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Monopoly Matters

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**Monopoly Matters**



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# Message from the Chairs

***Charles Moore and Shelley Webb***

Welcome to the Unilateral Conduct Committee's Spring 2021 Edition of *Monopoly Matters*. We are excited to share a fantastic collection of articles covering monopolization and dominance issues around the globe.

Big tech and new legislative proposals and guidelines feature prominently in this edition, including:

- An overview of past and ongoing European Union abuse of dominance investigations in the technology sector, by Daniel Weick and Rachel Rasp;
- A deep dive on the Digital Markets Act proposed by the European Commission, by Philipp Bongartz;
- A summary of recent developments in U.S. antitrust enforcement against tech platforms, by Daniel Weick;
- A commentary on China's new Antitrust Guidelines in the Field of Platform Economy, by Annie Xue;
- A summary of the Antitrust Law Section and International Law Section's comments on the Competition and Markets Authority's consultation paper "Algorithms: How they can reduce competition and harm consumers," by Aparna Sengupta and Jody Boudreault;
- A recap of the podcast on *States v. Google* presented by the Unilateral Conduct Committee, by Sarah Zhang; and
- A recap of the podcast on data scraping and monopolization presented by the Unilateral Conduct Committee, discussing *hiQ Labs, Inc. v. LinkedIn Corp.*, by Jonathan Justl.

This edition also includes an article discussing antitrust issues in the healthcare industry:

- A recap of the Unilateral Conduct Committee's seminar explaining the proposed class settlement in *In re Blue Cross Blue Shield Antitrust Litigation*, by Kristina Gliklad.

For future editions, we welcome articles related to monopolization, abuse of dominance, or other unilateral conduct issues. If you have an article to contribute or would like to discuss an idea, please contact our editors, Jody Boudreault and Arnd Klein.

For audio recordings of our committee programs and town hall held earlier this year, please see https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/.

If you would like to help us plan future programs or want to contribute in other ways, please reach out to the Unilateral Conduct Committee leadership.

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# EU Competition Enforcement in the Tech Sector

***Daniel P. Weick[1] & Rachel Rasp[2]***

## *Introduction*

The aim of this paper is to provide an overview of European Union ("EU") abuse of dominance investigations in the technology industry. It was originally included in the written materials for the American Bar Association Antitrust Law Section's Spring Meeting program, "Tech Firm Conduct: 'Hypercompetitive' or 'Anticompetitive'?" This paper begins by summarizing the applicable EU laws and procedures for antitrust cases, and then reviews a series of enforcement actions from the *Microsoft* case in the 2000s through to the present, concluding with a brief description of proposed legislation directed at tech sector competition.

## *Background on EU Competition Law*

EU competition law flows from two provisions of the Treaty on the Functioning of the European Union ("TFEU"). TFEU Article 101 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market[.]"[3] TFEU Article 102 prohibits "[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it."[4] The EU has also passed a Merger Control Regulation that prohibits mergers "which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position[.]"[5] The cases discussed in this paper generally fall under Article 102.

Primary responsibility for enforcement of these provisions lies with the European Commission, the executive branch of the European Union, though competition authorities of EU member states also have the ability to pursue cases under EU law or analogous member-state laws.[6] In an abuse of dominance case, after a preliminary assessment of the market characteristics and the conduct at issue, the Commission will use information requests and compulsory process to investigate the alleged infringement.[7] If the Commission concludes that an infringement of Article 102 has occurred, it will issue a statement of objections outlining its view of the case and advising the party of the conduct it deems violative.[8] A party faced with a statement of objections can either make binding commitments resolving the Commission's concerns or contest the statement of objections.[9] In contested cases, the party replies to the statement of objections and then may have an oral hearing before an independent Hearing Officer.[10] If, after the hearing, the Commission still believes a violation has occurred, it prepares a final decision stating its conclusions and imposing remedies, which can include prohibitions on future conduct as well as fines of up to 10% of the offending company's annual turnover.[11] The Commission's decision can be appealed to the European General Court and then to the European Court of Justice.[12]

## *Tech-Industry Antitrust Cases and Investigations in the EU*

### *Microsoft*

In 2004, the European Commission issued a judgment stating that Microsoft had infringed the predecessor provisions to TFEU Article 102 by abusing its dominant market position in PC operating systems through the tying of Windows Media Player with the Windows operating system, and through withholding interoperability information needed for competitors to be able to compete in the work group server operating system market.[13] The judgment was accompanied by a fine of over €497 million and various behavioral remedies preventing Microsoft from engaging in similar conduct.

The decision focused on operating systems for personal computers, work group server operating systems, and media players. Operating systems are the software that control

[1] Daniel Weick performed legal services for Google, Qualcomm, and Spotify as an attorney at Wilson Sonsini Goodrich & Rosati, P.C. from March 2011 to August 2020 but has no current relationship with any of the companies mentioned in this summary. Mr. Weick is currently at Columbia University and owns The Law Office of Daniel P. Weick.
[2] Rachel Rasp is an Associate in the Washington, D.C. Antitrust and Competition practice at Baker Botts L.L.P.
[3] Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Sept. 5, 2008, 2008 O.J. (C 115) 47, 88-89 (effective Dec. 1, 2009) [hereinafter TFEU].
[4] TFEU art. 102.
[5] Council Regulation (EC) No 139/2004, 2004 O.J. (L 24) 1, 7 (on the control of concentrations between undertakings).
[6] European Commission, "Antitrust: Overview" (Nov. 21, 2014), *available at* https://ec.europa.eu/competition/antitrust/overview_en.html.
[7] European Commission, "Antitrust procedures in abuse of dominance (Article 102 TFEU cases)" (Aug. 16, 2013), *available at* https://ec.europa.eu/competition/antitrust/procedures_102_en.html.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Case COMP/C-3/37.792— Microsoft Corp., Comm'n Decision, (Mar. 24, 2004) (summary at 2007 O.J. (L 32) 23), (2007), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007D0053&from=EN.

the basic function of personal computers (PCs), and "work group server operating systems" are operating systems that are designed to enable basic services (such as file-sharing and network administration) for office workers. The Commission's decision found that that Microsoft had a dominant position in the market for PC operating systems, with shares of above 50%,[14] and had abused that position to prevent competitors in work group server operating systems by refusing to share technical documentation competitors would need to make work group server operating systems that could run on Microsoft's Windows PC operating systems.

The Commission also found in its 2004 decision that Microsoft had abused its dominant position by tying the Windows Media Player, Microsoft's software that allows for the viewing of video and audio files, and the Windows operating system. Applying a four-element tying test, the Commission found that Microsoft's Windows operating system held a dominant market position; Windows Media Player has a distinct product from the Windows operating system; Microsoft did not give customers a choice to obtain Windows without their Windows Media Player; and finally, that bundling the Windows operating system with the Windows Media Player foreclosed competition, because the tying allowed Microsoft to take advantage of its dominant position in operating systems to obtain "unmatched ubiquity"[15] in media players on PCs. In 2007, the EU Court of First Instance (the predecessor to the current-day General Court) confirmed the 2004 decision of the Commission, and required Microsoft to share interoperability information with rivals and to sell a version of Windows that did not have Media Player bundled with it.[16]

The Commission issued a separate Statement of Objections against Microsoft following a subsequent investigation in 2009, alleging that Microsoft was tying its web browser, Internet Explorer, to the Windows operating system, harming competition in the web browser space. [17] To settle the matter, Microsoft and the Commission agreed on a number of behavioral commitments, including having a "Choice Screen" that would allow a consumer to choose what web browser they wish to install with a copy of Windows. The matter was closed without a finding of abuse of a dominant position against Microsoft, but the adoption of the decision containing the commitments was made legally binding on Microsoft for a period of five years extending until 2014.[18]

In 2013, the Commission imposed a €561 million fine on Microsoft for alleged violations of the 2009 commitments, specifically the commitment that required Microsoft to offer a "Choice Screen" to EU consumers. In its Statement of Objections, the Commission stated that the choice screen was enabled beginning in March 2010, but "[f]rom February 2011 until July 2012, millions of Windows users in the EU may not have seen the choice screen."[19] The Commission's view was that Microsoft had failed to roll out the previously utilized choice screen with its release of the Windows 7 Service Pack, starting in February 2011 and continuing until July 2012.[20]

*Intel*

The *Intel* case involved allegations that Intel Corporation ("Intel") had used loyalty payments to foreclose rival Advanced Micro Devices Inc. ("AMD") from distribution of x86 central processing units ("CPUs"). According to the European Commission's findings, Intel controlled 70% of the worldwide market for x86 CPUs and sought to maintain its position by granting rebates to the major original equipment manufacturers ("OEMs") for Windows and Linux-based desktop and notebook computers conditioned on the OEMs purchasing all or nearly all of their x86 CPUs from Intel, granting rebates to a leading retailer to only sell computers containing Intel's x86 CPUs, and paying various OEMs to delay launches of computers containing AMD x86 CPUs or to limit distribution of those computers.[21]

After a long investigation, the European Commission issued a decision in 2009 finding that this conduct constituted an abuse of Intel's dominant position and imposing a then-record €1.06 billion fine on Intel.[22] Intel appealed to the General Court, which dismissed the appeal and held that Intel's strategy fell into a category of "exclusivity rebate[s]" that "can be categorized as abusive" without any "analysis of the capability of the rebates to restrict competition in light of the circumstances of the case."[23]

On appeal to the Court of Justice, however, Intel found more success. The Advocate General (a formal advisor to the Court of Justice) issued an opinion in 2016 finding that "the

[14] *Id*.
[15] *Id*.
[16] Case T-201/04, Microsoft Corp. v Comm'n, 2007 E.C.R. II-03601 (Ct. First Instance).
[17] Press Release, European Comm'n, Antitrust: Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows (Jan. 17, 2009).
[18] Press Release, European Comm'n, Antitrust: Commission accepts Microsoft commitments to give users browser choice (Dec. 16, 2009) (IP/09/1941), *available at* https://ec.europa.eu/commission/presscorner/detail/it/IP_09_1941.
[19] Press Release, European Comm'n Antitrust: Commission sends Statement of Objections to Microsoft on non-compliance with browser choice commitments (Oct. 24, 2012) (IP/12/1149), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_12_1149.
[20] *Id*.
[21] Case C-413/14P, Intel Corp. v. Comm'n, 2016 ECLI:EU:C:2016:788 Opinion of AG Wahl ¶ 32 ), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CC0413&from=EN.
[22] *Id*. ¶¶ 30-31.
[23] *Id*. ¶ 57.

General Court erred in law in considering that 'exclusivity rebates' can be categorized as abusive without an analysis of the capacity of the rebates to restrict competition depending on the circumstances of the case."[24] Rather, the Advocate General advised that Intel's strategy needed to be assessed in light of the full market context, including the "market coverage" of the challenged agreements, the duration of the agreements, the performance of AMD and of market prices, and the validity of the "as efficient competitor" test undertaken by the Commission (which claimed to show that an equally efficient competitor could not have matched Intel's rebates).[25] The Court of Justice agreed with the Advocate General and issued a judgment in 2017 referring the case back to the General Court to determine "whether the rebates at issue are capable of restricting competition[.]"[26] The case remains pending.

*Google*

Google LLC ("Google"), now a unit of Alphabet Inc., has faced three separate fines from the European Commission in the last five years. In 2017, the Commission imposed a €2.42 billion fine for Google's conduct in 1) giving "prominent placement to its own comparison shopping service" in Google search results and 2) "demot[ing] rival comparison shopping services in its search results[.]"[27] According to the Commission, "by giving prominent placement only to its own comparison shopping service and by demoting competitors, Google has given its own comparison shopping service a significant advantage compared to rivals."[28]

The Commission followed this action with a record €4.34 billion fine over Google's conduct with respect to the Android mobile operating system. [29] The Commission found that Google "required manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google's app store (the Play Store)," "made payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices," and "prevented manufacturers wishing to pre-install Google apps from selling even a single smart mobile device running on alternative versions of Android that were not approved by Google (so-called 'Android forks')."[30] This conduct, according to the Commission, "helped Google to cement its dominance as a search engine" by preventing rival search engines from competing for placement on mobile devices and depriving them of data, and also "prevented other mobile browsers from competing effectively with the pre-installed Google Chrome browser" and "obstructed the development of Android forks, which could have provided a platform also for other app developers to thrive."[31]

The third fine imposed on Google by the Commission concerned online advertising.[32] In that case, the Commission found that Google included exclusivity clauses in its "online search advertising intermediation services" with major online publishers from 2006-2009 and then adopted a "'relaxed exclusivity' strategy" in 2009 where those publishers were required "to reserve the most profitable space on their search results pages for Google's adverts and request a minimum number of Google adverts" and "to seek written approval from Google before making changes to the way in which any rival adverts were displayed."[33] This meant that "Google's rivals were unable to grow and offer alternative online search advertising intermediation services to those of Google."[34]

Google has appealed all three Commission decisions to the General Court, but no court judgment has issued to date in any of the three cases.[35] In addition to the decided cases, the Commission has announced a preliminary investigation into Google's "data practices" concerning "the way data is gathered, processed, used and monetized, including for advertising purposes[.]"[36] No further details on that investigation have been made public.

*Qualcomm*

The European Commission has fined Qualcomm Inc. ("Qualcomm") twice in the past three years for alleged abuses of dominant market positions and has a third investigation pending. In the first matter, decided in 2018, the Commission

[24] *Id*. ¶ 106.
[25] *Id*. ¶¶ 132-72.
[26] Case C-413/14P, Intel Corp. v. Comm'n, 2017 ECLI:EU:C:2017:632 ¶ 149 (Eur. Ct. Justice) *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0413&from=EN.
[27] Press Release, European Comm'n, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June 27, 2017) (IP/17/1784), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.
[28] *Id*.
[29] Press Release, European Comm'n, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (July 18, 2018) (IP/18/4581), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.
[30] *Id*.
[31] *Id*.
[32] Press Release, European Comm'n, Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising (Mar. 20, 2019) (IP/19/1770), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.
[33] *Id*.
[34] *Id*.
[35] Foo Yun Chee, "Google's fight against EU antitrust fine to be heard February 12-14 at EU court," REUTERS (Oct. 14, 2019), *available at* https://www.reuters.com/article/us-eu-alphabet-antitrust/googles-fight-against-eu-antitrust-fine-to-be-heard-february-12-14-at-eu-court-idUSKBN1WT24V.
[36] Silvia Amaro, "EU starts new preliminary probe into Google and Facebook's use of data," CNBC (Dec. 2, 2019), *available at* https://www.cnbc.com/2019/12/02/european-commission-opens-probe-into-google-and-facebook-for-data-use.html.

concluded that Qualcomm had abused its dominance in LTE baseband chipsets by entering an agreement with Apple Inc. ("Apple") in 2011 that provided Apple with "significant payments" contingent on Apple exclusively using Qualcomm's chipsets.[37] The Commission found that the agreement, which lasted until 2016, had unlawfully foreclosed rival chipset makers from access to "a key customer," and it imposed a €997 million fine on Qualcomm for the alleged violation.[38] Qualcomm has appealed the Commission's decision.[39]

In 2019, the Commission issued a decision finding that Qualcomm engaged in predatory pricing on 3G baseband chipsets between 2009 and 2011 by selling chipsets below cost to certain "strategically important customers . . . with the intention of eliminating" a market rival.[40] The Commission imposed a separate fine of €242 million for this conduct,[41] and Qualcomm has also appealed this fine.[42]

Finally, in 2020, Qualcomm disclosed in securities filings that the Commission is currently investigating whether it violated Article 102 "by leveraging [its] market position in 5G baseband processors in the [radio frequency front end] space."[43] That investigation remains pending.[44]

*Amazon*

On July 17, 2019, the European Commission announced that it had opened a formal investigation into Amazon.com, Inc. ("Amazon"). The Commission's stated purpose was to investigate "whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules[.]"[45]

The announced investigation was focused on Amazon's online retail business. Amazon sells products through its website as a retailer, but also allows independent third-party sellers to use the Amazon retail platform to sell products to consumers directly. The Commission asserted that, based on the Commission's preliminary review, Amazon may use information gleaned from third parties selling on Amazon's platform that is potentially competitively sensitive, and the Commission's in-depth investigation would focus on that alleged data collection.[46] As part of the investigation, the Commission announced that it would take a closer look at the agreements in place between Amazon and third-party sellers using Amazon's platform that allow Amazon to collect and use seller data and would examine whether Amazon's use of that data affected competition.

The other specific issue the Commission announced it would investigate was the way Amazon's collected data might influence the "Buy Box," a display feature on Amazon's retail site that allows shoppers to add goods from a specific seller into their online shopping carts directly from a product's page.

Following this investigation, in November of 2020 the Commission announced that it had sent a Statement of Objections to Amazon, alleging that the company infringed EU antitrust rules through relying on non-public and sensitive business data from third-party sellers on Amazon to benefit Amazon's own competing retail business.[47] The Commission alleged that Amazon collected, aggregated and utilized large quantities of sensitive, non-public data from third-party sellers to "calibrate Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers,"[48] including through calibrating its own prices using that seller data.

The Commission's preliminary assessment, outlined in its press release announcing the Statement of Objections, is that Amazon's use of third-party seller data and its dominant position in the market for "marketplace services" allows Amazon to side-step normal competition in the retail space, which, if confirmed, would violate Article 102 of the TFEU.[49]

In the press release regarding its Statements of Objection, the Commission also announced they would be opening another investigation into "Amazon's business practices that might artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services (the so-called 'fulfilment by Amazon or FBA sellers')," including whether the criteria that Amazon uses to select the seller that appears in the "Buy Box," as well as the sellers who are able to offer products through Amazon's Prime

[37] Press Release, European Comm'n, Antitrust: Commission fines Qualcomm €997 million for abuse of dominant market position (Jan. 24, 2018) (IP/18/421), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_18_421.
[38] *Id.*
[39] Qualcomm Inc., Annual Report (Form 10-K) at F-30 (Nov. 4, 2020), [hereinafter Qualcomm 10-K], *available at* https://investor.qualcomm.com/sec-filings/annual-reports/content/0001728949-20-000067/0001728949-20-000067.pdf.
[40] Press Release, European Comm'n, Antitrust: Commission fines US chipmaker Qualcomm €242 million for engaging in predatory pricing (Jul. 18, 2019) (IP/19/4350), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4350.
[41] *Id.*
[42] Qualcomm 10-K at F-29.
[43] *Id.* at F-30.
[44] *Id.*
[45] Press Release, European Comm'n, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon (July 17, 2019) (IP/19/4291), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.
[46] *Id.*
[47] Press Release, European Comm'n Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices (Nov. 10, 2020) (IP/20/2077), *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.
[48] *Id.*
[49] *Id.*

program, preference Amazon's own retail business over other sellers.[50] The investigation is ongoing, and Amazon will have the opportunity to respond to the issued Statement of Objections.

*Apple*

June of 2020 saw the European Commission open separate antitrust investigations into both Apple's App Store and its Apple Pay mobile payment product.

Prompted by complaints made by music streaming service Spotify and an unnamed e-book distributor, the former investigation centers around Apple's rules and restrictions on app developers concerning the distribution of their apps. According to the Commission's press release, Apple mandates that developers who wish to distribute apps on Apple's iPhone and iPad utilize Apple's proprietary in-app purchasing system, which the Commission alleges may impact competition in music streaming and e-book/audiobook distribution.[51]

Two restrictions in particular are the focus of the Commission's investigation: one, the requirement that app developers utilize Apple's IAP system for distributing paid digital content, for which Apple charges developers a 30% commission on subscription fees; and two, restrictions on the ability of developers to point users to alternative methods of purchasing paid content through other platforms outside the IAP system.[52] The Commission raised concerns that the restrictions may give Apple "full control over the relationship with customers of its competitors subscribing in the app, thus dis-intermediating its competitors from important customer data while Apple may obtain valuable data about the activities and offers of its competitors."[53]

Alongside this App Store investigation, the Commission opened a parallel investigation into Apple Pay, Apple's mobile payment product on its iPad and iPhone hardware. Apple Pay allows customers to make payments on apps, websites, and in brick-and-mortar stores. The Commission's concerns are focused on the ways in which the integration of Apple Pay with Apple devices may affect competition, as well as allegations that Apple has restricted access to Apple Pay for the products of Apple's competitors.[54]

The investigations are currently ongoing, and the Commission has yet to publish any findings or issue a Statement of Objections.

*Facebook*

According to news outlets, the European Commission has opened a preliminary investigations into Facebook's Marketplace and advertising practices, as well as Facebook's data collection processes and how Facebook monetizes collected data.[55] A Commission spokesperson confirmed in December 2019 that the "Commission has sent out questionnaires as part of a preliminary investigation… concern[ing] the way data is gathered, processed, used and monetized, including for advertising purposes."[56] Questionnaires sent to third parties regarding Facebook's practices asked about the importance of data to entering and competing as a social media platform, as well as which online advertising services were the closest competitors to Facebook.[57]

In both investigations, Facebook challenged the Commission's demands for documents in the General Court, arguing that the requests went beyond the scope of what was necessary for the Commission to conduct its investigations and would include sensitive personal information.[58] The General Court limited access to the documents, requiring they be placed in a virtual data room that can only be access by certain investigators in the presence of Facebook's lawyers.[59]

## *Pending EU Legislation*

The European Commission has proposed two pieces of legislation relevant to competition in the technology sector. The Digital Markets Act would impose requirements on "gatekeeper" platforms—defined as firms that have "a significant impact" on the European market, operate "a core platform service which serves as an important gateway for business users to reach end users," and have "an entrenched and durable position[.]"[60] Such firms will be required to allow third-

[50] *Id*.
[51] Press Release, European Comm'n, Antitrust: Commission opens investigations into Apple's App Store rules (June 16, 2020) (IP/20/1073), *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.
[52] *Id*.
[53] *Id*.
[54] Press Release, European Comm'n, Antitrust: Commission opens investigation into Apple practices regarding Apple Pay (June 16, 2020) (IP/20/1075), *available at* https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075.
[55] Foo Yun Chee, "EU antitrust regulators raise more questions about Facebook's online marketplace," REUTERS (Apr. 7, 2020), *available at* https://www.reuters.com/article/us-eu-facebook-antitrust/eu-antitrust-regulators-raise-more-questions-about-facebooks-online-marketplace-idUSKBN21P22J.
[56] Amaro, *supra* note 36.
[57] Chee, *supra* note 55.
[58] Foo Yun Chee, "Facebook gains court backing in document row with EU regulators," REUTERS (Oct. 29, 2020), *available at* https://www.reuters.com/article/eu-facebook-antitrust-int/facebook-gains-court-backing-in-document-row-with-eu-regulators-idUSKBN27E25F.
[59] *Id*.
[60] European Comm'n, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020)842,36 (Dec. 15, 2020), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en.

party interoperability under certain circumstances, allow businesses operating on the platforms to access the data they generate on the platform, allow business users on the platform to promote offers and enter agreements with customers outside of the platform, and refrain from treating their own services more favorably than rival services on the platform, among other restrictions.[61] The Commission has also proposed a Digital Services Act that imposes a variety of reporting, complaint management, algorithm transparency, and data requirements (among other provisions) on online services, with requirements becoming heavier as services go from "intermediary services" to "hosting services" to "online platforms" to "very large platforms."[62] Both proposals must be approved by the European Parliament and European Council to become law.

[61] *Id*. at 39.
[62] European Comm'n, Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act), COM(2020)825, 49-67 (Dec. 15, 2020), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en.

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# The Digital Markets Act proposed by the European Commission

***Philipp Bongartz***[1]

Large digital platforms operating in the European Union ("EU") will soon face tougher regulation through a novel legal instrument, the Digital Markets Act ("DMA"). On December 15, 2020, Executive Vice President Margrethe Vestager and Commissioner for Internal Market Thierry Breton presented their proposal for a regulation of digital gatekeepers.[2] The DMA follows a report[3] published by the Commission in 2019 on competition issues in the digital economy and maps a new rulebook for the digital sphere in Europe. Its far-reaching regulation could also affect platform business in the U.S.

During the last decade, European competition authorities increasingly addressed business practices by digital platforms such as Google, Apple, Facebook, and Amazon ("GAFA").[4] After several probes and record fines, however, it has been widely recognized that EU competition law is unfit to keep pace with fast-moving digital markets.[5] In particular, market definition, competitive effects analysis, and the design of remedies slowed down antitrust procedures. The DMA is an attempt to design a regulatory instrument that is not subject to these constraints.

**Addressees**

The regulation applies to core platform services ("CPS") that gatekeepers provide to business users or end users located in the EU.

The proposal includes an exhaustive list of eight CPS ranging from search engines and social networks to operating systems and cloud computing. Most of these services and their providers have been in the focus of antitrust cases by the Commission in the past, and they typically operate in concentrated markets.[6] The Commission can add services within the digital sector to the list of CPS after carrying out a market investigation.

The DMA concerns only CPS provided by "gatekeepers," i.e., providers that satisfy the following three requirements: the provider (1) has a significant impact on the internal market, (2) operates a CPS that serves as an important gateway for business users to reach end users, and (3) enjoys an entrenched and durable position in its operations. For each of these criteria, there is a quantitative threshold establishing a rebuttable presumption. The thresholds include provision of the CPS in three Member States plus an annual EEA turnover of €6.5 billion or an average market capitalization of €65 billion of the undertaking to which the provider belongs. Additionally, the CPS must have had more than 45 million monthly active end users and 10,000 yearly active business users in the EU during the last three financial years. According to the Commission's assessment, ten to fifteen companies will satisfy the thresholds.[7] First estimates suggest that Oracle, SAP, AWS,

[1] Philipp Bongartz is a researcher at the Chair for Civil Law, German, and European Competition Law at Heinrich Heine University Düsseldorf. Mr. Bongartz's contribution is based on his work with Prof. Dr. Rupprecht Podszun and Sarah Langenstein. For the full article see Rupprecht Podszun, Philipp Bongartz & Sarah Langenstein, *Proposals on how to improve the Digital Markets Act* (Mar. 22, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788571. All websites referred to in this article have been last accessed on March 9th, 2021.

[2] European Comm'n, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020)842 (Dec. 15, 2020), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en.

[3] European Comm'n, Jacques Crémer et al., *Competition policy for the digital era* (2019) [hereinafter *Crémer Report*], *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[4] *See, e.g.*, Case COMP/AT.39740—Google Search (Shopping), Comm'n Decision (June 27, 2017) (summary at 2018 O.J. (C 9/11), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516198535804&uri=CELEX:52018XC0112(01); Case COMP/AT.40099—Google Android, Comm'n Decision (July 18, 2018) (summary at 2019 O.J. (C 402/19), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019XC1128%2802%29&qid=1620048186452; Case COMP/AT.40411—Google Search (AdSense) (Mar. 20, 2019) (summary at 2020 O.J. (C 369/8), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AT40411(03)&qid=1620048912509&from=EN; Press Release, European Comm'n, Antitrust: Commission opens investigation into Apple's App Store rules (June 16, 2020) (IP/20/1073), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1073;Case B2-88/18—Amazon, Bundeskartellamt Decision (July 17, 2019), *available at* https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=5; Case B6-22/16—Facebook, Bundeskartellamt Decision (Feb. 6, 2019), *available at* https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3; Case 19-D-26—Google, Autorité de la concurrence Decision (Dec. 19, 2019), *available at* https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2020-04/19d26_en.pdf.

[5] *See* FURMAN, ET AL., DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION (2019).

[6] *See, e.g.*, European Comm'n, *Impact assessment of the Digital Markets Act* (part 2) ¶ 128 (2020) [hereinafter *DMA Impact Assessment Report*], *available at* https://ec.europa.eu/digital-single-market/en/news/impact-assessment-digital-markets-act; European Comm'n, *Expert Group for the EU Observatory on the Online Platform Economy: Measurement & Economic Indicators* 6 (2021), *available at* https://ec.europa.eu/digital-single-market/en/news/expert-group-eu-observatory-online-platform-economy-final-reports; European Comm'n *Staff Working Document Impact Assessment Annexes Accompanying the document Proposal for a Regulation of the European Parliament and the Council on promoting fairness and transparency for business users of online intermediation services* 63-78 (2018), *available at* https://ec.europa.eu/digital-single-market/en/news/impact-assessment-proposal--promoting-fairness-transparency-online-platforms.

[7] *DMA Impact Assessment Report* ¶ 148.

and Microsoft Azure meet the criteria as well.[8] If they do, they are required to notify the Commission within three months.

If the provider fulfills the criteria, it can present substantiated arguments to disprove the presumption of being a gatekeeper. Even though not exactly clear,[9] the arguments may refer to qualitative criteria as set out in Article 3(6) of the DMA (e.g., size, number of dependent users, entry barriers, scale and scope effects, lock-in). However, justifications seeking to demonstrate efficiency gains will be discarded, as recital 23 states. If the provider succeeds, the Commission may designate it only after conducting a market investigation. Otherwise, the Commission will by decision designate the gatekeeper status to the provider and identify the relevant CPS. Within six months of the status designation, the provision of those CPS must comply with the following rules.

**Obligations of Gatekeepers**

In Articles 5 and 6 of the DMA, the regulation stipulates two rule sets with the goal to secure fair and contestable markets. Both rule sets are self-executing. Following the designation, they become effective without a further decision required. Yet, Article 6 obligations are "susceptible of being further specified": Before finding an undertaking non-compliant with respect to the corresponding rules, the Commission can specify the implementation measures by decision, directly or after a regulatory dialogue with the respective provider. The dialogue aims to tailor specific obligations to the particular situation of the gatekeeper concerned where this is required to ensure effective and proportionate implementation.[10]

The obligations under Article 5 include a ban on the combination of data from separate services, wide parity clauses, anti-steering clauses, and certain bundling practices. Article 6 prohibits, inter alia, self-preferencing and the use of non-public data that is generated through activities by business users in competition with those users. In addition, it requires gatekeepers to enable side-loading of apps and data portability while also imposing data sharing obligations. The regulation includes eighteen rules in total, with most of them derived from past and ongoing cases of EU competition authorities.[11]

For lack of a general clause the list is conclusive, i.e., the DMA does not provide a legal basis to intervene against practices that affect fairness or contestability other than the ones expressly mentioned in Articles 5 and 6. However, the Commission may open a market investigation to identify new practices that affect fairness or contestability. As a result, it can update the list by adoption of a delegated act. This is a non-legislative legal act which is not directly derived from the European Treaties but from secondary law (usually a regulation). Its adoption does not involve the European Parliament nor the Council and may take between two and three years.[12]

The DMA does not provide for an efficiency defense (although it allows for a rebuttal of the designation of the gatekeeper status). Relief may only be granted on grounds of overriding public interest concerns or harm to the economic viability of a gatekeeper.

The DMA does not alter the notification thresholds of the EU Merger Regulation.[13] Article 12 does, however, require gatekeepers to *inform* the Commission of intended concentrations in the digital sector.[14]

**Enforcement of the DMA**

The Commission is equipped with far-reaching investigative powers to monitor the effective implementation and compliance of the obligations. When the Commission detects an infringement, it will open proceedings that may result in a specification of measures to implement obligations under Article 6, in the acceptance of commitments or a cease and desist order. The latter may include a fine of up to 10% of the *gatekeeper's* total annual turnover. Behavioral or structural remedies (including "breakups") may be imposed only against repeat offenders, i.e., companies with a record of at least three non-compliance decisions within five years.

[8] Cristina Caffarra & Fiona Scott Morton, *The European Commission Digital Markets Act: A translation*, VOXEU (Jan. 5, 2021), *available at* https://voxeu.org/article/european-commission-digital-markets-act-translation. Sceptic regarding Oracle and SAP: Alexandre de Streel et al., *The European Commission's Proposal of a Digital Markets Act: A first assessment*, CERRE 13 (Jan. 2021), *available at* https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/. For raising the thresholds: Damien Geradin, *What is a digital gatekeeper?* (Apr. 2, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788152.

[9] Alfonso Lamadrid & Pablo Colomo, *10 Comments on the Commission's DMA Proposal*, CHILLING COMPETITION (17 Dec. 2020), *available at* https://chillingcompetition.com/2020/12/17/10-comments-on-the-commissions-dma-proposal/.

[10] With regards to the time expenditure associated with the dialogue, the Commission expects it to apply only where further evaluation is needed (e.g., interoperability conditions). Conversely, it considers obligations relative to transparency and non-discrimination self-evident. *See DMA Impact Assessment Report* ⁋⁋ 344, 399. For more information on the regulatory dialogue see Rupprecht Podszun, Philipp Bongartz & Sarah Langenstein, *The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers* 2 J. EuCML (forthcoming 2021).

[11] A list of the obligations and the respective cases are provided by Caffarra & Scott Morton, *supra* note 8.

[12] As in this case, delegated acts often take the form of delegated regulations by the Commission amending or supplementing those by the European Parliament and the Council. For further information on delegated acts and a word of caution see Podszun, Bongartz & Langenstein, *supra* note 10.

[13] Council Regulation (EC) No 139/2004, 2004 O.J. (L 24) 1 (on the control of concentrations between undertakings).

[14] *But see* Caffarra & Scott Morton, *supra* note 8.

**Concluding Remarks**

There seems to be a broad consensus in Europe that the Commission's attempt to tighten the grip on Big Tech is respectable yet leaves room for improvement.[15] Debates center around the definition of gatekeepers, the imposed rules, the introduction of a general clause and enforcement issues. The relationship with national rules (such as the novel German gatekeeper regulation[16]) in the EU is still unclear.

Since the regulation will apply almost exclusively to U.S. companies, the proposal created further tensions in the transatlantic relationship. The U.S. Chamber of Commerce voiced concerns only hours after its release.[17] As the customization of platforms to individual jurisdictions may be inefficient or infeasible, the DMA could impact platform conduct in the U.S. as well.[18] This would follow the examples of the EU General Data Protection Regulation and the Amazon Terms & Conditions that had been amended worldwide after a deal with the German national competition watchdog.[19]

The Commission needs to get the approval of the European Parliament and the Council of the EU, where Member States have formed alliances for and against the regulation.[20] Both institutions will draft their own versions of the bill, which in turn will be subject to amendments. Although it does not require unanimity to pass the Council, the outcome of the DMA proposal is highly uncertain.[21] Margrethe Vestager expects the adoption in summer 2022.[22] Until then, the race is on to shape the final DMA.

[15] Alexandre de Streel et al., *Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age*, CERRE (Nov. 2020), *available at* https://cerre.eu/wp-content/uploads/2020/11/CERRE_DIGITAL-MARKETS-ACT_November20.pdf ; Podszun, Bongartz & Langenstein, *supra* note 1; Damien Geradin, *The Digital Markets Act proposal: Is this a sound document?*, PLATFORM LAW BLOG (Jan. 20, 2021) https://theplatformlaw.blog/2021/01/20/the-digital-markets-act-proposal-is-this-a-sound-document/. More reserved: Lamadrid & Colomo, *supra* note 9.

[16] *See* Philipp Bongartz, *Happy New GWB!*, D'KART BLOG (Jan. 14, 2021) https://www.d-kart.de/en/blog/2021/01/14/happy-new-gwb/.

[17] Press Release, U.S. Chamber of Commerce, U.S. Chamber Concerned by European Commission Digital Services and Digital Markets Proposals (Dec. 15, 2020), *available at* https://www.uschamber.com/press-release/us-chamber-concerned-european-commission-digital-services-and-digital-markets. *See also* Laura Kayali & Thibault Lager, *5 challenges to the new EU digital rulebook*, POLITICO (Dec. 16, 2020), *available at* https://www.politico.eu/article/5-challenges-to-the-new-eu-digital-rulebook/. *See also* Caffarra & Scott Morton, *supra* note 8.

[18] Arnd H. Klein, *More Stringent Rules Towards Tech Firms in Europe – Will They Affect How Platforms Do Business in the U.S.?*, 17 A.B.A Sec. Pub. Monopoly Matters (No. 2) 3, 8 (Winter 2019).

[19] *See* Council Regulation (EU) No 2016/679, 2016 (L 119) 1 (on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)); Bundeskartellamt, *supra* note 4.

[20] Unlike Germany, France, and the Netherlands, Ireland, Finland, Denmark, and Sweden warn against detailed obligations. *See* Kayali & Lager, *supra* note 18.

[21] *See* Kayali & Lager, *supra* note 18. *See also* Damien Geradin, *What will be the role of EU competition law in a post-DMA environment?*, PLATFORM LAW BLOG (Feb. 2, 2021), *available at* https://theplatformlaw.blog/2021/02/02/what-will-be-the-role-of-eu-competition-law-in-a-post-dma-environment/.

[22] Margrethe Vestager, Video recording for the Studienvereinigung Kartellrecht International Forum 2021 (March 11, 2021), *available at* https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/video-recording-studienvereinigung-kartellrecht-international-forum-2021_en. Note that the notification, designation, and implementation will take another eleven months (roughly) before the obligations become effective.

# Recent Issues in U.S. Antitrust Enforcement Against Tech Platforms

***Daniel P. Weick***[1]

This summary provides an overview of recent developments in U.S. antitrust enforcement against tech platforms. It was originally included in the written materials for the American Bar Association Antitrust Law Section's Spring Meeting program, "Tech Firm Conduct: 'Hypercompetitive' or 'Anticompetitive'?" A two-sided platform "offers different products or services to two different groups who both depend on the platform to intermediate between them."[2] While, in principle, platforms may have more than two sides, and many types of services could be viewed as platforms, two-sided platforms have seen substantial antitrust interest because of the possibility of the platform operator exercising market power with respect to one or both sides of the two-sided platform.[3]

In recent years, policymakers and commentators have raised concerns regarding the potential for unilateral anticompetitive conduct by firms that both own an important commercial platform and provide services on that platform that compete with third-party providers who depend on the platform. Most of these concerns have focused on certain technology platforms where a single firm runs an online marketplace but also sells goods or applications in competition with other sellers in the marketplace.

Case law has not yet addressed these issues directly.[4] *In Lorain Journal Co. v. United States*, the Supreme Court held that a dominant newspaper's practice of terminating advertising contracts for advertisers that also used the local radio station represented an attempt to monopolize the local advertising market, suggesting that the Sherman Act limits the ability of a dominant platform to punish its customers for using other platforms.[5] Similarly, in *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, the First Circuit held that a produce market refusing space to a seller that competed with the market's shareholders violated Sherman Act Section 2, finding that "the latent monopolist must justify the exclusion of a competitor from a market which he controls."[6]

More recently, the Supreme Court found in *Ohio v. American Express Co.* that in platform markets exhibiting "indirect network effects" between the two sides of the platform, like the "two-sided transaction platforms" in the credit card payments market, courts must "analyze the two-sided market . . . as a whole" rather than determining antitrust liability based on harm to one side of the platform market.[7] The Court also addressed platform issues in *Apple Inc. v. Pepper*, holding that purchasers of "apps" on the Apple Inc. App Store had standing to sue as direct purchasers in a suit alleging that Apple monopolized "the iPhone apps aftermarket" by preventing iPhone users from downloading apps through any channel other than Apple's App Store.[8]

Developing issues in this space include pending investigations of major technology firms and the potential for new legislation directly addressing platform competition.[9] As to the investigations, the Department of Justice, the Federal Trade Commission, and several State Attorneys General have opened a series of investigations into technology platform companies.[10]

These investigations have resulted in five complaints, three against Google and two against Facebook. In the first complaint against Google, the Department of Justice and several States allege that Google LLC and its parent company, Alphabet Inc., deployed vertical restraints with smartphone developers and other tactics to ensure that most mobile devices installed Google's search engine as the default search engine.[11] The suit raises issues concerning potentially exclusionary vertical contracts, an area governed by well-defined legal

[1] Daniel Weick performed legal services for Google as an attorney at Wilson Sonsini Goodrich & Rosati, P.C. from March 2011 to August 2020 but has no current relationship with any of the companies mentioned in this summary. Mr. Weick is currently at Columbia University and owns The Law Office of Daniel P. Weick.
[2] *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018).
[3] *Id.* (collecting scholarly writings on two-sided platforms).
[4] *See Epic Games, Inc. v. Apple Inc.*, 493 F. Supp. 3d 817, 833-34 (N.D. Cal. Oct. 9, 2020) ("As the parties acknowledge, this matter presents questions at the frontier edges of antitrust law in the United States. Simply put, no analogous authority exists."). In resolving the plaintiff's motion for a preliminary injunction, the court found "serious questions" existed concerning the plaintiff's allegations that Apple Inc. unlawfully ties distribution of apps on iOS-based mobile devices to its in-app payment system, but not a likelihood of success. *Id.* at 843.
[5] *Lorain Journal Co. v. United States*, 342 U.S. 143, 149-55 (1951).
[6] *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484, 488 (1st Cir. 1952).
[7] *American Express Co.*, 138 S. Ct. at 2285-87. *See also id.* at 2280 ("Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate.").
[8] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 & 1525 (2019).
[9] *See* Cecilia Kang and David McCabe, *Lawmakers Denounce "Monopolies" Of Big Tech*, N.Y. TIMES, Oct. 7, 2020, at B1 (describing Congressional activity and agency investigations).
[10] *Id.* ("The Justice Department has been working to file an antitrust complaint against Google, followed by separate suits against the search giant from state attorneys general. Antitrust investigations of Amazon, Apple and Facebook are also underway at the Justice Department, the Federal Trade Commission and four dozen state attorneys general.").
[11] Compl., *United States v. Google LLC*, Case No. 1:20-cv-3010 (D.D.C. Oct. 20, 2020).

principles.[12] The second complaint against Google, filed by Texas and nine other States, alleges that the company monopolized various aspects of online advertising by acquiring DoubleClick in 2008 and then forcing publishers that sell online ad space (e.g., news websites) to license Google's ad server and use Google's ad exchange for selling advertising space, all while killing potentially competitive alternatives.[13] This complaint also alleges that Facebook conspired with Google to eliminate alternatives to Google's ad bidding process.[14] Most recently, a coalition of 38 States and territories led by Colorado filed a third complaint against Google alleging that it monopolized the search and search advertising markets by (1) using vertical restraints to ensure Google serves as the default search engine on mobile devices, (2) designing its Search Ads 360 tool to prevent interoperability with competing search advertising tools, and (3) limiting the ability of specialized search services (e.g., travel or entertainment-focused search tools) to acquire customers.[15]

The two complaints filed against Facebook, one by the Federal Trade Commission and the other by a coalition of 48 States and territories led by New York, make substantially overlapping allegations. In each case, the government enforcers contend that Facebook has monopolized social networking by acquiring nascent competitors Instagram and WhatsApp and by using restrictions on connection to its application programming interface ("API") to prevent potential competitors from offering services that would directly compete with Facebook's core product offerings.[16]

On the legislative front, the majority staff of the Subcommittee on Antitrust, Commercial and Administrative Law of the U.S. House of Representatives Committee on the Judiciary issued a report in October 2020 relating to the Subcommittee's investigation of competition in digital markets focused on allegations against Amazon.com, Inc., Apple Inc., Facebook, Inc., and Google LLC. The report alleges that "each platform now serves as a gatekeeper over a key channel of distribution" and that "each platform uses its gatekeeper position to maintain its market power."[17] It recommends legislation imposing structural and/or line-of-business separation rules,[18] nondiscrimination rules that "would require dominant platforms to offer equal terms for equal service and would apply to price as well as to terms of access,"[19] "data interoperability and portability" requirements,[20] merger presumptions under which "any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion,"[21] an antitrust safe-harbor for "news publishers and broadcasters" to engage in collective bargaining with "dominant online platforms,"[22] and prohibition of "the abuse of superior bargaining power, including through potentially targeting anticompetitive contracts, and introducing due process protections for individuals and businesses dependent on the dominant platforms."[23] The report also advocates broad legislative reforms to extend Section 2 of the Sherman Act to abuses of dominance short of monopolization; to modify the antitrust rules regarding monopoly leveraging, predatory pricing, essential facilities and refusals to deal, tying, self-preferencing, and anticompetitive product design; and to eliminate the requirement to define a relevant market to prove an antitrust violation.[24]

In the Senate, Senator Amy Klobuchar has released a broad antitrust reform bill with implications for platform owners.[25] It would broadly define exclusionary conduct for purposes of the Clayton Act as conduct that has "an appreciable risk of harming competition" and substantially lower the requirements for proving market power.[26] It would also eliminate any requirement that a party bringing an antitrust claim against a "platform business" show harm "on more than 1 side of the multi-sided platform."[27] If adopted, the proposed

[12] *See, e.g.*, *FTC v. Qualcomm Inc.*, 969 F.3d 974, 1003-05 (9th Cir. 2020) (analyzing vertical agreement between Qualcomm and Apple); *United States v. Microsoft Corp.*, 253 F.3d 34, 67-71 (D.C. Cir. 2001) (en banc) (analyzing vertical contracts between Microsoft and internet access providers).
[13] Compl., *Texas v. Google LLC*, Case No. 4:20-cv-957 (E.D. Tex. Dec. 16, 2020).
[14] *Id*. ¶¶ 12-14.
[15] Compl., *Colorado v. Google LLC*, Case No. 1:20-cv-3010 (D.D.C. Dec. 17, 2020).
[16] Compl., *FTC v. Facebook Inc.*, Case No. 1:20-cv-03590 (D.D.C. Dec. 9, 2020); Compl., *New York v. Facebook Inc.*, 1:20-cv-03589 (D.D.C. Dec. 9, 2020).
[17] STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONGR., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 6 (Comm. Print 2020).
[18] *Id*. at 377-81. "Structural separations prohibit a dominant intermediary from operating in markets that place the intermediary in competition with the firms dependent on its infrastructure. Line of business restrictions, meanwhile, generally limit the markets in which a dominant firm can engage." *Id*. at 378-79.
[19] *Id*. at 381.
[20] *Id*. at 384.
[21] *Id*. at 387.
[22] *Id*. at 388.
[23] *Id*. at 390.
[24] *Id*. at 394-98.
[25] Competition and Antitrust Law Enforcement Reform Act of 2021, S.225, 117th Cong. (2021).
[26] *Id*. § 9(a).
[27] *Id*.

legislation would have a wide-ranging impact on antitrust law, including the law applicable to tech platforms.[28]

[28] *See generally* Bill Baer, *How Senator Klobuchar's proposals will move the antitrust debate forward*, BROOKINGS INSTITUTION TECHTANK (Feb. 8, 2021), *available at* https://www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-proposals-will-move-the-antitrust-debate-forward/.

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# China's Antitrust Guidelines in the Field of Platform Economy: A Discreet Step Forward

***Annie Xue***[1]

China's anti-monopoly enforcement agency, the State Administration for Market Regulation ("SAMR"), released the Draft Antitrust Guidelines in the Field of Platform Economy ("Draft") on November 10, 2020 for public comments. It's a move taken amidst tightened supervision of large technology companies (especially Internet platform companies) in major global economies, and the growing criticism about issues such as "pick one in two"[2] and "big-data empowered discriminatory pricing" in China. The Draft generated severe controversies on various fronts. After a three-month comment period, on February 7, 2021, the SAMR officially issued the "Antitrust Guidelines in the Field of Platform Economy" ("Guidelines") without resolving certain unsettled issues. The release of the Guidelines highlights the Chinese government's determination to deal with certain market issues in the digital era with antitrust regulation and improve enforcement transparency and certainty by setting up a compliance roadmap.

## A. The Main Differences Between the Guidelines and the Draft

Compared with the Draft issued in November 2020, the amendments made in the Guidelines in the following areas are noteworthy:

### 1. Market Definition Still Required

The Draft distinguished when it was necessary to define a relevant market depending on the circumstances: (1) in a cartel or resale price maintenance ("RPM") case, it may not be necessary to define a clear relevant market; (2) in an abuse of market dominance case, if certain conditions are met[3] a platform operator's abusive practices can be directly determined without first defining a relevant market; and (3) in a merger review, market definition is necessary for the competitive analysis. The Draft's deviation in this respect from long-standing practices (especially in the abuse of market dominance case) caused significant concerns and debates. Commentators were concerned that the simplified competition analysis may arbitrarily lower the burden of proof for the antitrust authorities and private plaintiffs, resulting in more type I errors.

To address commentators' concerns, the official Guidelines first deleted the controversial circumstances where market definition can be skipped, sticking to the long-standing principle that relevant market definition is required in all types of antitrust cases. With that being said, the Guidelines reserve the possibility that "different types of monopoly cases have different practical needs for definition of relevant markets." It remains to be seen whether and how the law enforcement agencies will identify and justify the "special practical needs" of skipping market definition. In fact, both the relevant product market and the relevant geographic market were defined in two post-Guidelines high-profile exclusive dealing cases. They were respectively launched by the SAMR and the Shanghai Administration for Market Regulation ("SHAMR")[4] but both targeted the e-commerce platforms with national or regional market significance.

Second, the Guidelines clarify that when defining relevant markets, multiple relevant commodity markets can be defined based on one or multiple sides of a platform. It also states that where there are cross-platform network effects that can sufficiently constrain the platform operators, the relevant commodity market definition can take into account multiple sides of the platform. That is to say, the multi-sided market can be integrated to define a single relevant market.

In addition, the Guidelines add new factors to be considered for substitutability analysis in defining relevant markets. Specifically, due to complexities such as retaining platform functions, business models, user groups, multi-sided markets, offline transactions and other dynamics, the Guidelines add "application scenarios" as a factor for demand substitutability analysis. When it comes to supply

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[2] "Pick one in two" is a Chinese expression that refers to certain types of exclusive dealings, including exclusive contracting and the associated incentive mechanisms which prevent businesses operating on a platform from multihoming. The incentive mechanisms may include punitive measures such as search downgrades, traffic restrictions, technical barriers, and withholding. Positive incentives such as subsidies, discounts, preferences, traffic flow resource support, and the like may also be used to prevent multihoming. While these kinds of incentive schemes may benefit platform operators, consumer interests, and improve social welfare overall, they may also be harmful trading behavior if they cause obvious exclusive and restrictive effects on market competition.

[3] Article 4(3) of the Draft sets out the following conditions for the exemption of market definition in a market dominance abuse case: (1) certain behaviors that are only possible based on a dominant market position occur; (2) the said behaviors last for a material period of time; (3) the competition harm is conspicuous; (4) it's extremely difficult to come up with an accurate relevant market definition; and (5) there is sufficient evidence to prove the first four conditions.

[4] See the SAMR decision about the Alibaba case, *available at* http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210409_327698.htm (in Chinese). See the SHAMR decision about the Sherpa's case, *available at* http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210412_327737.html (in Chinese).

substitutability analysis, the SAMR will also consider cross-market competition in addition to the traditional factors such as market entry, technical barriers, network effects, lock-in effect and switching costs.

**2. Independent Parallel Acts Such as Price Following Do Not Create an Illegal Agreement**

Following the Draft, the Guidelines exclude independent parallel acts such as price following from liability but add use of data, algorithms and platform rules as alternative means to achieve concerned actions, a response to the phenomena prominent in digital industries.

When determining platform-related monopoly agreements, the Guidelines essentially take the subjective intentions of operators into consideration. The objective fact that platforms follow each other's prices or use similar data, algorithms, rules, etc., is not enough by itself to create a monopoly agreement. A monopoly agreement requires communication between the operators or at least indirect evidence that communication can be presumed to exist.

The Guidelines' position that platform independent parallel acts are not monopoly agreements is consistent with the certification requirements of "coordinated behavior plus communication" that China has consistently upheld in administrative and judicial enforcement of monopoly agreements. It is also in line with current enforcement needs. Presently, internet platforms in China are an oligopoly in many sectors. The competition among platforms is fierce, and "following" behaviors are common. Platforms make profit-maximizing decisions in an interdependent environment, thus it is difficult to prove that any action is the result of an explicit or tacit agreement between them. This provision of the Guidelines shows that law enforcement agencies currently adopt a relatively modest regulatory attitude on issues such as data, algorithms and other independent parallel acts and price-following behavior.

**3. Most Favored Nation Clauses ("MFNs") May Constitute a Monopoly Agreement or an Abuse of Dominant Market Position**

The Draft made it clear that the MFNs may constitute a vertical monopoly agreement. The SAMR would consider these factors in its analysis: the parties' market power, competition in the relevant market, the commercial motivation for entering the MFN, the impact of the MFN on the ability of other firms to enter the market, consumer welfare, and innovation.

The Guidelines describe MFNs as when "platform operators require the operators on the platform to provide them with equal or superior trading conditions such as price and quantity compared to other competitive platforms." These MFNs, the Guidelines further clarify, might be considered not only a vertical monopoly agreement but may also constitute an abusive practice of market dominance.

**4. A "Substantial Reduction in the Existing Number of Transactions" and Other Refusals to Deal Will Face Scrutiny**

Compared with the Draft, Article 14 of the Guidelines adds "substantially reducing the existing number of transactions with counterparties" as a potential refusal to deal claim under abuse of dominant market position. This is in line with the "Interim Provisions on Prohibition of Abuse of Dominant Market Position" and relevant regulations issued by the SAMR, that include indirect refusals to deal as potential violations. A most recent case that reflects this regulatory attitude is the Sherpa's case, where the Shanghai based takeaway platform would take down a seller if it also sells on other platforms.

**5. Data Is Not an Essential Facility, But a Platform Possessing Data May Be**

The Draft stipulated that both platforms and data may constitute an essential facility. The Guidelines delete the statement that data may constitute an essential facility, but in determining whether the platform constitutes an essential facility, the SAMR will look at the extent to which the platform possesses data.

Judging from the current law enforcement and judicial practices in Europe and the United States, the theory of "essential facility" is mainly applicable to public utilities with a natural monopoly and a network industry. As a new type of factor of production, data is quite different from the traditional ones. Anti-monopoly law enforcement in the data field is intertwined with data property rights, user privacy protection, and more complex issues such as how to balance and choose between innovation and competition. As to whether data needs to be regulated by anti-monopoly laws and whether traditional anti-monopoly theories can be applied, further exploration and examination through practice by law enforcement and justice are still needed. In the administrative guidance offered by the SAMR's in the Alibaba case, among others, the authority expressly mentioned personal information and privacy protection as one of the platform responsibilities to be strengthened.

**B. Important Breakthroughs of the Guidelines**

The Guidelines retain the provisions on "algorithmic collusion," "pick one in two," "hub-and-spoke agreements" and other related issues in the Draft. Compared with the previous departmental regulations and normative documents issued by

the regulatory agency, the Guidelines achieve breakthroughs in the aspects below.

**1. Monopoly Agreements**

The law enforcement field touches cutting-edge issues such as "algorithmic collusion" and "hub-and-spoke agreements." Specifically, the Guidelines stipulate that platforms' use of data, algorithms and platform rules, etc., to achieve coordinated behavior (with communication) may constitute a horizontal monopoly agreement (see Article 6). A hub-and-spoke agreement reached either through the "spokes" leveraging the vertical relationship with the platform operator, or through the platform operator "hub" organizing and coordinating the "spokes," may constitute a monopoly agreement if it excludes competition (see Article 8).

**2. Abuse of Dominant Market Position**

Article 15 clarifies that the "pick one in two" behavior may constitute restricted exclusionary behavior. Implementing punitive measures can also be deemed restricted exclusionary behavior. If an incentive scheme has an obvious exclusion or restriction effect on market competition, it may also be deemed restricted exclusionary behavior (see Article 15).

Article 17 clarifies that big data-enabled personalized pricing may constitute price discrimination regulated by the Anti-Monopoly Law. Differential transaction prices or other trading conditions based on big data and algorithms, according to the counterparties' ability to pay, consumption preferences, usage habits, etc., may constitute price discrimination. The Guidelines, however, eliminated the phrase "differential trading prices or other trading conditions for old and new counterparties, based on big data and algorithms" that was in the Draft. This modification indicates that whether the transaction counterparty is "old" is not a necessary condition for determining differential treatment. Rather, it is necessary to comprehensively consider the payment ability, consumption preferences and usage habits of the counterparty of the transaction to determine whether the users' transaction conditions are the same.

**3. Merger Review**

The Guidelines clarify that Variable Interest Entity[5] mergers and acquisitions fall within the scope of merger review. Under circumstances where the transaction does not meet the notification criteria and where there is a high degree of concentration in the relevant market, the regulatory agency can initiate ex officio investigations (see Article 18).

**4. Abuse of Power by Administrative Agencies**

It is an abuse of an administrative agencies' administrative power to exclude or restrict competition by taking specific stipulated acts, including by directly or indirectly restricting an entity or individual's operation, purchase, or use of the goods provided by the designated operators in the platform economy (see Article 22).

Administrative agencies and organizations authorized by laws and regulations to manage public affairs shall formulate regulations, normative documents, other policy documents and specific policy measures in the case based on the economic activities of market participants in the platform economy. The agencies shall conduct fair competition reviews (see Article 23).

**C. Conclusion**

On the whole, the Guidelines summarize the advanced law enforcement experience of China and other jurisdictions and respond to internet-related monopoly issues under the Anti-Monopoly Law. Before the Guidelines officially came out, the SAMR had launched an investigation into the suspected monopolistic behavior of some internet platforms and made administrative penalty decisions on some cases. The Guidelines signal that the government's anti-monopoly supervision and regulation of the internet and platform operators is on the agenda. Acts such as "pick one in two," "most-favored-nation treatment," "price discrimination through big data" and failure to notify mergers may all become the upcoming focus of law enforcement. In addition, in the field of civil litigation, some disputes between internet companies alleging platform and data monopolies have been submitted to court for trial. Therefore, it is necessary for Internet companies to take precautions, analyze their own controversial business models and competitive schemes based on the Guidelines, and evaluate and design alternative solutions, in order to reduce the legal risks that companies may face after the Guidelines come into effect.

[5] A variable interest entity ("VIE") refers to a legal business structure in which an investor has a controlling interest despite lacking majority voting rights. In the Chinese platform context, a VIE is often set up to achieve two goals: (1) obtain the qualification to apply for a telecom license, which is only available to Chinese-funded companies; and (2) conveniently raise funds and get listed.

# Summary of the ABA Sections' Comments on "Algorithms: How they can Reduce Competition and Harm Consumers"

***By Dr. Aparna Sengupta[1] & Jody Boudreault[2]***

On March 16, 2021, the Antitrust Law Section and the International Law Section of the American Bar Association ("the Sections") submitted their comments on the consultation paper "Algorithms: How they can reduce competition and harm consumers," published by the Competition and Markets Authority ("CMA") on January 19, 2021 ("the Paper").[3]

The Sections recognized the increasingly important role that algorithms play in commercial activities. The Sections also acknowledged the complexity of algorithmic systems and the importance of analyzing the implications of their use from a competition and consumer law perspective. As recognized by the CMA in the Paper, the Sections also noted that both inter-agency and international cooperation is essential for assessing such implications because platforms and internet businesses span the globe. The use of algorithms and their resulting consumer harm or benefit are not restricted to a single jurisdiction. The Sections appreciated the CMA's comprehensive overview and assessment of potential harms to competition and consumers from the use of algorithms and their continued commitment to coordinate further work on algorithms with its international enforcement colleagues.

This article summarizes the Sections' comments on exclusionary abuses and collusion risks.

## I. Exclusionary Abuses

The Sections commended the CMA "for comprehensively identifying potential theoretical harms that could stem from the unilateral development, adoption, or modification of algorithms."[4] These included exclusionary abuses that could theoretically foreclose competition, such as: (1) self-preferencing; (2) unintended exclusion from manipulation of platform algorithms; and (3) predatory pricing.[5] Although "the Paper acknowledges the potential efficiencies or benefits associated with algorithms generally, the discussion of these benefits is limited in the context of the assessment of individual exclusionary harms."[6] The Sections therefore made two suggestions. First, the CMA should further develop evidence on "the extent of efficiencies and benefits created by particular algorithms" because pro-competitive benefits are "relevant to the application of the legal standard. . . ."[7] Second, the CMA should help avoid enforcement uncertainty and promote the legitimate and procompetitive development, implementation, and refinement of algorithms.[8] For this, the CMA should provide further guidance on which applicable legal standards—including how pro-competitive benefits and efficiencies may be weighed—will apply to potential identified theories of harm.[9]

### *a. Potential Efficiencies and/or Benefits of Algorithms*

The Sections discussed efficiencies and benefits to consumers from algorithms that the Paper did not identify. "For example, refinement of a search algorithm could enhance relevance of results overall, to the benefit of consumers and other users."[10] Additionally, "potential benefits from algorithmic improvements [may] promote legitimate—and potentially procompetitive—modification of algorithms."[11] The Sections encouraged the CMA to "consider efficiency-enhancing discounts that promote competition and consumer benefits. . . ."[12]

"Further, when considering the real-world effects associated with use and modification of algorithms—including balancing the potential harms and benefits—the Sections strongly recommend[ed] that the CMA's future work program develop the Paper's theoretical discussion to develop and consider empirical evidence."[13] The Sections noted that the Paper rightly acknowledges that "[e]ven in relatively well-researched areas, such as algorithmic collusion, there is a dearth of empirical studies to understand real-world impacts."[14] Because the operation of machine learning and algorithms is a

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[3] ABA Section of Antitrust Law, *Joint Comments on Competition and Markets Authority Consultation Paper on "Algorithms: How They Can Reduce Competition and Harm Consumers,"* Mar. 16, 2021 [hereinafter *ABA Comments*], *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/march-2021/comments-uk-31621.pdf; Competition & Markets Authority, *Algorithms: How they can reduce competition and harm consumers*, Jan. 19, 2021 [hereinafter *Paper*], *available at* https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers.
[4] *ABA Comments*, *supra* note 3, at 4.
[5] *Paper*, *supra* note 4, § 2.2.
[6] *ABA Comments*, *supra* note 3, at 4.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 5.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Paper*, *supra* note 4, at 3.

highly complex area,[15] the Sections called for further evidence gathering. Given this context, the Sections respectfully recommended "that the future work in relation to the effects of algorithms be evidence based, taking due account of the complexity of the issues."[16]

*b. Framework for Assessment*

The Sections called for further guidance and clarification of "legal standards relevant to assessing: when development, use, or modification of an algorithm could constitute an exclusionary abuse; the types of evidence that the CMA envisages would be relevant to this assessment; and how changes to algorithms that may create benefits for some users and negative implications for others should be assessed."[17]

In particular, the Sections welcomed "guidance as to whether the CMA envisages its further work on exclusionary issues relating to algorithms proceeding under the proposed *ex ante* regime for the Digital Markets Unit, existing competition law, or both."[18] If both, the Sections suggested that "further guidance regarding the relevant factors for determining which legal framework to apply would be helpful."[19] For example, "[e]xisting competition law standards on issues such as 'self-preferencing' are currently in a state of development so that it is likely to be more difficult for businesses and advisers to 'self-assess' how potential uses of, and/or changes to, algorithms will be evaluated under applicable legal standards. Given the potential consequences for business (including exposure to sizeable penalties) and current lack of clarity in this area, the Sections encourage[d] the CMA to develop further guidance to assist businesses and their advisers in assessing when an algorithm is likely to result in one of the exclusionary harms identified in the Paper."[20]

Finally, the Sections called for further guidance as to the legal standard for assessment of "unintended harms"[21] stemming from legitimate business decisions to make changes to algorithms. Because the potential effects of algorithmic changes may not always be clear in advance, the Sections particularly encouraged guidance as to the legal standard for assessment of "unintended harms" "to allow businesses to proactively monitor and seek to mitigate the risk of such harms in advance."[22]

## II. Collusion Risks

The Sections appreciated CMA's evaluation of the use of algorithms in the context of horizontal price-fixing agreements, hub and spoke conspiracies, and autonomous tacit collusion. The Sections described that algorithms present a "double-edged sword" to competitive markets. The use of algorithms could enhance competition by facilitating rapid response to changing competitive conditions and customer demand. However, the use of algorithms may facilitate collusion and make cartels more stable. Based on the current understanding of the use of algorithms, the Sections concluded that the use of algorithms "does not alter the core elements of a cartel case."[23]

*a. Horizontal Price Fixing Agreements*

The Sections described that "[c]ases in which competitors use an algorithm to implement or monitor a price-fixing agreement are still, at their essence, just traditional price-fixing cases," and an agreement among competitors remains a required element in proving collusion.[24] The Sections cited the online poster cases, *United States v. Topkins*[25] and *United States v. Aston*,[26] where the DOJ demonstrated how U.S. antitrust laws can be used to prosecute this type of classic collusive agreement to restrain trade.[27]

The Sections commented that existing law and economic analysis could adequately address potential horizontal price-fixing issues raised by algorithms, although acknowledging that computer-determined pricing may be susceptible to coordination, just as human-determined pricing.[28]

The Sections clarified that the mere fact of using algorithms to detect competing prices that are already transparent quickly does not convert lawful conscious parallelism into a cartel offense. They illustrated this point by giving the example of two petrol stations across the street from one another, and as one station posts its new price to the public, the other station could adjust its price as well. "Without an

[15] *Id*. § 1.
[16] *ABA Comments*, *supra* note 3, at 5.
[17] *Id*.
[18] *Id*. at 5-6.
[19] *Id*. at 6.
[20] *Id*.
[21] *Paper*, *supra* note 4, § 2.2.2.
[22] *ABA Comments*, *supra* note 3, at 6.
[23] *Id*.
[24] *Id*. at 7.
[25] Information, *United States v. Topkins*, No. 3:15-cr-0021 (N.D. Cal. Apr. 6, 2015), ECF No. 1, *available at* https://www.justice.gov/atr/case-document/file/513586/download.
[26] Indictment, *United States v. Aston*, No. 3:15-cr-00419 (N.D. Cal. Aug. 27, 2015), ECF No. 1, *available at* https://www.justice.gov/atr/file/840016/download.
[27] Press Release, U.S. Dep't of Justice, Former E-Commerce Executive Charged with Price fixing in the Antitrust Division's First Online Marketplace Prosecution (Apr. 6, 2015), *available at* https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace.
[28] *ABA Comments*, *supra* note 3, at 7.

agreement between the stations on any component of the price, there is no cartel violation."[29]

*b. Hub and Spoke Conspiracies*

The Paper discussed the possibility that using algorithms by online platforms could create a "hub-and-spoke structure" or facilitate anticompetitive information exchange among such platforms and their supply-side users.[30] For a potential hub-and-spoke conspiracy, the Sections commented that "there should be evidence of an agreement among horizontal competitors to fix prices or allocate markets, or at least to use a particular algorithm to achieve those same ends."[31]

The Sections respectfully recommended exercising caution before inferring a per se unlawful cartel offense merely from using a common algorithm by sellers on an online platform. The Sections described that the rule in both UK courts[32] and the United States[33] is that a series of vertical agreements between a "hub" and various "spokes" can be viewed as a horizontal agreement among the spokes only if they use the hub as a means to communicate an anticompetitive intent with each other.[34] Finally, the Sections commented that there could be procompetitive justifications on certain online platforms to use a common algorithm that should be considered in any analysis (e.g., using a common algorithm may result in competitive pricing to consumers).[35]

*c. Autonomous Tacit Collusion*

The Paper discussed the possibility of "autonomous tacit collusion," as the third concern around algorithmic collusion, where algorithms could use complex techniques to learn to collude tacitly.[36] The Sections agreed with the Paper's conclusion that the risk of such collusion in real-world markets is unclear due to the lack of sound empirical evidence.[37]

The Sections raised three issues. First, if future research supports algorithmic "autonomous tacit collusion" (i.e., collusion without explicit communication and human intentions), would antitrust enforcers need a new definition of agreement and treat algorithmic interactions similarly to human interactions? Second, although humans design algorithms – do they intentionally design such algorithms so they can self-learn to collude? Finally, would individuals or firms that benefit from the algorithmic collusion be liable for the algorithm's autonomous decisions? Although the Sections did not rule out that a different legislative approach to some of these issues might be required, they agreed that additional studies and research are necessary to assess whether autonomous tacit collusion can and does take place.[38]

*d. Other Issues*

The Sections also recommended that the CMA consider other issues related to collusion that were not mentioned in the Paper.

First, the Sections suggested CMA exercise caution concerning their recommendation of disclosing algorithms to the consumers.[39] The Sections described that information relating to a firm's use of pricing algorithms should be considered highly confidential because sharing or even disclosing that a certain kind of algorithm is being used to set prices could facilitate collusion with competitors.[40]

Second, the Sections recommended CMA to consider discussing how algorithms might make markets more susceptible to collusive outcomes, if at all. For example, does the use of algorithms change any structural (demand and supply) characteristics, or does the availability of algorithms and data make it easier for firms to innovate and differentiate their production process leading to asymmetries in costs and hence harder to sustain "collusion."[41]

Finally, the Sections suggested that the CMA consider topics related to multi-market contacts and multi-sided markets in greater detail.[42] "For example, how would the CMA assess 'collusive' activities potentially harming one side of the market, third-party sellers, but that return as indirect network effects to the other side of the market, consumers, as benefits?"[43]

[29] *Id*.
[30] *Paper*, *supra* note 4, §§ 2.80(b), 2.83.
[31] *ABA Comments*, *supra* note 3, at 8.
[32] Nicolas Sahuguet & Alexis Walckiers, *Hub-and-Spoke Conspiracies: the Vertical Expression of a Horizontal Desire?*, 5 J. EUR. COMPETITION L. & PRAC. 711, 712 (2014).
[33] *E.g.*, *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).
[34] *ABA Comments*, *supra* note 3, at 8.
[35] *Id*.
[36] *Paper*, *supra* note 4, §§ 2.80(c), 2.84–2.85.
[37] *ABA Comments*, *supra* note 3, at 8.
[38] *Id*. at 8-9.
[39] *Id*. at 9.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.

# Recap: States v. Google Explained

***Sarah Zhang***[1]

On January 14, 2021, Mr. David Kully and Dr. Nancy Rose discussed the recent monopolization claims filed against Google by the Department of Justice ("DOJ") and by state attorneys generals in a program presented by the ABA Antitrust Section's Unilateral Conduct Committee.[2] Mr. Kully is an Antitrust Partner at Holland & Knight and former Chief of the Litigation III section at DOJ. Dr. Rose is the Charles P. Kindleberger Professor of Applied Economics at MIT.

Dr. Rose introduced the background information for this matter. In October 2020, the DOJ filed an action against Google for maintenance of its monopoly in search via exclusion of competitors, which was joined by fourteen state AGs.[3] On December 16, 2020, Texas filed an action against Google focusing on Google's conduct in the "ad tech" space, which was joined by nine other state AGs.[4] The next day, Colorado and thirty-four other state AGs filed another action against Google, alleging the same conduct as the DOJ action plus additional anticompetitive conduct.[5] Finally, there have also been many private class action suits against Google. Dr. Rose explained that the key question in each of these cases will be whether Google's actions reflect anticompetitive "bad acts" or whether Google simply prevailed by being a better competitor. Dr. Rose and Mr. Kully then proceeded to discuss the Texas v. Google and the Colorado v. Google actions in more detail.

## Texas v. Google

Mr. Kully presented the following graphic to help explain the Texas allegations:


The Texas action alleged that Google was dominant in each segment of ad tech (ad servers, exchanges & networks, and ad buying tools); for example, that Google's Ad Manager had a 90% market share in the ad server segment. Texas further alleged that Google's dominance across all the segments allowed it to work against the interest of the customers; for example, charging 2-4 times higher fees for its ad exchange than the next closest competitor and using its market power in one segment to gain power in another segment. In addition, Texas alleged that Google engaged in conduct that insulated itself against meaningful competition from smaller players.

Mr. Kully then expressed his view that, while the allegations of Google's conduct in insulating itself from smaller competitors seemed credible, the only "real existential threat" to Google was the invention of "header bidding," which he proceeded to explain in more detail. The complaint alleged that in 2014, ad publishers adopted a "header bidding" innovation which allowed them to route inventory to multiple exchanges; by 2017, 70% of publishers were routing inventory to exchanges other than Google. Publisher revenue "jumped overnight" due to header bidding because other exchanges could now compete with Google, and both publishers and advertisers became less dependent on Google's ad servers and exchanges. Google then allegedly took a variety of steps to eliminate the threat to maintain its monopoly. The "most explosive" allegation was that Google bought off Facebook from using header bidding technology. Facebook allegedly agreed to curtail its own header bidding and bid through Google's ad servers instead, and in return, Facebook would receive special auction access and possibly avoid paying exchange fees, as well as receive information and speed advantages when bidding as an advertiser on the demand side. Google also allegedly blocked header bidding by refusing to share necessary information with publishers to compare the performance of different exchanges.

Dr. Rose then expressed her views and observations on the Texas case against Google. She agreed that the header bidding allegations seem like the strongest aspect of the case, in the sense that Google was not simply targeting a potential competitor down the road (e.g., Microsoft and Netscape), but a real threat that has already materialized through innovation. She also noted that Texas appeared to hinge much of its complaint on Google's acquisition of DoubleClick, alleging that there was a dramatic change in Google's behavior in the ad markets once it acquired DoubleClick. Texas did not specifically request

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[2] ABA members can view a recording of the program at https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/january-2021/ by clicking on the hyperlink to "States v. Google Explained – January 14, 2021."

[3] Compl., *United States et al. v. Google LLC*, Case No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), available at https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc

[4] Compl., *Texas et al. v. Google LLC*, Case No. 4:20-cv-00957 (E.D. Tex. Dec. 16, 2020), available at https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf

[5] Compl., *Colorado et al., v. Google LLC*, Case No. 1:20-cv-03715-APM (D.D.C. Dec. 17, 2020), available at https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf

divestiture of DoubleClick, but it did include broad requests for structural and injunctive remedies. Dr. Rose speculated that perhaps this action was a strategy to establish a set of anticompetitive behaviors that were not so much "exclusionary" in the conventional Section 2 sense, but that were enabled by an anticompetitive acquisition leading to the alleged harms.

**Colorado v. Google**

Mr. Kully explained that Colorado effectively alleged the same relevant markets as the DOJ complaint – "general search services," "general search text advertising," and "general search advertising." Colorado also alleged the same kind of anticompetitive conduct, that Google uses "its massive financial resources" to obtain de facto exclusivity over all search access points.

However, Colorado included two additional conduct allegations:

1. Google operates its SA360 service in a biased manner, preventing advertisers from evaluating effectively performance of search advertising on Bing, and
2. Google responds to consumer searches in a way that prevents specialized vertical providers from receiving the traffic they need to compete effectively with Google.

Mr. Kully found the second allegation regarding disadvantaging specialized vertical providers the most intriguing. The allegation was that specialized vertical providers such as Hotels.com must rely on Google for traffic because there are no other search engines. If these providers could obtain enough direct search traffic, then they could potentially bypass Google and partner with alternative search engines such as Bing to increase Bing's prominence and undercut Google's monopoly. Google allegedly took steps to block the specialized vertical providers from achieving scale, for example, by pushing these providers lower in search results. In Mr. Kully's view, the claim seemed to be largely that Google is trying to make money off the searches in these verticals and has a good reason not to promote the specialized vertical providers in the way that those entities would like – so why isn't this allegation just like *Trinko*? Aren't these specialized providers just looking for access on Google's site, and Google shouldn't be obligated to give it to them?

Dr. Rose responded that she was more sympathetic towards that part of the complaint. One of Google's defenses was that it doesn't have a monopoly in search – for example, a large portion of product searches now occur directly on Amazon. As such, Google likely has a reasonable concern in preventing competitor entry in search. She believes that *Trinko* is something the plaintiffs will need to wrestle with, since the courts have put a lot of pressure on plaintiffs' cases to show that they really fit into the Section 2 bucket. But the fact that the alleged behavior seems to have developed more recently and perhaps coincidentally with how Amazon has managed to eat into Google's product search market, makes the allegations more credible that Google was trying to shut down potential competition rather than simply competing more aggressively.

Mr. Kully closed with the observation that Colorado's first additional allegation on Google's SA360 service was missing any allegation that Google has market power there or that any advertiser needs to use that service. The complaint alleged that Google's misuse of that service "harms the competitive process," but that did not sound like a Section 2 claim to him. Ultimately, he believes that Colorado's additional allegations didn't seem to add a lot to the DOJ complaint against Google.

# Recap: Podcast on Data Scraping and Monopolization—A Discussion of *hiQ Labs, Inc. v. LinkedIn Corp.*

***Jonathan Justl***[1]

The Unilateral Conduct Committee recorded a podcast on January 19, 2021 discussing the tension between antitrust and privacy law principles when examining the conduct of an alleged monopolist to prevent data scraping by a competitor, with a focus on the decisions to date in the pending *hiQ Labs, Inc. v. LinkedIn Corp.* case.[2]

Jonathan M. Justl, an antitrust attorney at Morgan, Lewis & Bockius LLP, moderated the discussion. The two panelists were Maureen K. Ohlhausen, chair of the antitrust group at Baker Botts LLP and former Acting Chairman and Commissioner of the FTC, and Gerard M. Stegmaier, an attorney at Reed Smith LLP where he focuses on the intersection of technology and antitrust law.

In *hiQ*, a data analytics company called hiQ filed a lawsuit against LinkedIn after LinkedIn allegedly blocked it from collecting information via automated bots that users had made publicly available on LinkedIn's professional networking website. The information obtained from public profiles allegedly was a key input into hiQ's proprietary analytics products, which it sold to businesses to enable them to identify employees who were most at risk of being recruited by another employer and to summarize employees' aggregate skills so they can identify any skill gaps among employees.[3]'

Following hiQ's launch in 2012, LinkedIn began offering its own competing product to provide employers with similar analytics based on LinkedIn's data. After LinkedIn implemented technical measures to block hiQ from accessing public profiles, hiQ filed a complaint asserting claims for intentional interference with contract and unfair competition under California's Unfair Competition Law, and moved for a preliminary injunction to require LinkedIn to stop blocking its access.[4] The district court granted a preliminary injunction in favor of hiQ, and the Ninth Circuit affirmed.[5] LinkedIn filed a petition for certiorari with the Supreme Court, which remains pending.

Meanwhile, hiQ filed an amended complaint with the district court in which it asserted claims under Sections 1 and 2 of the Sherman Act for monopolization, attempted monopolization, and unreasonable restraints of trade.[6] This time, however, the district court granted LinkedIn's motion to dismiss the antitrust claims, holding that hiQ had failed to allege a proper antitrust product market for "people analytics" and that the various theories of anticompetitive conduct alleged by hiQ such as a refusal to deal did not plausibly violate the antitrust laws.[7]

During the podcast, the panelists discussed their views on how hiQ brings together seemingly clashing areas of law, including privacy law's push to give consumers more control over usage of their data, antitrust law's concern that restricting access to data may harm competition in some circumstances, and intellectual property law's concern with enabling innovators to receive a sufficient reward for their investments to preserve incentives to innovate. The discussion focused on the extent to which these different areas of law can be reconciled to protect privacy rights and incentives to innovate without harming competition.

The panelists also discussed potential ways to reconcile the district court's rulings granting a preliminary injunction to hiQ but later granting LinkedIn's motion to dismiss antitrust claims in the amended complaint. They emphasized as a key factor the challenges plaintiffs face in antitrust cases when seeking to prove a defendant operates an essential facility or challenging a defendant's independent decision not to share data with competitors even if the competitors allegedly need the data in order to compete.

Last, the panelists discussed how shifts in privacy law toward giving users more control over their data may affect competition, and how a response by competition law in favor of sharing data could affect privacy rights. They also presented their views on how to properly balance privacy interests, antitrust law, and the need to protect intellectual property rights to preserve incentives to innovate where they point in different directions.

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[2] ABA members can view the podcast recording at https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/feb-21/22621-datascraping/.
[3] *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 991 (9th Cir. 2019).
[4] *Id.* at 995.
[5] *Id.* at 1005.
[6] *hiQ Labs, Inc. v. LinkedIn Corp.*, 485 F. Supp. 3d 1137, 1143 (N.D. Cal. 2020).
[7] *Id.* at 1149, 1151, 1155.

# Recap: The Blue Cross Blue Shield Association Proposed Class Settlement

***Kristina Gliklad*[8]**

The Unilateral Conduct Committee held a seminar on January 7, 2021 to explain the proposed class settlement by the Blue Cross Blue Shield Association ("BCBSA") with the Subscriber Class representatives in *In re Blue Cross Blue Shield Antitrust Litigation*, No. 2:13-cv-20000-RDP.[9] The proposed settlement includes both payment of substantial monies ($2.67 billion) and significant changes to BCBSA's business practices. Anthony Swisher, antitrust partner at Baker Botts L.L.P., and Dionne Lomax, managing director of Antitrust and Trade Regulation at Affiliated Monitors, Inc., and Professor at Boston University School of Law, examined the BCBSA settlement and its implications for the healthcare industry. Below is a summary of the discussion.

## *Background*

The *In re Blue Cross Blue Shield Antitrust Litigation* saga began over eight years ago when subscribers of individual blue plans filed a nationwide class action against BCBSA and its member plans ("Blue plans") (collectively, "Defendants"). The plaintiffs alleged, among other things, that Defendants violated Sections 1, 2, and 3 of the Sherman Act by using BCBSA's rules pertaining to the use of its trademarks to unlawfully restrain competition between the Blue plans, causing consumers to pay higher rates for health insurance. After forty similar cases were filed across the country, the actions were converted into an MDL proceeding in the Northern District of Alabama.

The Subscriber Class plaintiffs allege that the Blue plans stopped competing against each other in the 1980s after they entered into a series of trademark licensing arrangements with BCBSA to use the Blue trade name; this allegedly forced them to consolidate and restricted their abilities and incentives to compete. According to the plaintiffs, the thirty-five independent Blue plans own and control BCBSA, which acts as their licensor and is governed by a board of directors, two-thirds of which must consist of CEOs or board members from the various Blue plans. The theory is that the Blue plans use BCBSA as a formalistic shell to enter into per se unlawful agreements.

Specifically, the Subscriber Class plaintiffs argue that the Defendants: (1) allocated the Blue plans' geographic territories; (2) limited the Blue plans from competing against each other even when they are not using the Blue brand, by mandating that a Blue plan derive at least two-thirds of its national health insurance revenue from its Blue branded services, regardless of the availability of non-Blue alternatives; (3) restricted the right of any Blue plan to be sold to a company that is not a member of BCBSA; and (4) agreed to other ancillary restraints on competition. The plaintiffs point to the licensing arrangements as the scheme's policing mechanism, whereby Blue plans that violate these restrictions face the penalty of having their license and membership in BCBSA terminated.

## *Settlement*

On November 30, 2020, the district court preliminarily approved a proposed settlement agreement resolving the Subscriber Class claims. The settlement consists of monetary and injunctive relief, as well as the creation of a five-year monitoring committee. On the monies side, the Defendants agreed to pay $2.67 billion into settlement funds, wherein $1.9 billion will be available for authorized class members to submit a claim for distribution, $100 million will go towards notice and administrative costs, and approximatively $667 million will go towards attorney's fees (representing up to 25% of the settlement fund). But it is the injunctive relief terms that are "the polestar of this settlement"[10] with the potential to reshape the state of competition in health insurance markets going forward.

First, the proposed injunctive relief eliminates the Blue plans' national revenue cap on competition which currently requires them to maintain at least two-thirds of their revenue from Blue businesses, pursuant to its national best efforts rule ("NBE"). Because the NBE rule limits the Blue plans' ability to enter into transactions, including acquisitions by Blue plans or of Blue plans by non-Blue plans, its elimination quells the plaintiffs' concerns about the Blue plans' incentives to invest in and expand their use of non-Blue brands. To put the effect of this provision in context, during the

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[9] ABA members can view a recording of the program at https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/january-2021/010721-explaining/ by clicking on the hyperlink to "Explaining the Proposed Blue Cross MDL Settlement – January 7, 2021.". The proposed settlement, its preliminary approval, and other related documents are available at the Blue Cross Blue Shield website at https://www.bcbssettlement.com/documents.

[10] Order Prelim. Approving Settlement at 38, *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018) (No. 2:2013-cv-20000), *available at* https://www.bcbssettlement.com/admin/services/connectedapps.cms.extensions/1.0.0.0/asset?id=25abdffc-ca8d-4c25-af5a-ea71324ce124&languageId=1033&inline=true.

litigation phase, Dr. Pake estimated "that the NBE accounted for 97% of the total damages in the case."

Second, the Defendants agreed to allow certain national accounts to seek bids from more than one Blue plan. Currently, the BCBSA rules limit the ability of more than one Blue plan to bid for or solicit a bid from a national account (defined as employers with over 5000 employees). The proposed settlement will allow certain qualified national accounts to receive a bid from a second Blue plan, which will create increased choice for those accounts. This provision also creates guidelines to permit direct contracting between non-provider vendors and self-funded accounts.

Third, the injunctive relief limits BCBSA's use of most-favored-nation ("MFN") clauses. As described by the plaintiffs, some Blue plans have MFN differentials with providers, such that a provider guarantees the Blue plan a better rate than the provider offers to other health plans. The general concern with MFN clauses is that they create a disincentive to providers to offer discounts; providers know that if they offer a discount they must also offer it to the customer with whom they have an MFN clause. The settlement provides that a Blue plan with a local market share greater than 40% may not, as a general rule, employ MFN differentials.

Finally, the Defendants also agreed to establish a monitoring committee to serve for a period of five years to review new rules and regulations proposed by BCBSA and to mediate disputes related to the injunctive relief. While the use of an oversight committee is not unusual, especially with large complex antitrust actions, it is remarkable in this case because the settlement arises out of private enforcement and without a finding of liability. This is different from the more common oversight committee resulting from a negotiated settlement between an enforcement agency and an organization alleged to have engaged in misconduct. Considering the posture of this case, the scope of the monitoring committee's oversight appears quite extensive as its effects are forward looking reform intended to radically change the future of BCBSA's business.

### *Implications*

So what will this look like going forward? While the future is still unclear, one thing is certain: the "historic"[11] injunctive relief will require significant changes to Defendants' business practices. The elimination of the restriction on a Blue plan's non-Blue business revenue should permit out-of-state Blue plans to compete more often with a home Blue plan for new business, particularly for business from larger employers. Along with the NBE rule, there is also a local best effort's rule that currently applies similar limitations on Blue plans. Accordingly, the settlement has the potential to affect how the Blue plans go to market both on a national basis and on a more discreet local market level. Questions remain as to whether these changes will spur M&A activity.

And what about the ongoing BCBSA MDL with the Provider Class? While the Provider Class plaintiffs allege substantially similar claims to those raised by the Subscriber Class, the providers also argue that Defendants created and maintained a monopsony in the market for healthcare services in violation of Section 2. According to the providers, the Blue plans fixed reimbursement rates, causing less healthcare professionals to practice, especially in primary care, due to the below-market prices. The injunctive relief terms of the proposed settlement with the subscribers, however, appear to address all but one of the providers' requested injunctive relief terms: the providers seek to also enjoin Defendants from continuing with their alleged price fixing and boycott conspiracy. It is too soon to tell whether the subscriber settlement will address the latter of providers' concerns.

### *Standard of Review*

From a procedural standpoint, the most interesting issue was the district court's holding that a per se standard of review was appropriate to apply to the Defendants' alleged "aggregation of competitive restraints."[12] In doing so, the district court relied on two arguably dated Supreme Court decisions: *U.S. v. Sealy*[13] and *U.S. v. Topco*.[14] While the continuing relevance of these cases has been a source of debate within the antitrust bar, the district court reasoned that the Supreme Court, being the keeper of its own jurisprudence, has not expressly limited their application. The Eleventh Circuit subsequently upheld this ruling by denying the Defendants' interlocutory appeal on the application of the per se rule in December 2018.

On account of this case settling, however, we must wait for further clarification on the degree to which *Sealy* and *Topco* remain good law. This case would have presented the Eleventh Circuit with the opportunity to potentially distinguish *Sealy* or *Topco*, especially in light of other precedents where the Court has reviewed different joint conduct under a rule of reason framework.[15] Considering the waning of per se rule applications in the recent decades in favor of the rule of reason, this holding serves as a cautionary tale for modern business relationships that include both horizontal and vertical features.

[11] *Id.*
[12] *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1267 (N.D. Ala. 2018).
[13] *U.S. v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).
[14] *U.S. v. Sealy, Inc.*, 388 U.S. 350 (1967).
[15] *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music Inc. v. Columbia Broadcasting System Inc.*, 441 U.S. 1 (1979).