COMPETITION LAW IN THE DIGITAL AGE

MAY 2024

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FIRST NON-COMPLIANCE INVESTIGATIONS REVEAL DMA ENFORCEMENT PRIORITIES

Following their designation as "gatekeepers" by the European Commission in September 2023, six digital companies had until 7 March 2024 to ensure compliance with the **Digital Markets Act** ("DMA"). The Commission marked the occasion with a series of workshops followed by the launch of five separate non-compliance investigations.

DMA workshops – meaningful dialogue or publicity stunt?
Over the course of a week and a half in early March, the Commission organised workshops where Google, Apple, Microsoft, Meta, Amazon and ByteDance each presented their compliance choices to stakeholders.

Whether the Commission actually intended to draw any conclusions from the workshops is questionable, as the non-compliance investigations were **announced** on 25 March, the Monday after the first week of workshops, but before the last workshop took place (26 March). The investigations are targeted at aspects of compliance measures taken by Google, Apple and Meta, and reveal some of the Commission's key focus areas when it comes to enforcing the DMA.

Restricting business users' ability to distribute and advertise offers
One of the key enforcement areas that emerged from the announcements relates to the anti-steering provisions of Article 5(4) DMA, which requires gatekeepers to allow business users to offer apps through alternative channels. The Commission suspects that Apple and Google may fall foul of these rules by imposing various charges on app developers who distribute apps inside and outside the gatekeepers' ecosystems. The Commission's concerns are similar to some of those raised in the *Apple Music Streaming case*, which **concluded** recently with a EUR 1.8 billion fine for Apple.

Self-preferencing
Google is also being investigated for possibly breaching Article 6(5) DMA, which prohibits gatekeepers from preferencing their own services over those of competitors. The investigation focuses on whether Google's search engine results are skewed in favour of displaying Google's specialised services, such as Flights, Shopping or Maps. Google has taken some steps to address these concerns, including by making its Maps service less accessible via the Google search engine. However, the Commission has questioned the effectiveness of these measures. The Commission announced it was reviewing similar concerns in relation to the Amazon Store, but has yet to open any formal investigation.

Barriers to switching and side-loading
These three investigations relate to the direct effect of gatekeepers' conduct on competing businesses or those that are active downstream. The Commission's fourth non-compliance investigation targets Apple in relation to a possible breach of Article 6(3) DMA, and concerns the direct effect of Apple's practices on end-users of the iOS ecosystem. The Commission is concerned that the design of its web browser choice screen may make it more difficult for end-users to opt for a competitor of Apple's Safari. The Commission is also concerned that Apple may be making it difficult for users to uninstall applications and change other default settings.

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In parallel, the Commission is gathering information to assess whether it should investigate Apple for potential breaches of Article 6(4) DMA, which requires gatekeepers to open up their ecosystems to third-party apps and app stores, and to facilitate interoperability. The behaviour at issue appears to include Apple's new fee structure, which applies different terms to developers who have chosen to distribute apps via third-party app stores, and imposes other terms and conditions for alternative app stores or app downloads directly from the web.

Data protection and privacy concerns

Finally, an investigation into Meta's "pay or consent" model concerns the intersection of competition and privacy laws. Article 5(2) DMA requires gatekeepers to obtain GDPR-compliant consent before combining or cross-using individuals' data across platform services. Meta currently offers a choice between accepting data processing for personalised ads or paying a subscription fee to use platform services like Facebook or Instagram. The Commission argues that Article 5(2) DMA requires gatekeepers to provide a free but "less personalised" version of their services. When the European Court of Justice ("ECJ") **examined** a similar case in 2023, it referred to the possibility of Facebook charging an appropriate fee for providing a service that is not accompanied by data processing operations. However, the European Data Protection Board recently issued an opinion suggesting that in "most cases, it will not be possible for large online platforms to comply with the requirements for valid consent if they confront users only with a binary choice between consenting to processing of personal data for behavioural advertising purposes and paying a fee." It remains to be seen what impact these decisions will have on the Commission's investigation.

Next steps

Article 18 DMA gives the Commission 12 months to conclude the non-compliance investigations, with the Commission expected to share its preliminary findings with the parties within the first six months. The Commission can impose fines of up to 10% of the gatekeeper's total worldwide turnover if it finds any of the gatekeepers in breach of the DMA.

On the horizon

While the Commission's workshops and investigations drew most of the media attention, another notable DMA milestone was reached on 13 May 2024, when the Commission **designated** Booking as a gatekeeper for its online intermediation service Booking.com and in parallel decided not to designate TikTok Ads and X (formerly Twitter) Ads. Booking must comply with its DMA obligations within six months. The Commission has also launched a market investigation to evaluate the rebuttal previously submitted by X that claims its online social networking does not qualify as an important gateway between businesses and consumers despite meeting the DMA's quantitative designation thresholds. The Commission is expected to complete its investigation by October 2024

ADVOCATE GENERAL OPINION IN RESPECT OF ILLUMINA/GRAIL

On 21 March 2024, Advocate General Emiliou delivered an **opinion** inviting the ECJ to set aside the judgment of the General Court ("GC") in the *Illumina/GRAIL* case and to annul the European Commission's decision to review the deal under Article 22 of the EU Merger Regulation ("EUMR"). Should the ECJ agree with the AG's conclusions, the judgment will deal a serious blow to the Commission's strategy to scrutinise below-thresholds deals.

Background

In April 2021, the Commission took the unprecedented step of accepting a referral request from the French Competition Authority to review Illumina's acquisition of GRAIL – a US/US biotech deal which did not qualify for merger control review anywhere in the EEA. It did so after writing to the 27 EU Member States' national competition authorities ("NCAs") in February 2021, inviting them to make a referral under the procedure set out in Article 22 EUMR.

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Article 22 allows EU Member States to ask the Commission to examine a concentration even where the concentration does not satisfy the turnover thresholds under the EUMR if that concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request. The original purpose of Article 22 EUMR was to allow Member States without their own merger control regimes to request that the Commission review deals that could affect competition in those States.

Article 22 has only been used sparingly by the NCAs where it seemed appropriate to delegate their merger review powers to the Commission in cases where the Commission was manifestly better able to review - for example, where it raised pan-European issues. Until Illumina/GRAIL, the Commission's previous practice had been to discourage referrals from EU Member States if they did not have jurisdiction to review the deal themselves.

In July 2022, the GC **dismissed** Illumina's appeal requesting the annulment of the Commission's decision to assert jurisdiction over its acquisition of GRAIL. Illumina appealed the judgment to the ECJ.

AG opinion

In an opinion that is highly critical of both the Commission's expansive interpretation of Article 22 and the reasoning of the GC, AG Emiliou proposed that the ECJ should set aside the GC's judgment and annul the Commission's decision to assert jurisdiction over the deal.

AG Emiliou disagreed with the GC's conclusion that the Commission's interpretation of Article 22 EUMR was justified on "*literal, historical, contextual and teleological*" grounds and that the provision was intended to provide a "*corrective mechanism*" to ensure the effectiveness of the EUMR framework. The opinion notes that the GC's interpretation would, "*in one fell swoop*", significantly extend the scope of the EUMR and allow the Commission to consider nearly all concentrations, regardless of whether they occur in the EU and irrespective of the entities' turnover in Europe. In particular:

- AG Emiliou drew support from the text of Article 22, including the limits on the powers granted to the Commission to take "*only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State*" at the request of which it intervenes, to cast doubt on the GC's conclusion that Article 22 was intended to have a broader corrective function within the internal market.

- Article 22, when considered in its proper context and limited purpose, should be understood in the narrow sense to ensure consistency with the overall logic of the EU merger control framework and general principles of EU law. A broader interpretation would create a jurisdiction "sandwich" whereby the Commission reviews deals above the EUMR thresholds, NCAs review those below which are caught by their own rules, and the Commission sweeps up anything left behind. Such a sandwich seems unlikely to reflect the legislature's intention.

AG Emiliou noted that Article 22 should not be interpreted in such a way as to "*maximise the scope and purpose of the provisions of the EUMR to the point that their reach goes beyond the clear intentions of the EU legislature, upsetting the carefully devised balance it has envisaged between the various objectives*". The opinion states that, while it may be desirable to change the EUMR's current merger review thresholds, this must be the "*task of the EU legislature, not of the Commission*".

In particular, the opinion stressed that the broad interpretation of Article 22 supported by the GC would produce an inefficient or unpredictable legal landscape for merging parties. AG Emiliou was unconvinced by the Commission's contention that legal certainty could still be obtained if the parties bring the merger to the attention of "*those 30 [national] authorities by means of informal notifications*" – in effect defeating the purpose of the one-stop-shop system.

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Implications

While AG opinions are not binding on the ECJ, they are followed in most cases. Should the ECJ decide to follow AG Emiliou's opinion, the Commission's ability to scrutinise transactions that do not meet the EUMR thresholds will be significantly affected. However, the opinion notes that the NCAs may still carry out ex post reviews of below-thresholds deals under the abuse of dominance rules of Article 102 TFEU – a possibility which the ECJ confirmed in its **Towercast judgment** last year.

FRENCH COMPETITION AUTHORITY INQUIRY ON GENERATIVE AI

On February 8, 2024, the French Competition Authority ("FCA") launched an **inquiry** into the competitive functioning of the generative artificial intelligence ("generative AI") sector. This follows its recently concluded cloud sector inquiry and is the latest evidence of the FCA's continued focus on competition in the digital space, which the FCA recently reiterated in the context of its 2024 roadmap.

As part of its inquiry, the FCA will in particular examine the strategies implemented by major digital players to expand into generative AI. This will include issues related to access to cloud infrastructure, data, and a skilled workforce, as well as investments by major digital players in innovative companies specialized in generative AI. The FCA has also launched a public consultation to gather comments from stakeholders.

Key features of the market and key competition risks to be assessed

Among the key features and potential competition risks in generative AI to be examined by the FCA are the following:

- A potentially significant competitive advantage and the control of key inputs (such as data) or adjacent markets (such as cloud services) by incumbent digital operators – with the risk, according to the FCA, that such players could potentially implement practices to consolidate or leverage their current market power upstream in the generative AI value chain to expand in this sector. In particular, the FCA notes that developing generative AI requires:
  - very significant computing power and access to cloud architecture – a sector which the FCA notes is currently highly concentrated around a limited number of players;
  - a large dataset to train foundation models - with the risk that certain leading players could be tempted to restrict their competitors' access to the data indexed on their search engines, reserving it for their own use or establishing exclusive agreements with startups; and
  - a skilled workforce, which could potentially be captured by existing major digital players, who are likely to offer high salaries.
- The vertical integration of certain digital players – with the stated risk that their ecosystem of services could enable these companies to exclude competing foundation models or hinder the entry of companies operating downstream in the generative AI value chain; and
- An active acquisition strategy by existing digital players – including a number of acquisitions of minority stakes which are currently under close scrutiny by several competition authorities: the FCA has stated that it will examine these investments in its advisory role and if necessary make recommendations to better address their potential anticompetitive effects.

Wider regulatory initiatives at national and supra-national level

The FCA's inquiry is part of several other regulatory initiatives to address the development of AI, at both national and supra-national level, including:

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- At the national level, the creation of a "Generative AI Committee" in September 2023, tasked with making concrete proposals to implement the Government's AI strategy, as part of its France 2030 plan.
- At the European level, the adoption of the EU "Artificial Intelligence Act", the first law to regulate AI.
- At a global level, the adoption, in November 2023, of the G7 agreement on Guiding Principles and a Code of Conduct on AI. This also follows the earlier adoption, by the EU and 28 other countries, of the "Bletchley Declaration", in order to develop a shared understanding of AI-related risks and develop a coordinated response to address these.

The results of the FCA's inquiry and any ensuing recommendations will be published in the next few months.

ITALIAN COMPETITION AUTHORITY FINES TIKTOK FOR UNFAIR COMMERCIAL PRACTICE

In March, the Italian Competition Authority ("ICA") imposed a fine of EUR 10 million jointly and severally on three companies of the Bytedance Ltd group –TikTok Technology Limited (in Ireland), TikTok Information Technologies UK Limited (in Britain), and TikTok Italy S.r.l. (in Italy) (together, "TikTok"). The fine was for:

- failing to comply with its policies;
- failing to adequately monitor the content posted by users (especially content that could harm minors and other vulnerable individuals);
- disseminating content likely to endanger the psycho-physical wellbeing of children and adolescents; and
- unreasonably conditioning users to spend more time on the platform by systematically re-proposing content that exploits the vulnerability of certain categories of users.

The ICA found TikTok liable for disseminating content – such as the 'French scar' challenge[1] – likely to threaten the psycho-physical wellbeing of users, especially minors and other vulnerable individuals. The ICA also found that TikTok did not take adequate measures to prevent the dissemination of that content, thus not fully complying with its guidelines, which it published to reassure users that the platform is a 'safe' space. The ICA also stated that the guidelines are applied without adequately accounting for the vulnerability of adolescents, whose cognitive mechanisms can make it difficult for them to distinguish reality from fiction and lead them to emulate group behaviour.

The content is disseminated through a recommendation system based on algorithmic user profiling, which constantly selects videos to show users in the 'For You' and 'Followed' sections, with the aim of increasing user interaction and time on the platform so as to boost advertising revenue. The ICA therefore found that the potential harm to minors and other vulnerable individuals is due to the recommendation of potentially harmful videos to a large number of users. Furthermore, the ICA found that sending recommendations of targeted content by default restricts users' freedom of choice.

Finally, the ICA found that TikTok had failed to implement appropriate monitoring mechanisms to supervise content published by users in accordance with its due diligence obligation, especially in relation to particularly vulnerable users such as minors.

1) The French scar challenge relates to the dissemination of videos of children teaching themselves how to obtain a red mark on their cheekbone, which is visible and long-lasting, as if it were a large scar.

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WHERE SPORTS MEETS MONEY MEETS ANTITRUST– THE FCO STRIKES TWICE

Recently, antitrust courts and authorities have frequently chosen sports as their playing field. The German FCO, in two recent announcements, demonstrated that the ball for governing the interplay between antitrust law and the sports business is not only in the EU's court, but also in the Member States' courts

Paris 2024: More Self-Marketing Options for Team Germany

Athletes are the central players of the Olympics, but do not directly profit from the advertising revenues of the International Olympic Committee (IOC) and even face strict rules for self-marketing. This situation had, already in 2017, caused the FCO to initiate administrative proceedings against the IOC and the German Olympic Sports Confederation (DOSB) on suspicion of abuse of dominance (on the market for the organization and marketing of the Olympic Games). As a result, the IOC and the DOSB agreed to relax the advertising restrictions in Rule 40 of the Olympic Charter, and, to this end, adopted binding guidelines for German athletes.

The FCO has since then monitored the situation, and the DOSB and the IOC have now, in consultation with the FCO, **updated** the guidelines applying to advertising activities of members of Team Germany. The updated guidelines allow for more self-marketing options. For instance, German athletes will now be able to record short videos with their smartphones at Olympic venues or during the opening and closing ceremonies and share them on their social media accounts, although the videos as such may not be used for advertising purposes.

Bundesliga Broadcasting Rights: Preliminary Approval and Looming Conflict

The FCO has preliminarily **approved** the new marketing model presented by the German Football League (DFL) for the Bundesliga and Bundesliga 2 games for the period 2025-2029. According to the FCO, the DFL's joint sale of the broadcasting rights qualifies as an agreement (between the clubs) restricting competition under both Article 101 TFEU and Sect. 2 ARC, but an exemption from the general ban is possible if the agreement results in advantages for which the restraint is indispensable (such as by enabling fans access to league-wide products).

The DFL updates its marketing model every four years. The new model, now preliminarily affirmed by the FCO, auctions live broadcast rights in four pay-TV packages. In addition, there are separate packages for highlights on free-tv, enabling fans to follow the action without live broadcast subscriptions, which was an "important" aspect to the FCO.

Interestingly from an antitrust law perspective, the FCO, in a major shift from previous practice, abandoned the no-single-buyer-rule, which previously aimed to level the playing field by preventing a single broadcaster from acquiring all packages, thereby securing exclusive live rights to all Bundesliga games. The FCO explained that this change responded to new market circumstances, as the market had become much more dynamic, referring to companies such as Amazon and DAZN. The FCO also pointed out that the packages allowed competitors with limited financial resources to acquire broadcasting rights.

The preliminary decision provides only temporary certainty for the DFL amidst the ECJ's *Super League* ruling (C-333-21), which also considered issues relating to the joint selling of football media rights. The FCO has noted that it will assess whether the judgment requires them to adapt their approach to reviewing the broadcasting rights in the future.

However, the FCO may have to deal with the DFL's broadcasting rights much more urgently: In April, DAZN complained to the FCO that the DFL had rejected their offer for one of the major pay-TV packages, which they claim was financially superior to other bids. The DFL has since halted the entire auction process. Another consequential antitrust decision in the field of sports might be just around the corner. Game on.

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NO-POACH AGREEMENTS UNDER THE MICROSCOPE

Across Europe, national competition authorities (NCAs) are increasingly scrutinising no-poach agreements and wage-fixing agreements. In addition, the matter is also a focus of the European Commission, who recently published a **Competition Brief on Antitrust in Labour Markets**, detailing its understanding of the application of the European competition law framework to no-poach and wage-fixing agreements.

No-poach agreements entail collusion among employers to refrain from hiring each other's employees. The nature of the agreement could be horizontal, vertical or even hub-and-spoke. Under EU competition law, naked no-poach agreements could be either classified as a 'by object' or 'by effect' restriction of competition in light of the underlying relationship between the undertakings involved. In its recent **policy brief** on the matter, the European Commission noted that no-poach agreements are most likely to be qualified as restrictions by object and are unlikely to meet the requirements for an exemption under Article 101(3) TFEU. Moreover, according to the European Commission, no poach-agreements would be deemed as restrictive even if their respective parties do not compete in any downstream product markets, as long as they compete for the same labour source. In the context of mergers and acquisitions, no-poach agreements must be reasonable, limited to the product and geographic scope of the business being transferred and limited in time to be objectively justified.

No-poach agreements have become a clear enforcement priority, triggering **dawn-raids** by the European Commission and ongoing investigations by various national authorities. In recent years, high-profile cases in countries such as **Poland**, **Belgium**, **Romania** and **Hungary**, as well as increased interest from the **UK's Competition and Markets Authority (CMA)**, highlight NCAs' determination to tackle anti-competitive labour market practices.

The Portuguese Competition Authority (AdC, by its Portuguese acronym) has been particularly active in combatting this type of collusion. In 2021, it published **guidance** on the concepts of no-poaching and wage-fixing, as well as when they may lead to sanctions, and emphasised the negative effects of no-poach agreements on the labour market.

The AdC has issued some important decisions in recent years. For instance, in 2022, it addressed no-poach agreements **in the professional football industry**. The AdC fined 31 sports clubs a total of approximately EUR 11.3 million for entering into agreements that prohibited clubs from hiring players who had unilaterally terminated their contracts for Covid-19-related reasons.

More recently, in January 2024, the AdC **fined** two multinational companies in the IT consultancy sector. According to the AdC, these companies engaged in anticompetitive practices in the labour market, specifically they shared supply sources for the provision of IT consultancy services in Portugal from 2014 to 2022. Since 2023, the two sanctioned companies had been cooperating with the AdC by providing evidence through the leniency programme. The companies ended up paying reduced fines of EUR 1,323,000 and EUR 2,481,000 respectively. A third company was **fined** EUR 278,000 in April 2024. The remaining companies who were allegedly part of the cartel are still under investigation in the ongoing case.

The focus on competition law issues in labour markets is a relatively new practice for competition authorities in Europe. Therefore, every new decision provides valuable insights into how to interpret and apply competition rules in this area. As the ongoing investigations unfold, they will likely set precedents for future enforcement actions, thereby shaping the broader regulatory framework in this area.

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