

Competition policy in the digital era: a comparative guide

A MULTIJURISDICTIONAL OVERVIEW – 20 JUNE 2019

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From the Editors

Over the last few years, many competition authorities around the globe have been grappling with the same question: the extent to which current competition laws and policies are appropriate for protecting competition in the digital era. The rapid growth and increasing importance of digital platforms, Big Data, FinTechs and e-commerce more generally has meant that this has become an increasingly pressing question, with different jurisdictions taking different approaches. This comparative guide seeks to summarise the key policies and decisions of some of the leading competition authorities around the world, and to identify their key potential practical implications.

This guide summarises different authorities' approaches to anti-competitive agreements and cartels, abuse of dominance, merger control and other wider themes, as well as providing links to some of the key related documents and cases in these areas.

There are a number of common themes and approaches between competition authorities, which include:

- an increased focus on digital platforms and the collation of, and access to, data;
- some jurisdictions have changed, or considered changing, their merger control regimes to account for the impact of the digital era and to capture future key digital mergers that might otherwise fall outside current filing requirements;
- many jurisdictions have launched detailed market studies, or commissioned expert reports, relating to the digitisation of certain sectors and, more generally, the extent to which current competition laws and policies remain appropriate; and
- in general, many authorities consider that the existing framework of competition law continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era. However, some also consider that a "rethinking" of the traditional tools of analysis and enforcement is required to adapt to the challenges posed by the digital economy.

We have been advising clients in a range of sectors on these issues for a number of years. If you have any questions, please feel free to get in touch with your usual Ashurst contact, the editors of this guide listed above, or any of the individuals listed at the end of this guidance.



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Australia

1. Current overarching view

The Australian Competition and Consumer Commission (“ACCC”) is increasingly focusing on digital platforms, and competition and consumer law issues in the digital economy and traditional markets affected by digital disruption.

Notably, the ACCC is currently in the final stages of its Digital Platforms Inquiry, which is examining the impact of search engines, social media platforms and other digital content aggregators on competition in media and advertising services markets. The DPI commenced in December 2017, and a [Preliminary Report](#) was published in December 2018. A Final Report will be issued to the Treasurer by 30 June 2019, and is expected to be published shortly thereafter. In the Preliminary Report, the ACCC made 11 preliminary recommendations spanning competition law and policy, consumer law and policy, as well as privacy and media content policy. The recommendations include, relevantly, proposed amendments to merger control provisions, restrictions on default settings for browsers and search engines, the introduction of a new regulatory authority to monitor, investigate and report on (a) whether digital platforms are engaging in discriminatory conduct in their supply of advertising, and (b) the ranking of news content by digital platforms, a review of media regulatory frameworks to “level the playing field” between traditional media and digital platforms, and changes to Australia’s privacy laws.

2. Key documents

The summary below is based on a number of sources including:

- the ACCC’s Digital Platforms Inquiry [Preliminary Report](#);
- the [Address](#) given by ACCC Chairman, Rod Sims, to the 2019 Competition Law Conference on 25 May 2019; and
- the ACCC’s [2019 Compliance and Enforcement Priorities](#).

3. Anti-competitive agreements / cartels

Increasing focus on algorithms: To date, the ACCC has been more active in pursuing digital platforms for contraventions of the Australian Consumer Law. For example, in August 2018, the ACCC commenced proceedings against Trivago alleging it made misleading hotel pricing representations by presenting its website as an impartial and objective price comparison service, when in fact it prioritised advertisers who were willing to pay the highest cost-per-click to Trivago. However, the ACCC is also alive to the competition law risks that can arise from the use of pricing algorithms. ACCC Chairman, Rod Sims, has [acknowledged](#) that pricing algorithms may be used to effectively engage in and sustain collusion, and has stated that *“In Australia, we take the view that you cannot avoid liability by saying ‘my robot did it’”*. Sims has expressed confidence that, with the introduction of the prohibition on “concerted practices” (and the amended misuse of market power prohibition) in November 2017, Australia’s competition laws will be able to deal effectively with collusion between AI robots. The ACCC’s investigations in this area are supported by its Data Analytics Unit, and it is in active engagement with other competition authorities about issues arising from algorithms.

Price parity clauses: The ACCC has actively pursued price parity clauses in online platforms’ contracts. In 2016, the ACCC investigated vertical restraints imposed by online travel agents, Expedia and Booking.com, on Australian accommodation providers restricting them from offering better room rates or different inventories to other online agents and through offline channels. Expedia and Booking.com agreed to amend their contracts to allow accommodation providers to offer lower rates through telephone bookings and walk-ins, and to offer special rates and deals to customer groups, in addition to offering deals via Expedia and Booking.com.

Collective bargaining by competitors as a means to counter digital giants' market power: In the context of the Digital Platforms Inquiry, the ACCC has suggested that traditional businesses might explore collective bargaining in negotiations with digital giants (noting that in Australia, it is possible to obtain immunity for collective bargaining conduct through the authorisation or, for small businesses, notification processes, provided that likely public benefits will outweigh likely detriments).

However, to date, this avenue has not been successfully pursued. In 2017, the ACCC denied authorisation to Commonwealth Bank of Australia, Westpac Banking Corporation, National Australia Bank, and Bendigo and Adelaide Bank (the “Banks”), who had sought to collectively bargain with Apple for access to the Near-Field Communication (“NFC”) controller in iPhones and reasonable access terms to the App Store, and collectively boycott Apple Pay. The Banks claimed that access to the NFC controller would enable them to offer their own integrated digital wallets to iPhone customers in competition with Apple’s digital wallet, without using Apple Pay. Following lengthy submissions by the Banks and Apple, including detailed reports by their economists, the ACCC decided that it was not satisfied that the likely benefits from the proposed conduct outweighed the likely detriments. The ACCC accepted that Apple providing the Banks access to the iPhone NFC controller would likely lead to increased competition in mobile payment services (a significant public benefit), but concluded that this would be outweighed by the distortion of competition in other markets, including the impact on Apple’s current integrated hardware-software strategy for mobile payments and operating systems, and its ability to compete with Google.

4. Abuse of dominance

Need for ‘ex ante’ regulation and / or pro-active enforcement: There is current debate about whether the provisions of the Competition and Consumer Act 2010 (the “Act”) and the tools available to the ACCC to investigate and enforce the Act are sufficient to deal with digital platforms’ conduct, given the fast-moving nature of digital platforms’ markets and the slow nature of competition law enforcement proceedings. In its Digital Platforms Inquiry Preliminary Report the ACCC highlighted the risk of vertically integrated digital platforms favouring their own business interests in the operation of their advertising and ad tech services, the lack of transparency about digital platforms’ algorithms, and the risks that favouring which hinders competition may go undetected.

The ACCC has made a preliminary recommendation that a regulatory authority be tasked with monitoring, investigating and reporting on whether digital platforms which are vertically integrated and meet a set threshold (suggested Australian revenue of more than AU\$100 million p.a.) are engaging in discriminatory conduct (including – but not limited to – conduct which may be anti-competitive) by favouring their own business. Digital platforms meeting these criteria would be required to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers. The ACCC appears to be envisaging more pro-active monitoring of digital platforms (and if appropriate, enforcement, or recommendations to Government), under existing substantive provisions of the Act – rather than the introduction of new competition law rules for digital platforms. It is uncertain whether this preliminary recommendation will be retained (or modified in some way) in the ACCC’s Final Report.

Some stakeholders have suggested that the ACCC’s preliminary recommendation does not go far enough, and that ex ante regulation of digital platforms with substantial market power should be introduced, such as minimum criteria or standards covering interoperability, non-discrimination obligations and transparency, which would apply to their terms of service, or the introduction of an access regime (such as the regimes applicable to essential services).

Platforms facing greater degree of scrutiny: In a recent speech, ACCC Chairman, Rod Sims, spoke about the challenges in analysing the competitive effects of conduct of multi-sided platforms, commenting on the tendency for platform markets to tip to “winner-takes-all”, the “unusual” pricing (where often services are provided to users for “free”), and the implications of cross-side network effects (or indirect externalities) in considering firms’ conduct and incentives. Sims noted “We often take a deeper look at the conduct of platforms where similar conduct by another business may not receive the same level of scrutiny”, but warned about attempts to use competition law to solve all digital platforms issues.

5. Merger control

Proposal to introduce new merger factors: In its [Digital Platforms Inquiry Preliminary Report](#), the ACCC acknowledged that a key concern in fast moving markets (or those involving emerging technologies) is the removal of potential competition through the acquisition of nascent competitors. Acquisitions that involve increased access to data by firms that already have access to vast troves of data, and provide them with a competitive advantage, are also of concern. The ACCC has recommended that the merger factors in Section 50(3) of the Competition and Consumer Act 2010 be amended to include:

- the likelihood that an acquisition would result in the removal of a potential competitor; and
- the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.

These factors can already be taken into account in assessing whether a merger is likely to substantially lessen competition, so it is unclear whether the introduction of these new factors will substantively affect merger review in Australia. The ACCC has indicated that it intends to test with greater rigour the removal of potential competition when considering mergers by large existing players.

In a recent [speech](#), ACCC Chairman, Rod Sims, questioned the adequacy of the forward-looking substantial lessening of competition test that is applied in merger analysis in Australia. The test has been interpreted by the courts as meaning there is a “real chance” that the proposed merger will have the likely effect of substantially lessening competition in a market. Sims said “The question is whether this is sufficient to capture acquisitions where the likelihood of a lessening of competition may be low or uncertain, but if the acquisition does lessen competition, the lessening is likely to be very substantial indeed.” Sims expressed the view that “if the prospect that the target will become an effective competitor is small, but the potential increase in competition and consumer welfare is large, greater weight should be put on the potential for competition.”

Compulsory notification of proposed acquisitions by key digital platforms: The ACCC also proposes, as a preliminary recommendation in its DPI Preliminary Report, to request that key digital platforms (principally, Google and Facebook) provide it with advance notice of the proposed acquisition of any business with activities in Australia, and give it sufficient time to review the proposed acquisition.

6. Other

Consumer Data Right: The ACCC was appointed as the lead regulator for the new “Consumer Data Right”, which is proposed to be rolled out on a sector-by-sector basis, commencing with “Open Banking” from July 2019 (assuming the passage of enabling legislation), and followed by energy and telecommunications, before being extended across the economy. The Consumer Data Right will enable consumers to require suppliers in covered sectors to disclose data relating to the consumer to the consumer or to accredited persons, and enable any person to access information in covered sectors that is about goods or services and does not relate to any identifiable, or reasonably identifiable consumers, thus creating more choice and competition (for more information see our [May 2018](#) and [September 2018](#) Digital Economy alerts). The ACCC is responsible for publishing Consumer Data Right Rules, setting accreditation criteria and taking enforcement action.

Data privacy issues: The ACCC’s 2019 enforcement priorities include an emphasis on consumer issues arising from the collection and use of consumer data by digital platforms. In particular, the ACCC is seeking greater transparency of data practices, including in advertising and subscription services on social media platforms. In its [Digital Platforms Inquiry Preliminary Report](#), the ACCC has made several preliminary recommendations regarding privacy law reform, including strengthening notification and consent requirements, and increasing the penalties for breach.

Belgium

1. Current overarching view

In contrast to other National Competition Authorities, the Belgian Competition Authority (“BCA”) has been relatively quiet in publicly addressing issues relating to the application of competition law to digital markets. In particular, it has not published any policy papers on this topic, nor did it mention the digital economy sector as an enforcement priority in its [2019 priority policy note](#). A recent speech by the President of the BCA (Jacques Steenbergen) published in [CoRe](#) suggests that this might be due to the lack of coherent guidance at European Union level. He pointed out that competition enforcers face the challenge of taking swift decisions in this fast-moving sector and also made clear that “[s]ome challenges of the digital economy can be addressed more effectively by regulation, if only because regulations apply erga omnes [i.e. to everyone]. See eg the rules on geo-blocking, roaming and interchange fees”.

2. Key documents

The summary below is based on a number of sources including:

- The BCA’s draft guidelines on information exchange (September 2018), in [French](#) and [Dutch](#);
- The BCA’s conclusions on its [review of Belgian merger control notification thresholds](#) (May 2017); and
- the BCA’s [priority policy note](#) (2016).

3. Anti-competitive agreements / cartels

Price comparison tools: In its draft guidelines on information exchange published in September 2018, the BCA indicates that as a general rule, price comparison sites improve competition. The site administrator should nonetheless ensure that objective criteria are in place to select the prices displayed and that information is not misleading. Echoing the judgment of the German Federal Court of Justice in the [ASICS](#) case, the BCA also makes clear in its draft guidelines that per se prohibitions on the use by retailers of price comparison engines will infringe competition law.

4. Abuse of dominance

No enforcement so far: Whilst the BCA indicated in its [2016 priority policy note](#) that it “will continue to draw its attention to the maintenance of effective competition within the sector of the media and the digital economy, in particular as regards consumer access to content, regardless of platform”, no abuse of dominance case has so far been opened in the digital economy context. In April 2012, the BCA’s predecessor decided to take [no further action](#) in relation to the complaint submitted by Dialo against Google alleging discriminatory treatment when displaying Dialo’s websites on Google’s search engine results pages. The BCA stressed in particular that it might not be the best-placed authority to tackle such issues (noting that the algorithm used by Google to determine the order of search results on Google’s results page was not specific to Belgium and that the European Commission had opened a number of investigations against Google in 2010), and that an investigation would require significant resources, which the BCA did not have available.

New focus on platforms following changes to Belgian rules on abuse of dominance? In March 2019, legislative changes were adopted in Belgium that extended the prohibition on abuse of a dominant position to include abuse of ‘economic dependence’, targeted at companies that can be regarded as indispensable commercial partners for other companies (see further our [April 2019 Newsletter](#)). Speaking to [GCR](#), Jacques Steenbergen (President of the BCA) stated that the recent development of internet platforms was one of the main factors which convinced him of the need to include this new provision in Belgian competition law. This notion of “relative dominance” has also been gaining traction elsewhere, amidst suggestions that it may well be the best-suited concept to tackle abusive conduct on digital platforms. In particular, the German Federal Cartel Office made use of this concept in the [HRS](#) and [Booking.com](#) hotel reservation platform cases to prohibit these companies from including ‘best price’ clauses in their contracts (see further the Germany section of this briefing). It remains to be seen whether this new concept will be used by the BCA in the future to tackle competition issues relating to platforms.

5. Merger control

No change to the jurisdictional thresholds: In 2017, the BCA undertook a [review of the merger control jurisdictional thresholds](#) applicable in Belgium. It acknowledged that jurisdictional thresholds exclusively based on turnover may not capture so-called “killer acquisitions” (i.e. the acquisition of small start-ups by large platforms such as Google/Facebook, which do not trigger a merger filing due to low/no turnover, but which may have a negative impact on competition), and noted that other countries (such as Germany) were reviewing their notification thresholds in this context. However, the BCA concluded that it was not necessary to amend the jurisdictional thresholds in Belgium at this stage.

6. Other

Enforcement by the Data Protection Authority: The Belgian Data Protection Authority has been investigating Facebook since [2015](#) in relation to the way it processes personal data through cookies, social plug-ins and pixels. An appeal against the [judgment](#) ordering Facebook to stop tracking and recording the browsing behaviour of Belgian citizens until it brings its practices in line with Belgian privacy legislation is currently pending, and several [questions](#) have been referred to the Court of Justice of the European Union. These proceedings echo Jacques Steenbergen’s statements that regulation may be a better tool to tackle digital economy issues and contrasts with the German Federal Cartel Office’s approach in the recent Facebook case, where the competition authority applied data protection principles in the context of abuse of dominance under German law (see further the Germany section of this briefing).

European Union

1. Current overarching view

The existing framework of EU competition law continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era. However, a “rethinking” of the traditional tools of analysis and enforcement is required to adapt to the challenges posed by the digital economy.

2. Key documents

The summary below is based on a number of sources including:

- various European Commission (“Commission”) policy papers, comments and decisions (referred to below); and
- the [“Competition Policy for the digital era”](#) report of 4 April 2019 (the “EU Report”), commissioned in March 2018 by the Commission from three special advisers on the future challenges of digitisation for competition policy. It should be noted that the EU Report reflects the recommendations of its authors rather than the Commission’s policy. Commissioner Vestager has stated that the Commission will take some time to consider the EU Report before reaching its own conclusions.

3. Anti-competitive agreements / cartels

Algorithmic pricing is a “hot topic” in EU competition policy: Whilst the EU Report does not expressly consider the debate around the application of competition law to algorithmic pricing, the Commission’s interest in this area is clear from other sources.

- The Commission’s 2017 [e-commerce sector inquiry](#) identified that two-thirds of retailers who track competitors’ prices use automatic systems to do so, with most of those also using software to adjust prices automatically. Speaking at a conference in Berlin in March 2017 Commissioner Vestager acknowledged the risk that such pricing algorithms may be used to make price-fixing agreements more effective, and indeed to facilitate collusion. These issues were highlighted again more recently by Szilvia Szekely of DG COMP at an [ICN Cartel Working Group webinar](#) held on 16 January 2019 on digital cartels and algorithms.
- These concerns have already started to materialise in cases being dealt with at EU level, and there is a continuing debate amongst academics and practitioners as to how best to address the potential concerns. In July 2018, in the [Asus, Denon & Marantz, Philips and Pioneer](#) case, the Commission referred to the impact of pricing software/algorithms for the first time in relation to an EU antitrust infringement decision, imposing significant fines on four consumer electronics manufacturers for fixing online resale prices using pricing software (see our previous [newsletter article](#)). Whilst the decision did not appear to condemn the algorithms themselves, the Commission noted that the use of pricing algorithms that automatically adapt retail prices to those of competitors can increase the impact of resale price maintenance restrictions on overall online prices. The use of pricing software has also been considered by the ECJ: in a request for a preliminary reference in the [E-TURAS](#) case (2016), the ECJ held that a form of “hub and spoke” cartel was created where restrictions on maximum discounts were programmed into online booking system software (E-TURAS) used by Lithuanian travel agencies, and a system notice regarding the restriction was sent via the internal E-TURAS messaging system to travel agencies using the booking system.

- With regard to the risk that pricing algorithms could themselves fix prices, Commissioner Vestager has repeatedly emphasised the importance of ensuring “antitrust compliance by design”, by building pricing algorithms in a way that does not allow them to collude (for example, in terms of the algorithms colluding to set prices). In an [interview](#) in September 2018, she made clear her view that a company which uses an algorithm must take responsibility for how it behaves, stating that businesses that use algorithms should “*remember to send them to law school before they let them loose*”. This followed on from remarks made in a speech at a conference in Berlin in March 2017, when she emphasised that “*what businesses need to know is that when they decide to use an automated system, they will be held responsible for what it does. So they had better know how that system works.*”

Online sales restrictions: Following on from the Commission’s [e-commerce sector inquiry final report](#) in 2017, online sales restrictions – in particular online sales bans and “geo-blocking” (i.e. the use of technology to limit access to online interfaces by customers from other EU Member States wishing to engage in cross-border transactions) – remain an important area of focus for the Commission.

- With regard to “**geo-blocking**” and **restrictions on cross-border sales within the EU**, the Commission is taking a two-pronged approach, through (a) the general [Geo-Blocking Regulation](#), which entered into force on 3 December 2018 and prohibits restrictions on online cross-border sales within the EU (including through unilateral conduct by non-dominant companies) and the differential treatment of customers based on place of residence, nationality or place of establishment; and (b) increased enforcement of the competition rules prohibiting agreements which restrict cross-border sales within the EU in the e-commerce context.
- For example, in December 2018 the Commission [fined](#) clothing company Guess €40m for breaching competition law by restricting authorised retailers from advertising online and selling cross-border to consumers in other Member States, and in March 2019 it [fined](#) Nike £12.5m for restricting cross-border and online sales of football merchandising products. Similar investigations concerning alleged geo-blocking involving Universal Studios and Sanrio are ongoing. In March 2019, the Commission announced that it had accepted [commitments](#) offered by Sky and a number of Hollywood studios to address competition concerns relating to contractual clauses preventing the cross-border provision of pay TV services.
- With regard to **online sales bans more generally**, the ECJ clarified in the [Coty](#) decision that, in the context of a selective distribution system, restrictions preventing authorised distributors from selling products on third-party platforms such as Amazon (so-called “marketplace bans”) may be permissible where they are necessary to preserve a luxury image (see our previous newsletter article). However, in the case of non-luxury goods, an outright ban on online sales will amount to an illegal restriction of competition law (as seen in the Pierre Fabre case, which was distinguished in Coty). The precise delineation between permissible and impermissible restrictions in this context has attracted a lot of debate. In April 2018, the Commission published a Competition Policy Brief setting out its views on marketplace bans following the Coty decision, in which it concluded that marketplace bans (unlike outright bans on online selling) are not hardcore restrictions regardless of product category (see our previous newsletter article).

4. Abuse of dominance

Platforms: The market power enjoyed by large digital platforms has attracted considerable attention from the European Commission. Speaking at the OECD conference on 3 June 2019, Commissioner Vestager warned in particular against competition risks posed by big digital platforms that form “the centre of large empires”, offering a variety of seamlessly linked products and controlling major ecosystems.

The [EU Report](#) specifically makes a number of observations in relation to digital platforms. It states that there may only be room in the market for a limited number of platforms but that competition “for” the market must be protected, as well as competition “in” the market (i.e. competition on a dominant platform). The EU Report suggests a number of potentially controversial adjustments to existing competition law concepts and methodologies to address these challenges:

- **Market definition vs theories of harm:** competition authorities should place less emphasis on analysis of market definition (due to the rapidly evolving and complex nature of digital market boundaries), and more emphasis on theories of harm and identification of anti-competitive strategies;
- **“By object” abuses:** strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented “consumer welfare” gains, even where consumer harm cannot be precisely measured due to uncertainties around analysis of effects (effectively treating such strategies as “by object” abuses);
- **Burden of proof:** enforcement in digital markets should err on the side of disallowing potentially anti-competitive conduct, and the burden of proof should be lowered or even reversed in some circumstances, requiring incumbents to demonstrate the pro-competitiveness of their conduct;
- **Platforms’ “regulatory power”:** dominant platforms, in particular marketplaces, have “regulatory power”, in the sense that they set the rules through which their users interact. As such they have a responsibility to ensure that their rules do not impede free, undistorted and vigorous competition without objective justification; and
- **“Self-preferencing”:** intervention may be necessary wherever “self-preferencing” conduct by a dominant platform (i.e. giving preferential treatment to its own products or services when they are in competition with products and services provided by other entities using the platform) is likely to result in a leveraging of market power which is not justified by a pro-competitive rationale.

Data: The [EU Report](#) also makes the following observations in relation to data:

- **Assessment of market power:** any discussion of market power should analyse, case-by case, the access to data available to the dominant firm but not to competitors, and the sustainability of any such differential access to data;
- **Data sharing and data pooling:** data sharing and data pooling arrangements can produce significant efficiencies, but may also raise important competition concerns. A scoping exercise is needed to provide more guidance, but a block exemption regulation in relation to such arrangements may be appropriate in the future; and
- **Access to data:** granting access to data under the “essential facilities” doctrine is not always the best tool to deal with data requests by claimants who pursue business purposes that are essentially unrelated to the market served by the dominant firm (such as access to data for the purpose of training AI algorithms for unrelated purposes). Granting access to data via sector-specific regulation may be more appropriate in some cases.

Preliminary inquiry into Amazon’s use of third-party data: Like a number of national competition authorities (see for example the Germany and Spain sections of this briefing), the Commission has been carefully considering Amazon’s dual role as both a retailer and a platform/marketplace provider. In September 2018, the Commission launched a preliminary inquiry into Amazon’s use of third-party data on its platform, and the possibility that it can hamper sellers competing with its own retail service. Questionnaires were sent out to over 1,500 merchants that use Amazon, and a decision as to whether to open a formal investigation is expected in the next few months.

Break-up of “tech giants” considered a last resort: Commissioner Vestager has expressed doubts as to whether the break-up of “tech giants” (such as Google, Facebook and Amazon) being proposed by Elizabeth Warren and others in the USA is the right way to deal with the competition challenges posed by these companies (see further the USA section of this briefing). In May 2019, she was [reported](#) to have told a conference that this approach “would be a remedy of very last resort” for the European Commission, which “would keep us in court for maybe a decade.” She suggested that it would be “much more direct and maybe much more powerful to say we need access to data.”

5. Merger control

Too early to change EUMR: In 2016, the Commission launched a [consultation](#) to evaluate various procedural and jurisdictional aspects of EU merger control. This included considering whether the filing thresholds should be changed to address challenges posed by acquisitions in the digital field. The Commission's formal response to that consultation exercise has not yet been published, but the EU Report considers the same question and concludes that it is too early to change the jurisdictional thresholds of the EU Merger Regulation at present. However, it recommends that this option should remain under review, whilst monitoring the performance of the transaction value-based thresholds recently introduced in some EU Member States (e.g. Germany and Austria). This is largely consistent with the [consultation responses](#) received by the Commission in 2017. The Commission continues to consider the possibility of such changes. In a speech on 18 June 2019 (see our [summary](#)), echoing the EU Report, Commissioner Vestager opined that it is too early to change the existing EUMR's thresholds, that the experience of Germany and Austria should be monitored and that, as shown by recent precedents (namely [Apple's acquisition of Shazam](#) and [Facebook's acquisition of WhatsApp](#)), the EUMR's referral system may well provide an adequate and sufficient solution.

New theories of harm?: The [EU Report](#) concludes that the "significant impediment to competition" test remains a generally sound basis for assessing mergers in the digital economy. However, the EU Report's authors believe that there is a need to revisit the substantive theories of harm to properly assess cases where a dominant platform and/or ecosystem acquires a target with a low turnover but a large and/or fast-growing user base and a high future market potential.

Reversal of burden of proof for "killer acquisitions"?: The [EU Report](#) recommends that in such cases competition authorities should consider whether the acquisition is part of a possible strategy against partial user defection from the ecosystem ("killer acquisitions"), and if so, require the parties to bear the burden of showing that adverse effects on competition are offset by pro-competitive efficiencies (although it is emphasised that this should not be seen as creating a presumption against the legality of such mergers).

6. Other

Foreign Direct Investment ("FDI") Screening Regulation: In addition to competition-related merger control rules, many EU Member States are considering adopting or enhancing foreign investment rules. The EU-level [FDI Screening Regulation](#) adopted in March 2019 will introduce minimum requirements for FDI screening mechanisms implemented in EU Member States with effect from 11 October 2020 (see our previous [newsletter article](#)). When determining whether FDI is likely to affect security or public order, the Regulation provides that the Commission and EU Member States may take into account the potential effects of the FDI on critical technologies and dual-use (i.e. civilian and military) items, including artificial intelligence, robotics, cyber security, quantum and nuclear technology and nanotechnology. Any investment or acquisition of EU-based technology companies is therefore increasingly likely to require assessment of applicable FDI regimes in addition to "traditional" merger control rules.

EU transparency obligations for online platforms: in [June 2019](#), the European Council adopted new [rules](#) aimed at providing more transparent terms and conditions for businesses using online platforms and effective possible remedies when these terms and conditions are not met. The measures set out include requiring online platforms to use plain and intelligible language in their terms and conditions, clearer communication between the online platform and its business users, and swift internal systems for handling complaints. The [regulation](#) covers online market places, online software application stores, social media and search engines, irrespective of their place of establishment, provided that they serve businesses established within the EU and offer goods or services to consumers who are located within the EU.

France

1. Current overarching view

Competition issues relating to the digital economy are among the priorities of the French Competition Authority (“FCA”). According to its President, there is no need to change existing competition law rules to address the new challenges of digital markets. However, the FCA has made clear that a holistic approach is required, involving e.g. data protection, consumer law, prohibition of unfair trade practices and coordination between various different regulators. Whilst the FCA’s decisional practice in the digital sector is still developing, over the past four years, the FCA has published several studies and opinions in this area, and is currently working with the German Federal Cartel Office (“FCO”) on a joint report on the implications of algorithms for competition law enforcement. As illustrated by the work recently undertaken by the FCA in the online advertising sector, such studies and opinions may be the prelude to formal investigations.

2. Key documents

The summary below is based on a number of sources including:

- the [report](#) of the French Council of Economic Analysis (“CAE”) on competition and commercial policy reform proposals (16 May 2019) (French only, [summaries](#) in German and Spanish);
- the FCA’s [opinion](#) on data processing in the online advertising sector (6 March 2018);
- the FCA/FCO joint [report](#) on big data (10 May 2016); and
- the FCA/CMA joint [study](#) on the economics of open and closed systems (16 December 2014).

3. Anti-competitive agreements / cartels

Collusion through or between algorithms: The FCA/FCO joint report on big data (May 2016) concluded that, whilst pricing algorithms may facilitate tacit collusion, there are often difficulties in enforcing competition law in relation to that kind of behaviour. The joint study currently being undertaken by the FCA and FCO on the implications of algorithms for competition law enforcement is expected to consider these issues further, including how amending the operation of the burden of proof might enable more effective enforcement of competition law in this area. The FCA and FCO are due to report on this study in summer 2019.

Price parity clauses in the online hotel booking sector: In its April 2015 [decision](#) regarding the use of price parity clauses in the online hotel booking sector, the FCA accepted commitments from Booking.com to remove price parity clauses as well as any other form of parity clauses from its agreements with hotels. The proceedings leading to this decision were carried out in parallel with the Swedish and Italian competition authorities. An evaluation of these commitments was carried out in 2017, which confirmed that hotels had subsequently differentiated their prices between different channels. The prohibition on price parity clauses was enshrined in French law shortly after the FCA’s decision.

Extension of the Coty precedent to non-luxury products: The FCA has been leading the way on the application of competition law rules to selective distribution agreements in the online context. In its [Stihl](#) decision of 24 October 2018, the FCA ruled that the precedent established by the ECJ in the [Coty](#) case (i.e. that the preservation of a luxury image could justify preventing authorised distributors from selling products on third-party platforms such as Amazon) also applied to non-luxury goods where there is a need to protect their quality or intended use (see our [Coty](#) and [Stihl](#) newsletter articles for a more detailed summary of these cases).

4. Abuse of dominance

Platforms: The FCA has dealt with a number of cases involving alleged discriminatory or unfair treatment of business users by leading platforms in the online advertising or internet search sectors. In cases where the complaint has not been rejected, the FCA has so far accepted commitments or pronounced injunctions without imposing fines (as illustrated by the recent [Google/Amadeus](#) decision).

Access to data: The FCA has consistently stressed that a refusal of access to data could be held to infringe the competition rules only in limited circumstances, based on the essential facilities doctrine (see for example statements to this effect in the FCA/FCO joint study on big data, and the FCA's recent opinion on online advertising). This is illustrated by its July 2014 decision in the [Cegedim](#) case (French only) in which the FCA concluded that a database to which an undertaking had refused to grant access to a competitor was not an “essential facility” for the purposes of establishing an abuse of dominance (although in the particular circumstances of that case, the refusal to grant access to the database was nevertheless held to be anti-competitive, on the basis that it was discriminatory).

Increased use of interim measures?: The [report](#) published by the CAE on 16 May 2019 recommended increased and prompt use of interim measures in cases involving alleged abuse of dominance, suggesting that the European Commission should be permitted to make better use of precautionary measures, through amendments to the rules governing the use of interim measures contained in Regulation 1/2003. Whilst these proposals related to the use of interim measures by the European Commission, rather than the FCA, and were not specific to the digital sphere, it is clear that the concerns they are intended to address arise in the digital context (amongst others), and it will be interesting to see how these proposals are received.

Data collection: The FCA/FCO 2016 [report](#) on the joint study on big data highlighted a specific risk with regard to vertically integrated platforms, which may at the same time be both suppliers of marketplace services to merchants and competitors of these merchants on the platform. Concerns were raised that such platforms could be tempted to use data collected from their competitors to adapt their own prices/strategy. This remains a “hot topic” for the FCA.

Data interoperability: Potential competition law concerns relating to data interoperability have attracted the attention of the FCA for many years. In [November 2004](#), the FCA applied the essential facilities doctrine to Apple's refusal to ensure technical interoperability between its iPod devices and music downloaded on the VirginMega platform. It concluded that Apple's conduct was not an abuse as it was not unjustified and did not eliminate competition. More recently, in its [opinion](#) on online advertising the FCA confirmed that interoperability issues could also be considered in terms of discrimination, transparency or bundling practices (see paragraph 252 of the opinion).

5. Merger control

Possible move towards ex post merger control to catch “killer acquisitions”? Following a public consultation on possible reforms to the French merger control regime in October 2017, the FCA ruled out introducing a transaction value threshold, concluding that it would not be justified in the context of the French economy. However, it indicated that it would closely monitor the implementation of such thresholds in Germany and Austria. In addition, in June 2018 the FCA launched a further public consultation on the proposed introduction of an “ex post” merger control regime, which would enable the FCA to require certain transactions that may raise competition issues to be submitted for merger control approval on its own initiative. This is intended to catch concentrations which fall below the existing French turnover thresholds but which nonetheless raise significant competition concerns, and could, inter alia, be an alternative means of addressing the issue of “killer acquisitions” of promising start-ups (which the President of the FCA has identified as being one of the main concerns for competition in the digital economy). On 16 May 2019, the CAE (an advisory body composed of economists and academics) published a [report](#) which supported this proposed “ex-post” approach in the context of “killer acquisitions”, concluding that this option was preferable to the alternatives of either lowering turnover thresholds or introducing a transaction value-based threshold.

Mergers between platforms: On 1 February 2018, the FCA considered for the first time a proposed merger between two online platforms. The platforms specialised in the online publication of property advertisements for real estate professionals. The FCA [authorised](#) the concentration without commitments, following an in-depth investigation which looked at the effects of the transaction at both local and national level.

Online/offline competition: The FCA has adapted its approach to product market definition to include both online and in-store distribution channels in the same product market in a number of recent cases, starting with the landmark [Fnac/Darty](#) decision of 18 July 2016 (which involved consumer electronic products), and seen most recently in its [decision](#) of 17 April 2019 in *Picwic/Toys'R'Us* (in relation to retail of toys). In two [decisions](#) taken in 2018, the FCA also gave the green light to the acquisition of online retailers by traditional retail chains in the shoes sector. Whilst the FCA did not formally conclude on the existence of a single market encompassing both channels in the circumstances of those cases, it did take into account the competitive pressure of online sales on offline sales, including at the local level, elaborating on what it calls a “phygital” model (i.e. combining “physical” and “digital”).

Data and market power: The FCA has recognised that the merger of large data sets may increase market power, but in its joint study with the German FCO on big data it also emphasised the need to take into account efficiencies brought about by such mergers. The FCA focusses on a number of key factors it considers liable to give market power to data owners : (a) rarity (how easily they can be reproduced); (b) availability (can they be found using other sources?); and (c) volume and variety.

6. Other

Competitive impact of privacy rules: The FCA considers that the entry into force of stricter privacy regulations is liable to worsen current asymmetries in certain digital markets. In its [2018 opinion](#) on data processing in the online advertising sector, the FCA stated that these rules may give an advantage to undertakings already established on the market who are better equipped to deal with the additional administrative burden entailed by these regulations.

Blockchain: The FCA held a workshop on blockchain technology on 10 May 2019 as part of its efforts to understand the impact of this technology on competition.

Possible future institutional changes: Whilst there are currently no formal plans to create a separate digital unit within the FCA, the FCA President has strongly called for such a unit to be created.

Germany

1. Current overarching view

The existing framework of German competition law (the German Act against Restraints of Competition (“ARC”)) is generally considered to provide a sound and sufficiently flexible starting point for protecting competition in the digital era. However, a number of significant changes have been made to the ARC to address specific characteristics of the digital economy, in particular through the introduction of the 9th Amendment to the ARC in June 2017 (discussed further below). Further amendments are also expected.

The German Federal Cartel Office (“FCO”) was one of the “first-movers” in terms of dedicating resources to tackle the new issues raised by the digital economy for competition law enforcement, in particular setting up a “Think Tank” in early 2015 with the aim of enabling legal experts and economists to study the latest economic research on platforms and networks and to discuss how best to apply the results to antitrust case practice. The FCO remains highly engaged in this area, and is currently working on a [joint project with the French Competition Authority on the implications of algorithms](#) for competition law enforcement. In addition, a high-level panel of experts known as the “Competition Law Commission 4.0” has been set up by the German government in the context of preparations for reform of the German competition law framework. This panel is tasked with developing proposals to modernise competition law to meet the demands of the data economy, the dissemination of platform markets and so-called ‘Industry 4.0’. These are due to be published in autumn 2019, and are expected to cover, inter alia, preventing monopolisation through ‘tipping’, intermediation power, conglomerate and vertical strategies of digital platforms, amendments to merger control rules on buying small potential future rivals, and control over and access to data.

2. Key documents

The summary below is based on a number of sources (all available in English unless otherwise specified), including:

- [“Working Paper – Market Power of Platforms and Networks”](#) (June 2016), published by the FCO Think Tank on the digital economy (see also the separate Executive Summary and [Results and Recommendations](#));
- [“Competition Law and Data”](#) (May 2016), a joint paper by the FCO and the French Competition Authority;
- [“Green Paper – Digital Platforms”](#) (May 2016), published by the German Federal Ministry for Economic Affairs and Energy;
- A series of papers on “Competition and Consumer Protection in the Digital Economy” published by the FCO: (a) [“Big Data and Competition”](#) (October 2017), which explains the specifics of digital, data-based markets and the role which data plays in competitive analysis, and addresses the importance of data protection issues for competition law proceedings; (b) [“Innovations – challenges for competition law practice”](#) (November 2017); (c) [“Online advertising”](#) (February 2018); (d) [“Competition restraints in online sales after Coty and Asics – what’s next?”](#) (October 2018); and (e) [“Consumer rights and comparison websites: Need for action”](#) (February 2019); and
- [Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification](#) (July 2018), published by the FCO and the Austrian competition authority.

3. Anti-competitive agreements / cartels

Active enforcement of competition law in the online context: The FCO has initiated numerous investigations against anti-competitive agreements in the online context, often in cooperation with other competition authorities. The President of the FCO, Andreas Mundt, has made it very clear that he considers the challenges of competition law enforcement in the digital economy to be one of, if not the, key issue facing competition authorities at the moment, and that active enforcement in this area will continue.

Best price and price parity clauses: The FCO has undertaken investigations into the use of “best price clauses” in the context of online hotel booking reservation systems by HRS, Booking.com and Expedia. The FCO prohibited the use of such clauses, which obliged hotels always to offer the hotel portal their lowest room prices, maximum room capacity and most favourable booking and cancellation conditions available online. The FCO also initiated a similar investigation into price parity clauses used by Amazon, which prohibited sellers from selling products they offered on the Amazon platform cheaper through any other sales channel. However, this investigation was closed when Amazon “voluntarily” abandoned its use of such clauses following pressure from the FCO.

Online sales restrictions in the context of selective distribution: In 2015, the FCO held that restrictions preventing ASICS dealers from (a) using the ASICS-trademark on websites operated by third parties and (b) co-operating with price comparison engines by providing them with interface information both amounted to a “hardcore” infringement of competition, which primarily served to control price competition in both online and offline sales. This decision was upheld in December 2017 by the Federal Court of Justice, which distinguished this case from the ECJ’s decision in [Coty](#) on the grounds that:

- it did not involve luxury goods; and
- the restrictions went beyond a prohibition on the use of third party platforms.

Online advertising: In January 2019, the FCO [announced](#) that it had closed – in cooperation with the Austrian competition authority – an investigation into an agreement between Google and Eyeo, a German company which offers “ad blocker” programmes which can be integrated into standard web browsers to prevent adverts from appearing on websites visited by users. Advertisers and advertising marketers are able to pay a fee to Eyeo to exclude certain adverts from the ad-blocking process (known as “whitelisting”), provided the adverts meet “acceptable adverts” criteria. Google entered into such a “whitelisting contract” with Eyeo, which also included a number of additional clauses restricting Eyeo’s ability to develop its products, and expand and invest in the market for ad blockers. The President of the FCO stated that the offer of ad blockers is an integral part of the competitive process in online advertising services (as previously [held](#) by the German Federal Court of Justice in April 2018 (judgment only available in German)), and contractual clauses aimed at restricting the offer of ad blockers are therefore anticompetitive and unacceptable. In this case, the FCO’s concerns were triggered not so much by the whitelisting agreement but by additional clauses in the contract which, in the FCO’s view, restricted Eyeo’s possibilities to further develop its products, expand and invest in the market (details of which are not publicly available). However, the investigation was closed after the parties agreed to amend the contract.

4. Abuse of dominance

Products or services that are supplied for free can constitute relevant “markets” for purposes of competition law: The 9th Amendment to the ARC in 2017 included the addition of a provision which expressly stipulates that free products or services can constitute a relevant “market” (Section 18(2a) ARC). This has ended a long-standing controversial debate between the German courts and the FCO as to whether non-monetary transactions can qualify as “market activities” and whether products or services that are supplied for free can constitute relevant “markets” for the purposes of competition law. Examples of such “free” products or services where a customer does not need to pay in direct exchange for using a product or a service include online internet search services (such as Google or Bing), online communication services (e-mail, text, or chat services such as WhatsApp), or social and professional networks (such as Facebook or LinkedIn), as well as, for example, free television.

Access to data as a source of market power: In the digital economy, where access to users' data can be critical to the market position of a company, the collection and processing of data is an entrepreneurial activity that has great relevance for the competitive performance of a company. The German legislator has acknowledged this, and the 9th Amendment to the ARC includes making access to competitively relevant data a criterion for determining market power, as part of a non-exhaustive list of factors to be taken into account when assessing market power in digital markets (new Section 18(3a) ARC). Other relevant factors include:

- direct and indirect network effects;
- the “parallel use” of several online services and the possibility to switch;
- economies of scale; and
- the role of innovation in digital markets.

FCO investigation against Facebook – abuse of dominance through infringement of data protection laws: On 7 February 2019, the FCO [held](#) that Facebook infringed competition law by abusing its dominant position on social networks in Germany by imposing inappropriate contractual terms and conditions relating to the collection of data (full decision only available in German, but a [case summary](#) and a [FAQ paper](#) are available in English). In particular, Facebook required its users to consent to the collection of their data from both Facebook-owned services, such as Instagram or WhatsApp, as well as third party websites accessed using a Facebook account and/or which use Facebook analytical tools or embedded “like” and “share” buttons. As discussed in more detail in our [recent newsletter article](#), this case is one of the most important global precedents relating to the application of competition law in the digital economy. In particular, it is the first case in which an abuse of dominance has been based on an infringement of data protection law. According to the FCO, inappropriate contractual terms and conditions relating to the collection of data, combined with the extent to which Facebook collects, merges and uses data in user accounts, constituted exploitative abusive conduct. Technically the FCO's decision only applies to Facebook's business in Germany. However, in practice it may impact Facebook more widely given that its operational model operates in a similar way globally. Unsurprisingly, Facebook has appealed against the decision, but it is likely to take a number of years before a final decision is reached. In the meantime, and more generally, dominant companies which collect and use large amounts of data should be aware that there may now be limitations under competition law as to how that data is used without the user's consent.

Scrutiny of Amazon's terms of business and practices: In November 2018, the FCO initiated an investigation into Amazon's terms of business and practices towards sellers on its German marketplace “amazon.de”, in light of complaints received from sellers alleging an abuse of a dominant position. The investigation remains ongoing, but particular areas of focus for the FCO include:

- the use of liability provisions to the disadvantage of sellers, in combination with choice of law and jurisdiction clauses;
- rules on product reviews;
- non-transparent termination and blocking of sellers' accounts;
- withholding or delaying payment;
- clauses assigning rights to use information which a seller has to provide with regard to the products offered; and
- terms of business on pan-European despatch.

The outcome of the investigation is likely to have a significant impact on online selling via market places.

5. Merger control

Introduction of a transaction-value threshold to capture transactions in the digital economy: Before the 9th Amendment of the ARC in 2017, transactions were only notifiable to the FCO if certain turnover thresholds by the transaction parties were exceeded.

However, the German legislator had concerns that there is a gap in the law when it comes to transactions where the target may not yet have sufficient turnover to trigger the thresholds, but where the acquisition may nevertheless have a significant impact on competition in the future. This is a particular feature of the digital economy, where target businesses often generate modest, if any, turnover and are often acquired for a high purchase price (due to their innovative products/services, ability to access valuable data and/or other market potential). In such cases, the target's value and impact on the market may be more accurately reflected by the transaction value, rather than the target's turnover.

In light of this, the 9th Amendment of the ARC in 2017 introduced a new additional alternative merger filing threshold test which is based on the turnover of the companies involved as well as the value of the transaction. Accordingly, transactions with a value of more than EUR 400 million may, under certain circumstances, be notifiable in Germany if the target has "significant activities" in Germany. See our [guidance note](#) for more details on these new thresholds. The President of the FCO, Andreas Mundt, has been reported as stating at the ICN annual conference in May 2019 that the transaction value threshold test has "not played a very big role yet" in the authority's scrutiny of deals, with only just over 30 additional cases being reviewed by the FCO since its introduction in 2017 (none of which have been prohibited).

6. Other

New consumer protection competences for the FCO – sector inquiries into data-related markets: With the 9th Amendment to the ARC in 2017, the FCO also gained new competences in the area of consumer protection. The FCO is now authorised to conduct sector inquiries if it suspects certain infringements of consumer law, which are likely to harm a large number of consumers. The FCO has set up a new division dedicated to this task and has stated that it will use these new investigative tools with a particular focus on the digital economy. Since 2017 the FCO has started three sector inquiries in the digital sector, namely into:

- [Online price comparison sites](#) (October 2017 – April 2019) – an inquiry to assess the pricing models of comparison websites in the fields of travel, insurance, financial services, telecommunications and energy supply. The FCO initially looked into around 150 firms, before narrowing down its inquiry to focus on 36 comparison websites. The FCO's inquiry considered cooperation between the various websites, market coverage of the websites, how comparison search result rankings are determined, other factors influencing the consumers' choice, and the handling of user ratings. The FCO concluded that in some cases consumers were misled, transparency obligations were breached or advertisements were not indicated as such. The [final report](#) is only available in German; however, in February 2019, the FCO published a paper on "[Consumer rights and comparison websites: Need for action](#)" in English.
- [Smart TVs](#) (launched in December 2017 – ongoing) – an inquiry into TVs which have an internet connection through which viewers not only receive data and programmes, but also transmit their user data. The aim of this inquiry is to examine what data is collected, processed and commercially used by smart TVs, and whether the users are informed about this. In particular, the inquiry is also intended to examine the terms of use and data protection provisions. In its first survey approximately 30 TV manufacturers received questionnaires from the FCO. Following analysis of the questionnaire responses, the conduct of the major manufacturers is to be more closely examined in a further stage of the inquiry. The results of this sector inquiry will be summarised in a final report in due course.
- [Online advertising](#) (launched in February 2018 – ongoing) – an inquiry into the online advertising market to assess the effects of current and foreseeable technical developments on the market structure and market opportunities of the various players, including the significance of different technical services and the way in which they function (including for example options for data

Italy

1. Current overarching view

The existing framework of Italian competition law is considered to provide a sound and sufficiently flexible basis for protecting competition in digital markets. In recent months, data-related issues have been at the core of investigations launched not only by the Italian Competition Authority (“ICA”), but also by the Italian Data Protection Authority (“IDPA”), indicating that the Italian authorities are getting ready for the challenges that the data-driven economy brings about.

2. Key documents

The summary below is based on a number of sources including:

- the [Interim Report of the Joint Inquiry on “Big data”](#) (June 2018), a joint inquiry being undertaken by the ICA, the IDPA and the Italian Communications Authority, which is considering big data and potential competition and consumer protection concerns, data privacy issues, and information pluralism within the digital ecosystem (as detailed in our [previous newsletter article](#)); and
- various other policy papers, comments and decisions issued by the ICA and the IDPA.

3. Anti-competitive agreements / cartels

Limited enforcement activity to date: So far, the ICA has undertaken only a limited number of investigations relating to anti-competitive agreements in the digital economy. Its attention has been focused on e-commerce cases, mainly involving two types of alleged vertical restraints:

- price restrictions imposed on online dealers by manufacturers (i.e. traditional companies hindering the commercial policy of digital suppliers downstream): see for example the [Online sale of stoves](#) case in which the ICA closed proceedings in April 2018 by accepting the commitments submitted by the business preventing it from setting retail prices (directly or indirectly) and constraining the commercial strategies of online dealers; and
- price parity clauses imposed on hotels by online travel agencies (i.e. digital operators hindering traditional firms downstream): see for example the [Online hotel bookings](#) case, in which the ICA closed proceedings in April 2015 by accepting commitments offered by Booking.com, which narrowed the scope of application of price parity clauses in order to strike a balance between possible negative effects on prices and the benefits for consumers. This outcome was coordinated with the French and Swedish competition agencies, as in this case the interests at stake went far beyond national boundaries.

In assessing these cases, the ICA has successfully applied its existing legal, investigative and analytical tools, confirming its view that although the internet is substantially changing the way in which goods and services are distributed, the underlying competition law assessment remains fundamentally the same, and the existing Italian antitrust laws and enforcement framework are flexible enough to deal with these issues.

4. Abuse of dominance

Exploitation of data as an abuse: The ICA has not yet undertaken any specific investigations involving suspected infringements of competition law related to access to data in the digital economy. However, in December 2018 the ICA fined two vertically-integrated suppliers of electricity ([Enel](#) and [ACEA](#), decisions only available in Italian) for abusing their dominant positions in the electricity market through the exploitation of personal data they held in relation to their customers.

In particular, the ICA objected to the use of the privacy-consent statements of customers provided under the “enhanced protection” regime (whereby customers who do not opt for offers at market prices can be supplied at a tariff set by the sector regulator, in the context of the ongoing liberalisation of the retail electricity market in Italy) to contact them for commercial purposes and make “targeted” offers to these customers, with a view to encouraging them to sign up to market-based electricity contracts instead of their regulated tariffs. The ICA considered that this commercial exploitation of “privileged” data that was not available to other suppliers was intended to alter future competitive scenarios resulting from complete market liberalisation, at the expense of non-vertically-integrated electricity suppliers, and constituted an abuse of dominance. It seems that in reaching this conclusion the ICA considered that the processing and storage of personal data resulting from the signing of the privacy-consent statements constituted a “strategic asset”.

Amazon – investigation into possible abuse of dominance: in the context of online platforms, Amazon’s dual role as a retailer and a marketplace platform has also come under the spotlight in Italy, echoing the ongoing probes at EU-level and in Germany (see further the EU and Germany sections of this briefing). In April 2019, the ICA [opened proceedings](#) against five companies belonging to the Amazon group for having allegedly abused their dominant position, by discriminating on the Amazon e-commerce platform in favour of third party merchants who use Amazon’s logistics services (for example by granting better visibility of their offers).

Google – investigation into possible abuse of dominance: on 8 May 2019, the ICA [launched an investigation](#) against Alphabet Inc., Google LLC and Google Italy S.r.l. following allegations made by Enel Group that Google had abused its dominant position in the market for operative systems for smart devices via the Android operating system, by refusing to integrate the app “Enel X Recharge” (developed by Enel to provide end users with information and services for recharging electric car batteries) into the Android Auto environment (which allows owners of Android smartphones to easily and safely use certain apps and mobile phone features when driving a vehicle). When launching the investigation, the ICA noted that Google seems to have an interest in defending and strengthening the business model of its Google Maps app, which offers a wide range of services to end users, including information on the location of columns for charging electric cars and directions on how to reach them. Google Maps also represents a point of access to end users as well as to the data stream generated by their activities.

5. Merger control

“Killer acquisitions”: The ICA has not yet publicly commented on how best to deal with the challenges posed by so-called “killer acquisitions” of small start-ups in the context of the digital economy, in contrast to many other national competition authorities. However, the second phase of the (ongoing) joint inquiry launched by the ICA, the IDPA and the Italian Communications Authority in 2017 into big data and potential competition and consumer protection concerns will address, among other topics:

- the analysis of market power and the effects of concentrations, including conglomerates, in the digital economy; and
- the qualitative dimension of competition in markets where services are offered for free.

6. Other

Interplay between competition, consumer protection and data protection laws: The attention of both the ICA and the IDPA has recently focused on unfair commercial practices by companies that force consumers to transfer personal information for marketing purposes. For example, on 25 January 2017, the ICA [announced](#) a €3.1m fine on Samsung in respect of two misleading and aggressive commercial practices related to the marketing of its products, namely:

- promoting the sale of Samsung’s electronic products by promising prizes and bonuses (e.g. discounts, bonuses on electricity bills, and free subscription to a TV content provider) to consumers which, contrary to what the advertising promised, could not be obtained immediately upon purchasing the products but instead only following a complex procedure which only became apparent to consumers after registering on a specified website and reviewing the terms and conditions in full; and
- making discounts conditional upon consumers registering with the company’s digital platform and giving consent to the commercial use of their personal data for purposes unrelated with the promotional offer of the product itself.

However, in 2018, the ICA’s original decision was [partially annulled by the TAR](#) (the Italian Administrative Court) on the basis that the ICA was not competent to judge the alleged unlawful collection of data on the platform or the unlawful processing of that data by Samsung to the extent that it fell under the jurisdiction of the IDPA as a possible violation of the regulation on personal data. This case illustrates the difficulties surrounding the interplay between competition, consumer protection and data protection laws, and determining the boundaries of the competencies of the various different regulators.

Similar issues also arose in the ICA’s investigation into terms of services relating to use of data by WhatsApp. In May 2017, WhatsApp was fined €3m by the ICA for imposing terms of service that functionally required WhatsApp users to share their personal data with WhatsApp’s parent company Facebook, and it was also required to amend its terms of service going forward. The ICA considered that a commercial relationship exists in all instances where a business offers a “free” service to consumers in order to acquire their data. On that premise, according to the ICA, WhatsApp induced users of its WhatsApp Messenger service to believe that without granting consent to share their personal data with Facebook, they would no longer be able to use the service, in breach of the Italian rules on unfair commercial practices. A separate investigation into changes to WhatsApp’s Privacy Policy was also launched by the IDPA in September 2016, focusing on provisions which allowed WhatsApp to pass on information relating to users’ accounts to Facebook for various purposes, including targeted advertising. In October 2018, the IDPA issued a [decision](#) in which it held that users could not be deemed to have consented to this use of their data in circumstances where refusal to consent would have resulted in an interruption of the service.

Social media “influencers” and “hidden marketing”: The ICA continues to focus heavily on the increasingly widespread phenomenon of marketing influencers on social media. In August 2018, it undertook a second [“moral suasion” action](#) to counteract hidden advertising on social media by public figures with low to medium follower numbers. This action took the form of letters sent to influencers and to the owners of the brands used by these influencers, reminding them that advertising must be clearly recognizable as such and highlighting that the prohibition on hidden advertising is equally applicable to communication via social networks, such that influencers must not lead their followers to believe that they are acting spontaneously and in a disinterested manner if, in reality, they are promoting a brand. More recently, in April 2019, the ICA also imposed a fine in its [first case on influencer marketing](#), fining companies trading under the “Juice Plus +” brand €1m in respect of hidden marketing practices that were held to be in breach of EU advertising law, in particular via Facebook pages and secret groups. Ashurst advised Juice Plus + on this case and is currently assisting with the appeal against the ICA’s decision.

Singapore

1. Current overarching view

The Competition and Consumer Commission of Singapore (“CCCS”) has a keen interest in competition issues relating to digital platforms, and has been actively considering the opportunities, challenges and policy implications of digital platforms for several years (as is evident from the studies described below).

One of the CCCS’ key sectors of focus for 2019 includes digital platforms. The CCCS has described its current efforts as being directed towards deepening its understanding of technological and market developments, and reviewing whether its toolkit remains relevant and sufficient to meet the new business models that abound in the digital sector. The CCCS will continue to monitor algorithms and artificial intelligence, in particular, as the sector evolves.

2. Key documents

The summary below is based on a number of sources including:

- the [Handbook on E-Commerce and Competition in ASEAN member states](#) (“ASEAN Handbook”) (August 2017) championed by the CCCS;
- the CCCS’s [research study](#) on “E-Commerce in Singapore – How it affects the nature of competition and what it means for competition policy” (“2015 E-commerce Research Study”) (December 2015); and
- the CCCS’s [paper](#) on “Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights” (“2017 Big Data Paper”) (August 2017), published in collaboration with the Intellectual Property Office of Singapore and Personal Data Protection Commission of Singapore.

3. Anti-competitive agreements / cartels

Collusion through data sharing: The CCCS commented in its [2017 Big Data Paper](#) that competition law concerns regarding anti-competitive collusion between competitors may arise where there are few firms in the market, data sharing is frequent, the data shared is commercially sensitive, and/or the data is shared with certain market participants while others are excluded, unless it can be shown that there are net economic benefits. On the other hand, sharing of data with businesses in other markets or industries, government agencies or consumers is unlikely to be problematic. Similarly, where the data being shared is historical, properly aggregated, unidentifiable, and not commercially strategic, sensitive or confidential, there are unlikely to be competition concerns.

Colluding through algorithms: The CCCS acknowledged in its [2017 Big Data Paper](#) that there are many positive uses of algorithms that do not give rise to competition concerns (for example, using algorithms to make more efficient decisions and predictions which can allow the firm to offer greater customisation of products). However, it noted that algorithms can also foster collusion, including by increasing market transparency (for example, through the use of monitoring algorithms, which allow firms to automatically collect and analyse real-time information about competitors’ prices, and can also facilitate detection of deviations from a collusive agreement) and the frequency of interactions between firms. Concerns about the use of pricing algorithms were also raised in the CCCS’s [2015 E-commerce Research Study](#) (which concluded that the use of sophisticated systems to monitor competitors’ online prices could result in consumers paying higher prices and diluting the benefits of searching for competitive prices online), and the [ASEAN Handbook](#) (which considered the risks of horizontal co-ordination via pricing algorithms, in particular in the context of digital platforms).

The CCCS' view is that the use of algorithms in furtherance of (or to support or facilitate) any pre-existing or intended anti-competitive agreement or concerted practice is likely to contravene the Competition Act. Similarly, algorithms which form part of a classic “hub and spoke” scenario where competitors collude through a third party intermediary, would likely breach the Competition Act. It is, however, less certain whether existing competition laws provide an adequate framework to deal with future potential misuses of algorithms, such as collusion by or via self-learning algorithms – or indeed, greater instances of tacitly collusive equilibriums.

Exclusivity clauses in the digital context: In 2016, the CCCS investigated the online food delivery industry in relation to complaints that a key player had entered into exclusive agreements with restaurants, which resulted in restaurants being unable to multi-home and generate additional revenues. Whilst the CCCS decided not to pursue the investigation further, it noted that exclusive agreements could be problematic and vowed to continue to closely monitor the market.

4. Abuse of dominance

No prosecutions to date but alert to the risks: Although the CCCS has not yet prosecuted any digital businesses for abuse of dominance, the ASEAN Handbook (championed by the CCCS) highlights how digital platforms impact traditional competition dynamics, and outlines policy considerations and advocacy strategies to address the challenges of enforcing competition law in digital markets. In particular, it considers the challenges of market definition in respect of multi-sided platforms, the impact of the data held by a firm on assessments of market power, and competition concerns arising from the tying and bundling of products and services, predatory pricing, price discrimination, loyalty discount schemes and the imposition of vertical conditions with respect to the e-commerce industry. In its 2017 Big Data Paper the CCCS reiterated that, whilst dominance in and of itself is not a contravention of Singapore's competition laws, there is clear potential for abuse of dominance to occur in the digital economy context through, for example:

- discriminatory access to critical data for competitors (achieved through vertical integration, where a firm discriminates against downstream competitors, or by engaging in bundling or tying);
- exclusive dealing that forecloses the entry of new competitors; and
- refusal to supply critical data that cannot be replicated, where an alternative solution is not available.

In its 2015 E-commerce Research Study report, the CCCS also highlighted concerns that a market may “tip” in favour of a small number of large e-commerce platforms. While there are benefits from having large online platforms, the strong network effects may mean that competition becomes “for” the market.

Dominance through the accumulation of large data sets: The CCCS recognised in its 2015 E-commerce Research Study report that customer data may become an important source of market power as new entrants may find it difficult to replicate information collected by incumbents in the course of their normal business activities, thereby creating a barrier to entry and expansion. There is potential for customer information collected by incumbents in some circumstances to constitute an “essential facility”, if there is no alternative information available and this presents a significant entry barrier. However, in its 2017 Big Data Paper the CCCS confirmed that the mere accumulation of large data sets does not, in and of itself, equate to being “dominant”. In assessing dominance in data-driven industries, two questions must be answered:

- could the data be replicated under reasonable conditions by competitors?; and
- is the use of the data likely to result in a significant competitive advantage?

In addition, the CCCS acknowledges that the existence of multi-homing, ease of access and substitutability of data, and market dynamics may weaken a firm's market power.

5. Merger control

Existing merger control legislation is sufficient to deal with transactions between digital platforms: The ASEAN Handbook highlights the need for merger control to be sufficiently broad in order to capture dynamic competition concerns in the digital context. However, the CCCS has indicated that it considers the current Singaporean merger control regime (and analytical framework) to be sufficiently robust and flexible to deal with transactions in this field, and no proposals for reform have been put forward at the time of writing.

By way of recent example, in September 2018, the CCCS issued an infringement decision in the [Grab/Uber](#) case, which involved the sale of Uber's South East Asian business to Grab and Uber's acquisition of a 27.5% stake in Grab. The CCCS found that the transaction substantially lessened competition in the market for chauffeured point-to-point platform services (i.e. ride-sharing services) in Singapore. The CCCS found that the transaction had led to an increase in prices of between 10 and 15% following completion, and had removed competition between Grab and Uber which were previously the two most vigorous competitors in the market. The CCCS also found that Grab had exclusivity clauses in its contracts with drivers, which compounded the network effects already present in a scenario with strong interdependence of drivers and riders. Such strong network effects would result in potential new entrants having high barriers to entry in terms of capital and time investments.

The CCCS imposed a number of remedies aimed at lessening the impact of the transaction on drivers and riders and levelling the playing field for new players to encourage competition, including removing Grab's exclusivity arrangements and maintaining Grab's pre-merger pricing algorithm and driver commission rates. In addition, the CCCS imposed financial penalties on the parties totalling S\$13m for intentionally or negligently infringing the prohibition on mergers that could substantially lessen competition within any market in Singapore. It found that both parties had proceeded with the merger despite knowing that they could be violating competition laws in doing so, and had even had measures in place to split any possible financial penalties.

Assessing the combination of data sets and personal data issues: Where presented with a merger involving entities with two separate data sets, the CCCS will assess whether the concentration of the data sets could substantially lessen competition. For example:

- in its assessment of the [SEEK/JobStreet](#) merger in 2014, the CCCS took into account the merger of the parties recruitment platforms and jobseeker databases, and concluded that the parties enjoyed significant network effects which represented a significant barrier to entry, and that the transaction would be likely to result in a substantial lessening of competition in the market for the supply of online advertising services. The CCCS cleared the transaction subject to behavioural and divestment undertakings, including 3-year commitments not to demand exclusive "lock-in" contracts with employer and recruiter customers and restrictions on price increases; and
- in its assessment of the [Thomson/Reuters](#) merger in 2008, the concentration of data sets of the parties was a relevant factor in considering barriers to entry, and the finding that the merger might substantially lessen competition. However, the CCCS found that undertakings offered to US and European regulators (which required the sale of certain databases to a purchaser, and licensing of related IP) effectively created a new competitor.

More generally, the CCCS has noted that, whilst privacy and data protection issues are not strictly within its remit, the CCCS is empowered to consider these issues as non-price factors of competition when undertaking merger assessments. In the context of the [SEEK/Jobstreet](#) clearance decision, it [stated](#) that "[w]here data protection is a non-price factor of competition (e.g. privacy is something which affects the quality of a service delivered), the treatment of personal data may affect how CCCS considers and assesses the competitive dynamics of a specific market."

6. Other

Market study into online travel booking: In April 2018, the CCCS [announced](#) a market study looking into online travel booking platforms and examining in particular the relationship and arrangements that third-party vendors have with service providers, including how platforms and providers compete with each other. In a submission to Global Competition Review's [Asia-Pacific Antitrust Review 2019](#), the CEO of the CCCS, Han Li Toh, indicated that the CCCS is set to conclude and publish the results of this market study shortly. The CCCS has encouraged international coordination in relation to the approach taken towards competition issues in the e-commerce sector, whilst noting that previous attempts at multi-agency cooperation in the hotel booking space have not been fruitful.

Consumer protection issues: In looking to enable consumers' choices, while facilitating disruptive business models, the CCCS will focus on consumer protection issues relating to digital platforms. Specifically, the CCCS will [explore guidelines and policy positions](#) to address issues such as drip pricing, pre-ticked boxes and strikethrough pricing, which are prevalent across digital platforms.

Data portability: The government of Singapore is considering the potential introduction of a data portability requirement in the country's Personal Data Protection Act. A [joint discussion paper](#) on Data Portability was issued by the CCCS and the Personal Data Protection Commission on 25 February 2019.

Collaboration with other agencies: The CCCS is a member of the International Competition Network ("ICN") Steering Group and a co-chair of the ICN Advocacy Working Group ("AWG"). As co-chair of the AWG, the CCCS is leading the Advocacy and Digital Markets Projects, which focuses on collating agencies' experience in conducting competition advocacy in relation to digital markets.

In 2015, the CCCS and the Singaporean Land Transport Authority ("LTA") were congratulated by the World Bank Group and the ICN for their collaboration on facilitating the entry of third-party taxi booking apps. In May 2015, the LTA introduced a regulatory requirement that all third-party taxi booking apps with more than 20 participating taxis register with the LTA. Prior to introducing this regulatory framework, the LTA worked with the CCCS to assess the competition impact of these apps on the taxi industry, and how innovation could be encouraged while preserving the LTA's regulatory tradition.

Spain

1. Current overarching view

The Spanish National Commission on Markets and Competition (“CNMC”) has stated that “existing antitrust laws are robust, forward-looking, and demonstrably capable of evolving with the times and thus able to cope with the challenges posed by the digitisation of the economy”. The CNMC recognises that the digital sector poses a number of challenges for competition law enforcement, but it considers that these are common to the entire EU and that the European Commission is therefore the best placed authority to enforce competition law in this area, absent any specific connection to the Spanish market. In practice, therefore, the CNMC will generally consider issues arising in the digital sector to the European Commission.

2. Key documents

The summary below is based on a number of sources including:

- the [CNMC's Action Plan for 2019](#);
- the CNMC's [contribution](#) on the “Implications of Digitalisation for competition policy” for the European Commission’s conference on “Shaping competition policy in the era of digitalisation” held in January 2019;
- the CNMC's [market study on the impact on competition of technological innovation in the financial sector \(“Fintech”\)](#) (September 2018);
- the CNMC's [Public Consultation on the Sharing Economy](#) (ongoing);
- the CNMC's [report](#) submitted to the OECD on competition policy developments in Spain in 2017 (May 2018); and
- the [Payment Systems Report](#) (November 2017) published by the Catalan Competition Authority, one of the Spanish Regional Competition Authorities.

3. Anti-competitive agreements / cartels

Online selling restrictions: In 2017, the CNMC carried out two investigations into potentially anti-competitive vertical restrictions affecting cross-border sales imposed on online sellers by eBay and Amazon. Both companies modified aspects of their contracts to address concerns that the restrictions could be interpreted as unjustifiably limiting online sellers’ ability to compete in those marketplaces. In November 2018, the authority also opened an investigation into allegedly anti-competitive e-commerce restrictions imposed by [Adidas](#), including a prohibition on online sales, and indirect resale price maintenance clauses. This investigation is still ongoing.

Access to data in Fintech context: In 2015, the CNMC closed an investigation into Caixabank, which had been accused by a financial aggregator of bank accounts (Fintonic) of refusing to supply access to its clients’ account information, which Fintonic considered necessary to provide its services. Fintonic alleged that this infringed both the prohibition on anti-competitive agreements and the prohibition on the abuse of a dominant position. The CNMC investigated the complaint but decided to close the case for a number of reasons, including that:

- although CaixaBank refused to supply access to its clients' information through the direct transfer of their passwords for security reasons, it did however offer Fintonic access through other means, such as the conclusion of contracts between its clients and Fintonic giving access to the accounts in question, or by enabling the clients to download the information to subsequently send it to Fintonic;
- only 20% of Fintonic users were clients of Caixabank; and
- Fintonic had a market share of 75-80% in the market of financial aggregators.

4. Abuse of dominance

Lack of recent decisions: There have not been any recent infringement decisions in Spain relating to abuses of dominance in the digital sector.

Risk of reinforcement of dominance through use of Fintech?: In its report on its [market study into the impact of Fintech on competition](#) (September 2018) the Fintech sector, the CNMC acknowledged that whilst the use of Fintech can often have a positive impact on competition, it is arguable that Fintech might worsen competition in other sectors, because firms with dominant positions in other activities, like retail trade or digital services, might reinforce this dominance thanks to the inclusion of Fintech in their range of activities, by cross-subsidising services and gathering more consumers and/or data. However, the CNMC considers that neither the theory nor the evidence are conclusive, so specific circumstances should be assessed on a case-by-case basis. It stated in its report that "competition agencies must remain vigilant for this process in order to avoid abusive or exclusionary practices".

Platforms and access to data: The CNMC considers that, in general, technological neutrality and interoperability are pre-requisites for any regulatory solutions aimed at addressing concerns about anti-competitive behaviour by dominant platforms and, in particular, concerns about access to data. In addition, the CNMC will robustly enforce competition law against dominant platforms which abuse their position, or enter into anti-competitive agreements that result in access to critical data being unduly restricted.

Increased use of interim measures and structural remedies: The CNMC considers that interim measures may need to be used more often in the digital sphere, in order to prevent a situation where anti-competitive conduct pays off by irreversibly altering the competitive landscape before an investigation into an alleged infringement can be concluded (given the network effects and data advantages that the infringing firm may obtain from the suspected practice). For similar reasons, the CNMC has highlighted on several occasions that structural remedies in digital antitrust cases (going beyond a mere cease and desist order) should also play a more prominent role if they allow the restoration of competition as if the anti-competitive conduct had not happened.

5. Merger control

Use of market share threshold: Spanish merger control notification thresholds include both a turnover threshold and a market share threshold. For the latter, if a share of 30% or more of the national market or a 'defined' geographic market within it, of a given product or service, is acquired or increased, the transaction has to be notified to the CNMC, unless the turnover in Spain in the preceding accounting period of the target (or of the assets being acquired) does not exceed €10 million and the individual or combined market share of the parties does not amount to 50 per cent or more in any 'affected market' in Spain or in any 'defined' geographical market within Spain. The CNMC has reviewed several concentrations concerning digital platforms on the basis of this market share threshold, for example, [Schibsted/Milanuncios](#) (classified advertising), [Just Eat/La Nevera Roja](#) (food delivery) and [Daimler/Hailo/MyTaxi/Negocio Hailo](#) (taxi-hailing apps). A number of mergers in the digital sphere which met this market share threshold have also ultimately been reviewed by the European Commission pursuant to the EUMR referral mechanisms, most notably [Facebook/WhatsApp](#) (referred to the Commission at the request of the notifying party, with the support of the CNMC and other national competition authorities) and [Apple/Shazam](#) (referred to the Commission at the request of the Austrian competition authority, joined by the CNMC and other national competition authorities).

Use of commitments to facilitate new entry: Each of the digital platform mergers referred to above that were reviewed by the CNMC were ultimately cleared subject to commitments, despite leading to a significant increase in the market share of the notifying party (since they combined two of the largest platforms in a given market). The commitments were designed to facilitate the entry of new firms into the relevant market, thus preserving the dynamic and innovative nature that epitomises these markets. In particular, the CNMC prohibited exclusivity clauses that could lock customers into the leading platform.

“Killer acquisitions”: In informal conversations the CNMC has explained to us that they consider the market share threshold discussed above to be a very useful tool in identifying and reviewing potential “killer acquisitions” of start-ups by dominant firms/platforms, but that it is not sufficient to fully address the concerns associated with such deals. In particular, difficulties arise due to both lack of clarity regarding market definition and the fact that many such transactions do not in fact qualify for review on the basis of the market share threshold, especially where the dominant company acquires a target in a different market, albeit on that is related to those in which it enjoys market power. We understand that the CNMC believes that legislative intervention is therefore required to provide new tools to enable it to fully address the competition concerns which arise in this context. However, we are not aware of any official statements of the CNMC to this effect.

6. Other

Potential concerns in relation to Fintech: The CNMC’s [market study on Fintech](#) (September 2018) concluded that although Fintech boosts competition in the different segments of the financial sector and in the system as a whole, there are some market failures and barriers to entry inherent to the financial sector that might be problematic. The document makes six recommendations:

- regulation of the financial services sector should welcome the Fintech phenomenon and adapt to it, given its positive impact on competition and efficiency;
- the necessity and proportionality of the different regulatory requirements for entering and engaging in financial activities must be re-evaluated, recognising that Fintech can correct market failures;
- regulation should focus on activities rather than on entities: against the backdrop of Fintech, it is advisable that financial regulation places more emphasis on the activities engaged in rather than on the legal form of the entity carrying out each activity;
- the RegTech phenomenon must also be taken into account, since it allows the use of new technologies for regulatory compliance;
- a “regulatory sandbox” should be adopted, so that the most innovative business models can develop and their impact on the market can be assessed, instead of the regulator adopting a general restrictive regulatory approach in advance (a “regulatory sandbox” is a framework set up by a regulator that allows FinTech start-ups and other innovators to conduct live experiments, typically involving data, in a controlled environment under the regulator’s supervision); and
- Open Banking and insurance initiatives must be promoted, to ensure the application of principles of technological neutrality.

Online advertising: In April 2019, the CNMC launched a public consultation on [online advertising](#) in Spain, as an initial step ahead of a market study in this sector. The market study will analyse the online advertising sector in Spain, including an assessment of the competitive environment in online advertising. For this purpose, the public consultation raises a series of questions and requests the contribution of the various participants that are active in the sector.

New Economic Intelligence Unit: Since early 2019, the Competition Directorate of the CNMC has been using a newly created Economic Intelligence Unit, which aims to:

- analyse public bidding databases in search of patterns that may indicate collusion;
- analyse open data sources for its own records (big data analysis applications); and
- improve overall the application of artificial intelligence in the CNMC’s day to day operations.

United Kingdom

1. Current overarching view

The view of the UK's Competition and Markets Authority ("CMA") is that the existing framework of UK competition law largely continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era, with the tools being fit for purpose. However, there is also considerable backing for the CMA's enforcement tools to be enhanced and for a dedicated regulator in the digital field, with its own enforcement powers. The UK government, in June 2019, has already indicated that it will push ahead with some changes recommended in recent reports.

2. Key documents

The summary below is based on a number of sources, including:

- the "[Unlocking digital competition](#)" report (13 March 2019) ("Furman Report") published by the "Digital Competition Expert Panel" to the UK government, which considers the appropriateness of the current UK competition law regime in dealing with the emerging digital economy and makes a number of proposals to the government. The UK government, in June 2019, has already indicated that it would push ahead with some of the recommendations contained in the report;
- the CMA's [response to those recommendations](#) of 22 March 2019, in which it stated that it "strongly welcome[d] the panel's report and is very supportive of [the] overall approach";
- a number of competition law-related recommendations made as part of the House of Lords Select Committee [Report on Regulating in a Digital World](#) (9 March 2019);
- the [LEAR Report on Ex-post Assessment of Merger Control in Digital Markets](#) (9 May 2019), commissioned by the CMA and published on 3 June 2019; and
- other CMA and UK government policy papers, comments and decisions.

3. Anti-competitive agreements / cartels

Algorithmic pricing – enforcement: The competition law challenges resulting from increased use of algorithmic pricing have been in the spotlight in the UK for some time now. In [August 2016](#) in the Posters case, the CMA concluded that two online retailers had infringed competition law by agreeing not to undercut each other's prices for posters and frames sold on Amazon's UK website. The retailers used pricing software to automatically re-price products to match each other's prices.

Algorithmic pricing – economic research paper: More recently, in [October 2018](#), the CMA published an economic research paper on the conditions under which algorithmic pricing could cause harm to consumers. Whilst recognising that the growth of pricing software could potentially increase the risks of firms colluding in ways which infringe competition law, the paper suggested that extensive use of software to generate personalised pricing would make it significantly less likely that algorithms are able to achieve co-ordinated outcomes. In practice, this is likely to mean that whilst competition concerns may arise in relation to either co-ordination or personalisation, both should not occur in the same market (as discussed by Chris Jenkins of the CMA at the [ICN Cartels Working Group webinar](#) on digital cartels and algorithms held on 16 January 2018).

Responsibility for algorithms: Like the European Commission, the CMA has emphasised that businesses should take responsibility for ensuring that automated and machine-learning pricing technologies are compliant with competition law. However, with regard to the challenges posed by the concept of algorithms fixing prices without any human “meeting of minds”, David Currie, speaking at a conference in February 2017 when he was the Chairman of the CMA, questioned whether the concept of human agency could be sufficiently stretched to cover these sorts of issues. He suggested that the rise of the algorithmic economy may in fact be one area where the existing tools available to competition authorities may not be sufficient.

4. Abuse of dominance

Possible new ex-ante regulatory approach: The [Furman Report](#) recommends an ex ante pro-competitive regulatory approach intended to prevent harm before it takes place, and the introduction of a code of conduct that is applicable only to established digital platforms with “strategic market status” (i.e. must-have platforms on which other businesses depend, despite having recourse to alternative channels of market access). This would clarify acceptable conduct between digital platforms and their users upfront, and would be developed “collaboratively” by the proposed new digital markets unit with platforms and other affected parties. This proposed ex-ante regulatory approach has been [welcomed by the CMA](#), provided it complements, rather than replaces, existing enforcement powers.

Artificial Intelligence: Both the [Furman Report](#) and the [CMA](#) advocate further monitoring of how machine learning algorithms and artificial intelligence evolve to ensure they do not lead to anti-competitive activity or consumer detriment, in particular to vulnerable consumers.

5. Merger control

Furman Report advocates more frequent and firmer action: The [Furman Report](#) recommends that the CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition, supported by changes to legislation where necessary. In particular:

- the CMA should further prioritise scrutiny of mergers in digital markets and closely consider harm to innovation and impacts on potential competition in its case selection and in its assessment of such cases;
- digital companies that have been designated with a “strategic market status” should be required to make the CMA aware of all intended acquisitions;
- the CMA’s Merger Assessment Guidelines should be updated to reflect modern digital markets; and
- changes should be made to legislation to allow the CMA to use a ‘balance of harms’ approach which takes into account the scale as well as the likelihood of harm in merger cases involving potential competition and harm to innovation.

LEAR Report on digital merger review: The [LEAR Report on ex-post assessment of merger control in digital markets](#) (commissioned by the CMA and published on 3 June 2019) considers three key areas:

- how potential competition theories of harm are generally assessed under the current merger control framework;
- whether the assessment undertaken in five particular recent digital merger clearance decisions (including *Facebook/Instagram* and *Google/Waze*) was reasonable based on the evidence available at the time; and
- whether, with the benefit of hindsight, clearance in those cases led to a detrimental outcome, given the way the market subsequently evolved.

The report concludes that there were certain gaps in the way the selected previous cases were analysed, although these gaps do not undermine the legitimacy of the clearance decisions and it is not always clear whether competitive harm has arisen as a result of such gaps. The report makes a number of recommendations for best practice when considering similar issues in the future, including adjustments to the definition of the counterfactual (by accepting more uncertainty and using a longer timeframe for the assessment of future market developments), enriching the information set relied upon (including through possible use of dawn raids), and developing a better baseline understanding of key markets in the digital sector, in particular likely entry strategies.

Current regime considered “fit for purpose” by the CMA: The CMA has acknowledged that the competition assessment of mergers in digital markets poses a number of challenges. However, it [does not believe](#) that addressing these challenges requires fundamental changes to the existing merger control regime at this stage – the current regime is “fit for purpose” (including in capturing a range of theories of harm in fast-moving and dynamic markets based on recent inquiries in this sector). [Speaking at the OECD conference](#) on 3 June 2019, the Chief Executive of the CMA, Andrea Coscelli, warned of the risk that “reinventing our entire approach leads to more harm than good”. That said, the CMA agrees that there may be incremental steps which can be taken to improve its ability to assess digital mergers, and that a review of the current Merger Assessment Guidelines would be beneficial. On 3 June 2019 the CMA therefore launched a [Call for Information](#) seeking input on specific areas of those guidelines relevant to the assessment of digital mergers.

Possible new public-interest test for data-driven mergers and acquisitions?: The [House of Lords Select Committee Report](#) concludes that large companies should not be allowed to become data monopolies through mergers, and recommends that the UK government consider implementing a public-interest test for data-driven mergers and acquisitions. The public-interest standard would be the management, in the public interest and through competition law, of the accumulation of data. It remains to be seen whether this option will be pursued, but amendments to the existing public interest regime in the context of mergers raising national security concerns ([June 2018 newsletter](#)) demonstrate that approaching merger control reform from a public interest perspective has been deemed appropriate in other contexts.

6. Other

The establishment of a pro-competition digital markets unit: The [Furman Report](#) recommends the creation of a digital markets unit, tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses. The [CMA welcomes this proposal](#), noting that enforcement action is no longer enough to address the wider concerns in online markets, and that ex-ante regulation in some form is likely to be required, complementing existing approaches. The Furman Report suggests that the digital markets unit should, inter alia, establish a digital platform code of conduct, have enforcement powers and be able to impose measures where a company holds a strategic market status, pursue personal data mobility and systems with open standards, and use data openness as a tool to promote competition.

Updating of enforcement tools: The CMA broadly welcomes the [Furman Report's](#) recommendations that the CMA's enforcement tools should be updated, noting that many of the recommendations align with those set out in the [CMA Chairman's letter to the Secretary of State for BEIS](#) of 21 February 2019, in particular: streamlining the processes for it to use interim orders (for example, through the introduction of a new overriding statutory duty to protect the interests of consumers, and possible reforms to access to file requirements); changing the standard of appeal for antitrust cases and reducing the time those cases take; and prioritising consumer enforcement work in digital markets. The CMA has suggested that it would be less eager to change its existing decision-making process.

Digital advertising market study: The [Furman Report](#), the [CMA](#) and the [House of Lords Select Committee Report](#) all advocate the launch of a market study into digital advertising to examine whether competition is working effectively and whether consumer harms are arising. This will be contingent on the outcome of EU Exit negotiations and any resulting resource constraints.

Open Banking: The UK is leading the world in developing Open Banking – an initiative mandated by law which requires the UK’s top nine retail banks to develop common APIs that allow third party service providers (“TPPs”) to build apps to access customer transaction data (subject to their consent) in order to facilitate better comparisons of banking products and promote switching, as well as facilitate the provision of additional services by the TPPs. In short, it requires the holders of valuable customer data to share that data in a commonly accessible form for third party service providers to utilise, subject to customer consent. Whilst a number of other jurisdictions have followed the UK in developing their own Open Banking regimes, the UK continues to lead the way. If successful, Open Banking could form a model for data sharing in numerous other jurisdictions and sectors. See [here](#) for further details and [here](#) for its potential application to other sectors.

Overview of developments in other key jurisdictions

Japan

- **Current overarching view:** The existing framework of the Antimonopoly Act of Japan (“AMA”) is generally considered to provide a sound and sufficiently flexible basis for protecting competition in digital markets by local regulators. However, some improvements, through the amendment of the law or accompanying guidelines, have been actively discussed.
- **Digital platforms:** In December 2018, the Ministry of Economy, Trade and Industry (“METI”), the Japan Fair Trade Commission (“JFTC”), and the Ministry of Internal Affairs and Communications (“MIC”) formulated a joint policy paper titled “[Fundamental Principles for Improvement of Rules Corresponding to the Rise of Digital Platform Businesses](#)”, based on an earlier interim discussion paper. The joint policy paper states that to ensure fair and free competition in digital markets, the operation of AMA and related institutions will be further considered. This includes further consideration of the following: (a) taking into account data and innovation in merger reviews; and (b) applying the rules relating to abuse of a superior bargaining position to the relationship between digital platforms and consumers who provide personal data in exchange for service provided by the platform. The joint paper also mentions that rulemaking on transfer of data and open data, such as data portability and open API, will be considered. The METI, JFTC, and MIC intend to promptly advance implementation of specific measures in line with these principles.
- **Creation of new expert group:** At the 23rd meeting of the Council on Investments for the Future in February 2019, Japanese Prime Minister Shinzo Abe suggested the creation a new group of experts across government to meet the demand for highly-specialized knowledge and expertise and enable swift responses to the accelerating changes in the digital market.

USA

- **Current overarching view:** The existing US antitrust laws (the Sherman Act 1890, Federal Trade Commission Act and Clayton Act) provide the Federal Trade Commission (“FTC”) and the Department of Justice (“DoJ”) with a wide remit to consider anti-competitive behaviour in US markets, including criminal penalties of up to \$100m for a corporation and \$1m for an individual alongside up to 10 years in prison. However, both agencies have seen the need to specifically address the application of competition law to technology companies (and their relevant markets), due to the distinct challenges that the technology sector poses for antitrust enforcement, as discussed further below.
- **New technology task force:** In February 2019, the Federal Trade Commission (the “FTC”) announced the creation of a new task force to monitor technology markets and investigate any potential anti-competitive conduct, to ensure consumers benefit from free and fair competition. The [new task force](#) will have unique expertise in markets including online advertising, social networking, mobile operating systems and apps, and platform businesses. The U.S. Department of Justice (“DoJ”) Antitrust Division is also currently assessing whether to add more staff attorneys to the DoJ’s existing Technology and Financial Services Section.
- **Cryptocurrency and blockchain technologies:** In March 2018, the FTC stated that it had set up a [Blockchain Working Group](#). Whilst this group appears to be focused primarily on the use of cryptocurrencies in fraud cases, its aims also include considering the implications of developments relating to cryptocurrency and blockchain technologies for the FTC’s competition policy remit. The FTC has noted in particular that such technologies could disrupt existing industries, with a related risk that incumbent companies may seek to restrict potential competitors through regulatory burden.

- **FTC reports on potentially disruptive technologies:** Prior to the establishment of its technology market task force, the FTC had also already produced reports on a number of different technologies which it identified as being disruptive to incumbent industries:
 - [Cross-device tracking](#) (sharing of consumer activity across connected (“Internet of Things”) devices;
 - [The sharing economy](#); and
 - [Broadband](#).
- **DoJ conducting a digital advertising market analysis:** The DoJ held a [public workshop](#) in May 2019 to explore industry dynamics in television and online advertising and the implications for antitrust enforcement and policy. A range of topics were discussed, including developments in advertising technologies, the effects of changes in consumer behaviour, and the competitive dynamics of media advertising in general, in light of the rise of digital advertising. The DoJ is completing a market analysis based on the discussion and it is expected to be completed in July 2019.
- **Relatively hesitant approach to date/where next?:** Recent decisions by the agencies in the digital sphere include decisions involving the [e-prescription market](#) (anticompetitive agreements) and [online sales/marketing platforms](#) (merger control). However, both agencies have been fairly hesitant in reaching decisions in this field, amidst some calls to deregulate markets instead of monitoring them more closely for anti-competitive or abusive behaviour. President Trump has [hinted](#) at a crackdown on the dominance and related potential abuse of large technology companies, in particular Google, but nothing has come to the fore as of May 2019.
- **Controversial proposals to break-up tech giants:** Elizabeth Warren, a US senator seeking the Democratic nomination for the US presidential election in 2020, has recently attracted a lot of attention for [proposing](#) “*big, structural changes to the tech sector to promote more competition*” if she is ultimately successful in her bid to become President. In particular, Ms Warren has highlighted concerns that “tech giants” (such as Amazon, Google and Facebook) have stifled competition in technology markets by pursuing mergers aimed at limiting competition, and using proprietary marketplaces (for example, participating in their own marketplace – Amazon own-brand goods [competing](#) with smaller companies on Amazon’s platform). By designating large technology companies as “Platform Utilities” through specific legislation, Ms Warren proposes to require such companies to spin off any participant that it has on that platform. For example, search engines would be designated as Platform Utilities, and Google Search would have to be spun off as a separate company. Other democratic candidates have joined Ms Warren in calling for the break-up of “tech giants”, including [Bernie Sanders](#), [Pete Buttigieg](#) and [Andrew Yang](#). Front-runner, Joe Biden, has recently also said that [he is looking at the issue seriously](#). This proposed approach is in stark contrast to statements made by European Commissioner Vestager, who has made clear that she considers that the break-up of large technology companies should be considered a last resort (see further the EU section of this briefing).

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