Foreword:
Big Tech and Dominance: An overview of EU and national case law

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A. Decade of the Gatekeeper

As we near the end of 2023, we can reflect on yet another 'Big Tech' year: a year in which market power was almost synonymous with digital markets. It seems unlikely that this will be the last year marked by competition law enforcement and regulation in digital markets. Perhaps future historians will look back on the 2020s as the 'Decade of the Gatekeepers'. These have been fascinating years for those interested in the shifts in the paradigms which justify competition law: with new economic and societal concerns have come new ways to look at firms, markets, and power. Concerns about the power of Big Tech have taken on additional dimensions than merely that of companies with dominant positions over discrete products in single markets. There has not only been renewed attention in recent years for the power a company may have over individual customers or suppliers (so-called 'relative' power[3]), but also on new conceptualisations of economic power beyond a single relevant market. Big Tech companies are called 'gatekeepers', because of the position they hold between groups of users or within an ecosystem of products and economic actors.[4] These 'gatekeeper' or 'intermediation' positions have found their way into the Digital Markets Act in the EU, as well as inspiring new or proposed regulation in the UK[5], US[6] and Japan,[7] Germany,[8] and elsewhere.[9] These new concepts of power have brought new concerns to the fore, prompting enforcers to rethink traditional theories of harm.

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[3] As exemplified by the new or invigorated provisions on abuse of economic dependence and their enforcement, seen in a few cases in this Bulletin.
[4] See Ioannis Lianos and Bruno Carballa-Smichowski, 'A Coat of Many Colours – New Concepts and Metrics of Economic Power in Competition Law and Economics' (2022) 18(4) Journal of Competition Law and Economics 795.
[5] The UK's proposed 'Digital Markets, Competition and Consumers Bill' (DMCC Bill).
[6] The US's proposed Bills: 'American Innovation and Choice Online Act', 'Ending Platform Monopolies Act', 'Platform Competition and Opportunity Act', 'Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act' targeting major digital platforms and Open App Markets Act.
[7] Japan's 'Act on Improving Transparency and Fairness of Digital Platforms (TFDPA)'..
[8] Section 19a Gesetz Gegen Wettbewerbsbeschränkungen (GWB).
[9] See Australian Competition Authority, The Australian Competition Authority announces new rules and regulations regarding the dominance of Big Tech companies on app marketplaces (Google / Apple), 19 August 2021, e-Competitions Big Tech & Dominance, Art. N° 102092.

As we write this, antitrust activity in the United States against Google,[10] Meta,[11] and Amazon[12] is making headlines. These suits, which were a long time in the making, come in addition to the flurry of excitement (and dread) games lovers felt at the *Epic v Apple* and *Epic v Google* cases.[13] The suits in the US make for fascinating threads on social media, thanks to the reporters dedicating their time and energy to sharing the court proceedings with the public. It is not at all quiet on the other side of the Atlantic, however, where authorities intervene in digital markets in a less publicised, but no less dedicated manner. The many summaries in this e-Competitions Bulletin are testimony to the extensive activity in Europe, particularly by national competition authorities (NCAs) in the EU and UK. While the European Commission started designating 'gatekeepers' under the Digital Markets Act (DMA), national authorities used existing or new powers within their competition law arsenal. Over 30 of the entries in this Bulletin discuss decisions, investigations or studies by European NCAs since 2021.

The companies covered by these cases are largely the same as those designated as gatekeepers under the DMA: Alphabet (Google), Amazon, Apple, Meta (Facebook), Microsoft, and ByteDance.[14] ByteDance is, unsurprisingly, the exception, as the only one not covered in the summaries in the Bulletin. Microsoft, the protagonist in the headline-grabbing antitrust saga which started over 20 years ago, has been remarkably less visible, despite the role it played in advocating *for* antitrust enforcement against some of the other companies on this list. This may be changing, with investigations into more 'traditional' tying practices,[15] as well as its recent (and ongoing) stint in the spotlight when negotiating its takeover of Activision Blizzard.[16]

Quite a few of these enforcement activities involve new legal provisions or more creative theories of harm. While the European Commission prepared for enforcement of the Digital Markets Act, Germany was busy enforcing its new Section 19a of the GWB (its Act against Restrictions of Competition) and France and Italy were reinvigorating abuse of economic dependence in the context of digital markets. [17] The common denominator in these cases is the recognition that a Big Tech firm is likely to control more than a single market, holding a

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[10] In *United States v. Google LLC* (2023), the DoJ and eight State Attorneys General accuse Google of illegally monopolizing the adtech market, while in *United States v. Google LLC* (2020) the DoJ and eleven State Attorneys General accused Google of illegally monopolizing search and search advertising markets.

[11] The FTC, along with forty-six State Attorneys General, sued Facebook (now Meta) for illegal monopolization through a series of anti-competitive acquisitions, including of Instagram and WhatsApp. The first version of the FTC's complaint was dismissed by the U.S. District Court for the District of Columbia, but it accepted an amended version of the complaint, and the case is set to go to trial at the end of this year or early next year.

[12] The FTC, alongside seventeen State Attorneys General for illegally maintaining its monopoly in the online superstore market that serves shoppers and the market for online marketplace services purchased by sellers.

[13] See *Epic Games Inc. v Google LLC* (2020), also known as the 'Google Play Trial', District Court, N.D. California; *Epic Games Inc. v Apple INC.* (2020), District Court, N.D. California.

[14] The first six gatekeepers were designated by the European Commission on 6 September 2023.

[15] European Commission, Antitrust: Commission opens investigation into possible anticompetitive practices by Microsoft regarding Teams' (27 July 2023).

[16] European Commission case M.10646 *Microsoft / Activision Blizzard*, decision of 15 May 2023; FTC Matter/File Number 2210077, *Microsoft/Activsion Blizzard*; CMA, *Microsoft/Activision Blizard merger inquiry*.

[17] See Michele Giannino, The Italian Competition Authority investigates a Big Tech company over an alleged abuse of economic dependence in digital markets (SIAE / Meta), 4 April 2023, e-Competitions Big Tech & Dominance, Art. N° 112086; Alexandre Predal, Tom Bolster and Wessen Jazrawi, The Paris Court of Appeal partially overturns the competition authority's decision concerning a big tech company's distribution practices, and reduces the fine imposed by two-thirds (Apple), 6 October 2022, e-Competitions Big Tech & Dominance, Art N° 109533.

position of gatekeeper between different services or different markets. [18] 'Ecosystem' power and 'ecosystem' harm has started playing a bigger role in the cases in this Bulletin, even absent clarity on the actual scope of ecosystem theories of harm.[19] In addition to the expansion of 'self-preferencing' to cover abuses in which a gatekeeper gives preference to its own services or those of preferred partners,[20] cases in the last two years have included: a deepening of the relationship between data protection rules and competition law, the use of competition law powers to secure remuneration and related intellectual property rights in the creative industries, and reliance on behavioural remedies and commitments to actively shape business models.

B. Data protection meets competition law

The business models of Big Tech companies rely heavily on the processing of user data.[21] It is no surprise therefore that some of the alleged anti-competitive conduct covered in this Bulletin involves the use of data: from limitations imposed by a platform on the data collection abilities of third-party websites, apps or sellers using the platform, to the use by the platform of the data from these third parties to give itself a competitive advantage. Data accumulation may lead to barriers to entry.[22] It was inevitable, then, that overlaps between data protection law and competition law would become a critical topic at EU and national level. The Court of Justice's preliminary ruling in *Meta Platforms v Bundeskartellamt* ('*Meta*') indicated that there can, in theory, be a substantive link between competition law and the GDPR (EU General Data Protection Regulation). This is because the ability to process data is a significant parameter of competition in the digital era,[23] and non-compliance with data protection law is likely to improve Big Tech firms' data processing abilities at the cost of users' data protection interests. The Court also emphasised the need for cooperation between data protection supervisory

[18] See Badri Narayanan, Charanya Lakshmikumaran, Aditya Bhattacharya, Neelambera Sandeepan, The Indian Competition Authority initiates probe into a Big Tech firm for potential abuse of dominance in the app store market (Apple / Together We Fight Society), 31 December 2021, e-Competitions Big Tech & Dominance, Art. N° 106172.

[19] See Cristina Caffarra, Matthew Elliott and Andrea Galeotti, ''Ecosystem' theories of harm in digital mergers: New insights from network economics, part 2' (6 June 2023) VoxEU blog.

[20] See Giovanni Pregno, Barbara Monti, Andreas Reindl, The Italian Competition Authority imposes record-breaking fine of € 1.1 billion on an e-commerce company for "self-preferencing" its own logistical services (Amazon), 9 December 2021, e-Competitions Big Tech & Dominance, Art. N° 104606; Geoffrey Manne, Lazar Radic, The Italian Competition Authority issues record €1.128B fine against a Big Tech company for merging its platform marketplace and its distribution operations thereby shutting out rival distributors (*Amazon*), 30 November 2021, e-Competitions Big Tech & Dominance, Art. N° 106075; See also Australian Competition Authority, The Australian Competition Authority releases its third digital platform services inquiry interim report and proposes that it be given the power to develop and implement a mandatory search engine choice screen in web browsers (Google), 28 October 2021, e-Competitions Big Tech & Dominance, Art. N° 103545.

[21] See German Competition Authority, The German Competition Authority issues a Statement of Objections against a Big Tech search engine for implementing anticompetitive data processing terms (Google), 11 January 2023, e-Competitions Big Tech & Dominance, Art. N° 110585.

[22] See Turkish Competition Authority, The Turkish Competition Authority decides that a Big Tech firm illegally combined data from several of its operations which raised barriers to entry and distorted competition (Meta), 10 November 2022, e-Competitions Big Tech & Dominance, Art. N° 109511.[23] See Andreas Reindl, Niharika Parshurampuria, The EU Court of Justice confirms that National Competition Authorities may consider violations of data protection laws as part of their abuse of dominance assessments (Meta), 4 July 2023, e-Competitions Big Tech & Dominance, Art. N° 113117.

[23] See Andreas Reindl, Niharika Parshurampuria, The EU Court of Justice confirms that National Competition Authorities may consider violations of data protection laws as part of their abuse of dominance assessments (Meta), 4 July 2023, e-Competitions Big Tech & Dominance, Art. N° 113117.

authorities and competition authorities in such circumstances.[24] The *Meta* judgment did not, however, resolve all questions about the relationship between the two areas of law.[25] Among the many questions which remain, two issues stand out from the enforcement practice covered in this Bulletin. One is that some companies may use data protection policy as an excuse to justify their anticompetitive conduct, the validity of which should be assessed under competition law. The other is that the applicability of data protection law does not mean conduct will escape competition law scrutiny, making it necessary to develop standards where both sets of rules apply.

Firms may have the incentive and ability to apply stricter privacy protection policies to the services offered on their platform by third parties who compete with them in advertising services. A few cases in this Bulletin illustrate this concern. In 2021, the Polish NCA launched an investigation into Apple's new privacy policy on iOS, concerned that imposing more privacy protection obligations on third-party apps may restrict the ability of third-party apps to provide personalised advertising services, thereby providing an advantage to Apple's own advertising services.[26] Similarly, in 2023 the French NCA notified its objections to Apple, concerned that Apple may be abusing its dominance in in the distribution of mobile apps, by implementing discriminatory, non-objective and non-transparent conditions on data mining of user data for advertising purposes .[27] A similar concern was raised by the UK NCA, because it suspected that Google's Privacy Sandbox proposals to remove third-party cookies protected users' privacy at the cost of reduced competition. To dismiss this concern, Google committed not to discriminate against competitors in these proposals.[28] In the US, concerns were raised about the potential impact on competition of Meta's refusal to provide access to application-programming interfaces, which was adopted to prevent developers from sharing Facebook's data with third parties.[29]

These cases illustrate that, in practice, Big Tech companies may take advantage of data protection objectives to restrict or prevent their competitors or downstream customers from

[24] Case C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt* ECLI:EU:C:2023:537, paras 42 and 52-59.
[25] See Or Brook and Magali Eben, 'Another missed opportunity? Case C-252/21 Meta Platforms v. Bundeskartellamt and the relationship between EU competition law and national laws' (2023) Journal of Competition Law and Practice.
[26] See Polish Competition Authority, The Polish Competition Authority investigates the data processing policy of a Big Tech company (Apple), 13 December 2021, e-Competitions Big Tech & Dominance, Art. N° 105252.
[27] See French Competition Authority, The French Competition Authority notifies its objections to a Big Tech company concerning its practices in the distribution of mobile apps sector (Apple), 27 July 2023, e-Competitions Big Tech & Dominance, Art. N° 113434.
[28] See UK Competition Authority, The UK Competition Authority secures improved commitments from a Big Tech company on its proposals to remove third-party cookies and other functionalities from its browser (Google Privacy Sandbox), 26 November 2021, e-Competitions Big Tech & Dominance, Art. N° 103797; UK Competition Authority, The UK Competition Authority accepts a Big Tech company's revised offer of commitments relating to its proposed removal of third-party cookies from a browser (Google Privacy Sandbox), 11 February 2022, e-Competitions Big Tech & Dominance, Art. N° 105243; Victor-Emanuel Ion, The UK Competition Authority accepts a Big Tech company's commitment in its treatment of third-party cookies (Google Privacy Sandbox), 11 February 2022, e-Competitions Big Tech & Dominance, Art. N° 105665.
[29] See Jaclyn Phillips, Andrew Black, George Paul, The US Court of Appeals for the DC Circuit hears an appeal brought by 48 State Attorney Generals against a ruling by a District Court in a Big Tech refusal to deal case (Meta), 14 January 2022, e-Competitions Big Tech & Dominance, Art. N° 106317. A concern about the overlap between data protection and competition law is also present in US Federal Trade Commission, The US FTC files an amended complaint against a social media company alleging it resorted to an illegal buy-or-bury scheme to crush competition after a string of failed attempts to innovate (Facebook), 19 August 2021, e-Competitions Big Tech & Dominance, Art. N° 102162.

accessing data collected by Big Tech firms. Although this protects users' interests in data protection, it may generate anticompetitive effects which are detrimental to other companies and ultimately to these users. Therefore, it seems that where privacy policies are implemented which may come at the cost of reduced competition, authorities may consider that they should be assessed under competition law,[30] even if they may be in compliance with data protection law. The complexity of intervention in this area requires cooperation between competition authorities and data protection supervisory authorities. As the Google Privacy Sandbox case in the UK shows, competition authorities' intervention requires a continuous supervision of Google's data processing commitments, which requires cooperation with data protection authorities.

In addition to using data protection objectives to restrict competition, Big Tech firms may engage in data processing activities that infringe both data protection law and competition law. Although competition authorities are not competent to deal with pure data protection issues, practices show that non-compliance with data protection legislations may have anticompetitive effects. In July 2022, the Italian NCA was concerned that Google's restrictions on data portability might not only infringe users' rights under Article 20 of the GDPR but also constitute an abuse of dominance by creating data barriers for Google's potential competitors.[31] In January 2023, the German NCA issued a statement of objections and secured commitments from Google because its policies and practices for obtaining users' consent for data processing were deemed deficient.[32] Although consent is also relevant to the GDPR, the German NCA relied on its new competition law provision Section 19a GWB, to argue that users' consents to Google's data processing terms is deficient because they were not given sufficient choice. This case exhibits commonalities with the German NCA's case against *Meta* in 2019, which had been brought under its national abuse of dominance provision, and which led to the preliminary ruling before the Court of Justice of the European Union.

Following both the EU *Meta* ruling and national enforcement actions, a practical challenge remains: a lack of standards for analysing the GDPR, a non-competition rule, when enforcing competition law.[33] To avoid the potential overreach that may arise while considering data protection issues in competition assessment, the CJEU does emphasise that competition authorities assessing the lawfulness of data processing activities must seek to cooperate with data protection supervisory authorities. In 2022, the UK NCA cooperated with the Information Commissioner's Office (ICO).[34] However, the effectiveness of the cooperation mechanism will continue to be a practical challenge due to the limited experience so far.

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[30] See statement by CMA Chief Executive Andrea Coscelli in UK Competition Authority, The UK Competition Authority secures improved commitments from a Big Tech company on its proposals to remove third-party cookies and other functionalities from its browser (Google Privacy Sandbox), 26 November 2021, e-Competitions Big Tech & Dominance, Art. N° 103797.

[31] See Italian Competition Authority, The Italian Competition Authority opens investigation against a Big Tech for abuse of dominant position in data portability (Google), 14 July 2022, e-Competitions Big Tech & Dominance, Art. N° 107833.

[32] See German Competition Authority, The German Competition Authority issues a Statement of Objections against a Big Tech search engine for implementing anticompetitive data processing terms (Google), 11 January 2023, e-Competitions Big Tech & Dominance, Art. N° 110585..

[33] See Andreas Reindl, Niharika Parshurampuria, The EU Court of Justice confirms that National Competition Authorities may consider violations of data protection laws as part of their abuse of dominance assessments (Meta), 4 July 2023, e-Competitions Big Tech & Dominance, Art. N° 113117.

[34] See UK Competition Authority, The UK Competition Authority accepts a Big Tech company's revised offer of commitments relating to its proposed removal of third-party cookies from a browser (Google Privacy Sandbox), 11 February 2022, e-Competitions Big Tech & Dominance, Art. N° 105243.

C. Competition law and the creative industries

The gatekeeping position of Big Tech has also had repercussions on the creative industries, as news, music, games, film and TV, are more frequently accessed through digital platforms. This has had its impact on competition law enforcement, as exemplified by some of the summaries in this Bulletin. In the process, the interaction between intellectual property and competition law is becoming more prominent too. In Italy, the NCA ordered Meta to resume negotiations with a copyright collecting organisation, determining that music right holders are dependent on the social media platform to reach their audience. It relied on its new legal provision establishing a presumption of economic dependence for intermediation services 'provided by a digital platform with a decisive role for reaching the final users'.[35]

The news industry features in several of the cases discussed in this Bulletin. The showing of news excerpts (or 'snippets') by digital platforms has been a key topic of concern in recent years. The rise of online aggregators – particularly search engines – can be seen as both a blessing and a curse for news distribution. The aggregation function of such services can benefit consumers looking for information from diverse sources. News from a range of sources can be accessed with a click of the mouse. This has meant that some consumers start their news journey entirely from one search engine or social media platform, rather than from a particular press publisher's print copy or website. It can be argued, therefore, that digital platforms have become unavoidable trading partners for press publishers, who need to be shown on a search engine or social media site to reach their audience. At the same time, the transition from print to online news has meant that the revenue of news publishers has taken a hit: the number of subscriptions is down, and they compete with the digital platforms for revenue from online advertising. In that context, press publishers have raised concerns that digital platforms benefit from the content the publishers generate – by showing their news snippets on their platforms – and should be remunerating publishers for this content.[36]

The competition community may not have paid that much attention at the start of this debate. After all, this seemed like a question for intellectual property or communications regulation, rather than competition law. Diversity of news sources and sustainability of the free press is essential for a democratic society, but it is not a topic which fits squarely into the more narrow readings of the aims of competition law. It does not take long to realise, however, that this is a matter of platform regulation. And, where there is platform regulation, competition law action tends not to be far behind.

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[35] See Italian Competition Authority, The Italian Competition Authority orders a social media giant to resume negotiations with a copyright-collecting organisation following an investigation over an alleged abuse of economic dependence in the licensing of music rights on social media platforms (SIAE / Meta), 20 April 2023, e-Competitions Big Tech & Dominance, Art. N° 112213; Italian Competition Authority, The Italian Competition Authority commences an investigation over an alleged abuse of economic dependence by a Big Tech firm in the licensing of the use of music rights on its platforms (SIAE / Meta), 4 April 2023, e-Competitions Big Tech & Dominance, Art. N° 112043.

[36] See Tone Knapstad, 'Fighting the tech giants—news edition: competition law's (un)suitability to safeguard the press publishers' right and the quest for a regulatory approach' (2021) 16(12) Journal of Intellectual Property Law & Practice 1319.

Initially the EU aimed to tackle this challenge by introducing new neighbouring rights through Directive 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive). Under this right, aggregators who wish to show news snippets on their platforms must have a licence with the press publishers whose content they are showing. [37] There has been reasoned criticism of both the scope of the legal provision and the way it has been understood and used in practice. Scholars have argued that the right is unclear: it may give rightsholders the power to grant or block the use of their content on platforms, but it cannot be used to force these platforms to use the content and pay for it, nor can it force them to the negotiation table.[38]

Google's response to the new right, in France (where the right had been swiftly transposed into national law), was not entirely surprising. Publishers' content would not be included in the results unless the publisher had opted in – without remuneration. In other words, if it had to pay for them, Google would no longer show snippets in its search results, but merely show links to the webpage – which were said to generate less traffic to the press publishers' own webpages than a snippet would. This impasse quickly turned the debate into a competition law matter, as press publishers claimed that Google was an unavoidable trading partner who was abusing its dominance. As can be read in this Bulletin, the French NCA considered that Google may indeed be abusing its dominant position with its news 'Showcase'. After a complicated back and forth, including the imposition of fines for failure to comply with injunctions and various revisions of the commitments,[39] the French NCA accepted Google's commitments to 'negotiate in good faith' with all press publishers and news agencies for the remuneration of protected content based on transparent, objective, and non-discriminatory criteria, as well as share advertising revenue information with a monitoring trustee.[40]

Google news also grabbed the attention in Germany, where the authority used the new Section 19a to ensure that Google offers access to its Showcase service on a non-discriminatory basis. It also made sure that German publishers can license their ancillary copyright for press content separately too, while leaving the question of adequate remuneration to the special arbitration

[37] Article 15 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (CDSM Directive).

[38] See Ula Furgał, 'The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings' (2023) 22 (7) GRUR International 650.

[39] See French Competition Authority, The French Competition Authority fines a Big Tech search engine €500M for failing to comply with multiple injunctions which sought to protect online publishers from abuses of dominance (Google), 13 July 2021, e-Competitions Big Tech & Dominance, Art. N° 107747; French Competition Authority, The French Competition Authority calls for comments on the proposed commitments made by a Big Tech search engine to allay abuse of dominance concerns in the publishing industry (Google), 15 December 2021, e-Competitions Big Tech & Dominance, Art. N° 104579.

[40] See Andreas Reindl, Barbara Monti, The French Competition Authority accepts a Big Tech company's commitments to compensate publishers for the use of journalistic content (Google), 21 June 2022, e-Competitions Big Tech & Dominance, Art. N° 107662; French Competition Authority, The French Competition Authority fines a Big Tech search engine €500M for failing to comply with multiple injunctions which sought to protect online publishers from abuses of dominance (Google), 13 July 2021, e-Competitions Big Tech & Dominance, Art. N° 107747.

proceeding under the German Collecting Societies Act (VGG) at the German Patents and Trademark Office.[41]

The position of press publishers vis-à-vis digital platforms is also a topic of concern outside of the European Union. In 2022, the Competition Commission of India considered that Google abused its dominance through its unilateral and non-transparent determination of ad revenue sharing, as well as by refusing to pay publishers for news snippets.[42] A year earlier, a mandatory code of conduct came into effect in Australia, based on the Australian Competition and Consumer Commission's 2020 recommendations, to address the bargaining power imbalance 'designated' digital platforms have over news businesses. Although the designation happens by the Treasurer, the Australian Competition and Consumer Commission has also enabled collective bargaining by providing exemption notices under competition law. The Australian government indicated that, even in the absence of designation, this code has been a success, because it has prompted Google and Meta to strike several agreements with press publishers.[43]

The Australian experience may be influencing the debate in other jurisdictions. In the UK, press publishers have welcomed the consideration by the legislator of the 'Digital Markets, Competition and Consumer Bill' (DMCC Bill),[44] believing it could be used to create a 'news bargaining' code and thus to impose an obligation on digital platforms to pay for news content.[45] Whether they will get their wish remains to be seen. Either way, the relationship between digital platforms and the press, and between Big Tech and the creative industries more broadly, is likely to continue to play a role in the years to come.

D. Behavioural remedies make headwinds

Gatekeeper positions of Big Tech firms between different services or different markets may be abused, but gatekeeper positions also have the advantage of economies of scale. To dismiss anticompetitive concerns without undermining this advantage, competition authorities frequently welcome behavioural remedies to put an end to investigations. Although behavioural remedies are also applied to anticompetitive activities of firms outside digital markets, the characteristics of the products and business models of Big Tech companies requires a high level of engagement by competition authorities in order to achieve intended

[41] See German Competition Authority, The German Competition Authority secures a licensing deal on behalf of news publishers as part of a now-concluded investigation into the world's largest search engine (Google News Showcase), 21 December 2022, e-Competitions Big Tech & Dominance, Art. N° 110239; German Competition Authority, The German Competition Authority holds consultations on a Big Tech company's proposals for dispelling competition concerns in the press sector (Google News Showcase), 12 January 2022, e-Competitions Big Tech & Dominance, Art. N° 105192.

[42] See Badri Narayanan, Charanya Lakshmikumaran, Aditya Bhattacharya, Neelambera Sandeepan, The Indian Competition Authority orders an investigation into a Big Tech firm for allegedly abusing its dominant position by forcing certain practices on digital publishers (Google / Digital News Publishers Association), 7 January 2022, e-Competitions Big Tech & Dominance, Art. N° 106170.

[43] See the ACCC, 'News media bargaining code' (https://www.accc.gov.au/by-industry/digital-platforms-and-services/news-media-bargaining-code/news-media-bargaining-code).

[44] See footnote 5.

[45] See InPublishing, 'NMA Paper Debunks Myths From Tech Platforms On Payment For Content' (13 June 2023); PressGazette Future of Media, 'ITN boss and Labour minister throw weight behind big tech news payments bill' (5 July 2023); News Media Association, 'Digital Markets, Competition and Consumers Bill'; Public Interest News Foundation, 'Can a UK news media bargaining code serve independent publishers?' (8 March 2023).

outcomes (and avoid unintended harm to incentives to innovate and compete). Competition authorities negotiate with firms on their commitments before they are adopted, and are expected to monitor Big Tech companies' implementation of behavioural remedies.

In the EU, Amazon committed not to use data collected by marketplace sellers or engage in self-preferencing with regards to the Buy Box and Prime.[46] Due to parallel enforcement, Amazon Italy was excluded from Amazon's final commitments to the EU, but similar behavioural remedies were imposed by the Italian NCA.[47] In France, Meta was investigated because it had revoked the "Facebook Marketing Partner" (now "Meta Business Partner") status of a French online advertising company, without providing a convincing reason, as well as rescinding its access to APIs which could be used to improve bidding and track the success of advertising campaigns. The NCA considered that this may have anticompetitive effects in the French market of non-search online advertisement. To put an end to the investigation of NCA, Meta proposed and revised commitments, including making sure that the criteria of access to Meta Business Partner are objective, clear and non-discriminatory.[48] In the same year, 2022, Meta responded to concerns raised by the German NCA under both its abuse of dominance provision and its new Section 19a, by unbundling the usage of social media services and VR headsets.[49] Before Meta's response to the authority, the German NCA had already obtained commitments from Google to give users better control over their data,[50] which is only one of several issues the authority has notified to the company, including Google's practice of offering services for infotainment systems in vehicles as bundles only.[51]

These cases show that, in order to address the concerns of authorities, Big Tech firms may have to offer to change the conditions under which they offer products to customers or final consumers. Behavioural remedies and commitments have an impact on the business models of Big Tech firms and the products offered to consumers. These behavioural remedies are big interventions, because market participants should have the freedom of how to design their products and whether they want to build business partner relationships with others. However, the freedom of business model choice is not absolute: it is protected only in so far it does not significantly harm competition in the relevant market. Authorities may pay particular attention to Big Tech because they may abuse their gatekeeper positions to restrict consumers' choices

[46] See European Commission, The EU Commission accepts the commitments of a Big Tech online marketplace to address concerns over discriminatory practices and its use of non-public data to unfairly bolster its own retail business (Amazon), 20 December 2022, e-Competitions Big Tech & Dominance, Art. N° 110191.

[47] See Italian Competition Authority, The Italian Competition Authority imposes behavioral remedies and fines an e-commerce company over € 1.128 billion for abusing its dominant position in the market for e-commerce logistics services (Amazon), 9 December 2021, e-Competitions Big Tech & Dominance, Art. N° 104554; Geoffrey Manne, Lazar Radic, The Italian Competition Authority issues a record €1.128 billion fine against a Big Tech company for merging its platform marketplace and its distribution operations thereby shutting out rival distributors (Amazon), 30 November 2021, e-Competitions Big Tech & Dominance, Art. N° 106075.

[48] See Andreas Reindl, Barbara Monti, The French Competition Authority accepts commitments from a social media platform to remedy competition concerns over a refusal to provide access to a marketing tool (Meta), 16 June 2022, e-Competitions Big Tech & Dominance, Art. N° 107663.

[49] See German Competition Authority, The German Competition Authority receives a Big Tech company's response that its virtual reality headsets can now be used without an account on its social network (Meta Quest / Meta), 23 November 2022, e-Competitions Big Tech & Dominance, Art. N° 109700.

[50] See German Competition Authority, The German Competition Authority accepts a Big Tech company's commitment to give its users better control over their data (Google), 5 October 2023, e-Competitions October 2023, Art. N° 114496.

[51] See German Competition Authority, The German Competition Authority issues a statement of objections against various practices of a Big Tech company in connection with its automotive services and maps (Google Maps), 21 June 2023, e-Competitions June 2023, Art. N° 112911.

due to limitations of alternative services (e.g., VR headsets sale) in relevant markets or restrict competitors' access to relevant markets (e.g., Amazon's abuse of dual role characteristic to grant itself a self-preference). Application of behavioural remedies – big interventions – aims to stop Big Tech companies' anticompetitive behaviour. In addition, these behavioural remedies are not usually imposed in forms of 'hard' interventions (e.g., penalty). Instead, these behavioural remedies are accepted by competition authorities in forms of commitments, which are proposed and revised by Big Tech firms in negotiations. This kind of soft intervention allows Big Tech firms to propose commitments that have the least impact on their business models.

Where anti-competitive effects flow from the way products or business models are designed, remedies which require changes to these products and business models may be the most appropriate to remedy the harm. This makes the (quasi-)regulatory nature of competition intervention more palpable, raising questions both of the power and role of competition authorities and their relationship with other regulators, as also exemplified by the cooperation need between data protection authorities (regulators) and competition authorities discussed above. [52]

The use of behavioural remedies and commitments is likely to pick up pace, as the reliance on regulation increases, to complement competition law enforcement. With the Digital Markets Act, gatekeepers have to comply with obligations listed in Articles 5-7. Their application does not rely on case-by-case competition law proceedings: instead, obligations under the Digital Markets Act are automatically imposed on Big Tech firms that are recognised as gatekeepers under the Digital Markets Act, although exceptional circumstances may be considered by the Commission on a case-by-case basis according to Article 9 of the Digital Markets Act. Therefore, in the future, we are likely to see more 'behavioural' changes by Big Tech firms, even in the absence of enforcement proceedings, as they adapt their business models to fulfil their obligations under the DMA. Some gatekeepers have indeed already advertised that they may start offering subscriptions alongside their free, ad-supported versions of their services.[53] It remains to be seen how the different initiatives by the gatekeepers will be received by the regulators.

Supervising behavioural remedies is as, if not more, important as proposing them. [54] Behavioural remedies require more significant monitoring than structural remedies. The implementation of behavioural remedies is challenging for competition authorities to supervise,[55] in particular in dynamic markets. This is one of the reasons that Article 26 of the Digital Markets Act grants the European Commission wide-ranging powers to monitor the effective implementation and compliance with the obligations by gatekeepers. It is by no means clear how each obligation will be fulfilled in practice, nor what the impact will be on the way

[52] See Victor-Emanuel Ion, The UK Competition Authority accepts a Big Tech company's commitment in its treatment of third-party cookies (Google Privacy Sandbox), 11 February 2022, e-Competitions Big Tech & Dominance, Art. N° 105665.

[53] 'Facebook and Instagram to Offer Subscription for No Ads in Europe' (30 October 2023), Meta website.

[54] See UK Competition Authority, The UK Competition Authority accepts a Big Tech company's revised offer of commitments relating to its proposed removal of third-party cookies from a browser (Google Privacy Sandbox), 11 February 2022, e-Competitions Big Tech & Dominance, Art. N° 105243.

[55] And may require external assistance: see French Competition Authority, The French Competition Authority accepts an advisory firm as the monitoring trustee to ensure a Big Tech firm complies with commitments (Google / Accuracy), 21 June 2022, e-Competitions Big Tech & Dominance, Art. N° 109133.

consumers and other companies experience the services offered by the gatekeepers. Many questions remain – and only time will tell what these industries will look like a few years from now. When we next look back, we may find that the Decade of the Gatekeeper has become the Decade of the Regulator – and that these products and business models look entirely different as a result.