will contemplate additional regulation containing more onerous provisions in order to prevent such competition issues arising in the first place. Commissioner for Digital Economy and Society, Mariya Gabriel, has pointed out that the Platform Regulation will be the "*first-ever regulation in the world that addresses the challenges of business relations within the online platform economy.*"<sup>42</sup> This indicates (1) that the EU Commission is not afraid to enter new territory when it comes to addressing the challenges posed by digital markets; and (2) that the regulatory response to these challenges is very much in its infancy and has the potential for further development.

Indeed, there is a precedent for competition law enforcement actions being followed up by the enactment of regulations seeking to address the issues identified in the preceding competition action. In April 2015, the Italian, French, and Swedish competition authorities accepted commitments from Booking.com following investigations into its use of MFN clauses.<sup>43</sup> Subsequently, Italy passed a law including a specific provision in relation to the use of MFNs in contracts between online travel agencies and suppliers of touristic services. Similarly, in France the *loi Macron* introduced a provision to ensure that online travel agencies do not apply MFN clauses in contracts with hotels.<sup>44</sup>

<sup>39</sup> Margrethe Vestager, Speech, *supra* note 2.

<sup>40</sup> European Council, Press Release, *EU introduces transparency obligations for online platforms* (Jun. 14, 2019), <https://www.consilium.europa.eu/ro/press/press-releases/2019/06/14/eu-introduces-transparency-obligations-for-online-platforms/>.

<sup>41</sup> *Id.*

<sup>42</sup> EU Commission, Statement, *Digital Single Market: Commission welcomes European Parliament's vote on new rules to improve fairness and transparency of online platforms* (Apr. 17, 2019), [http://europa.eu/rapid/press-release\\_STATEMENT-19-2160\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-19-2160_en.htm).

<sup>43</sup> See *Booking.com probes closed by Italian, French and Swedish competition authorities*, PaRR (Apr. 2, 2015).

<sup>44</sup> See D&P Studio Legale, *Online Travel Agencies market: the ban of the MFN clauses in Italy or the so-called "Booking Law,"* LEXOLOGY (Sept. 14, 2017), <https://www.lexology.com/library/detail.aspx?g=2d2ab9fe-a2a5-4f37-be33-914f5a30f441>.

As part of the same trend, in December 2007, the EU Commission found Mastercard's interchange fees on cross-border transactions in the EEA to restrict competition between banks. The EU Commission's findings were confirmed by the European Court of Justice in September 2014. In April 2015, a new regulation capping interchange fees for cards issued and used in Europe was adopted.<sup>45</sup>

It remains to be seen whether the new EU Commission which will start its mandate on November 1, 2019 will have greater appetite for legislative intervention in this area.

## IV. CONCLUSION

The European Council has indicated that at present, over one million businesses based in the EU trade through online platforms.<sup>46</sup> This illustrates the significance of online platforms to EU consumers and indicates that the effective enforcement of competition law in digital markets will, in all likelihood, continue to be a primary focus of both the EU Commission and Member State competition authorities going forward.

Perhaps a more telling indication of the momentum gathering behind this subject is Donald Trump's recent indication that his administration would look into the activities of a number of the U.S. tech giants.<sup>47</sup> While we are accustomed to the proactive enforcement of antitrust rules in Europe, this has not always been the case in the U.S., where the authorities have generally taken a less interventionist approach based on the belief that the markets are best placed to remedy themselves. In line with President Trump's promises, in July 2019 Apple, Amazon, Facebook, and Google were reportedly summoned to testify in front of a House Judiciary Committee subcommittee as part of its investigations into the threats large tech companies pose to competition.<sup>48</sup>

On top of this, a recent study commissioned by the University of Chicago's business school (prepared by a panel chaired by Fiona Scott Morton) found that while some markets may self-correct, this may not always be the case in markets dominated by large digital platforms. The report suggests that the U.S. should create a new specialist "Digital Authority" to better regulate digital platform markets. In the UK the recent Furman report on "Unlocking digital competition" similarly proposes the creation of a new digital markets unit to support greater competition and consumer choice in digital markets.

While questions remain unanswered as to exactly *how* competition authorities will enforce competition law in digital markets (i.e. whether in addition to competition law actions, this will also include the enactment of regulation), the substantial resources being dedicated to better understanding this field indicates that reaching a satisfactory solution is high on the regulatory agenda. We are, therefore, sure to see developments in this regard within the near future.

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45 See EU Commission, Press Release, *Antitrust: Commission accepts commitments by Mastercard and Visa to cut inter-regional interchange fees* (Apr. 26, 2019), [http://europa.eu/rapid/press-release\\_IP-19-2311\\_en.htm?locale=FR](http://europa.eu/rapid/press-release_IP-19-2311_en.htm?locale=FR).

46 European Council, Press Release, *EU introduces transparency obligations for online platforms* (Jun. 14, 2019).

47 See *EU 'attacking' Apple, Google, Facebook for 'easy money,' Trump complains*, MLEX (Jun. 10, 2019).

48 See Tony Romm, *Apple, Amazon, Facebook and Google to testify to Congress on antitrust*, THE WASHINGTON POST (Jul. 9, 2019), [https://www.washingtonpost.com/technology/2019/07/09/apple-amazon-facebook-google-testify-congress-antitrust/?utm\\_term=.15f7a43e5c00](https://www.washingtonpost.com/technology/2019/07/09/apple-amazon-facebook-google-testify-congress-antitrust/?utm_term=.15f7a43e5c00).

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