COMPETITION LAW IN THE DIGITAL AGE

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THE FCO CONCLUDES THE FIRST CASES UNDER THE NEW GERMAN GATEKEEPER RULES

At the EU level, the Digital Markets Act's substantive obligations on "gatekeepers", who are yet to be designated by the Commission, will start to fully apply around March 2024. In the meantime, the German Federal Cartel Office (FCO) continues to enforce its national gatekeeper rules (Section 19a Act against Restraints of Competition – ARC), which were introduced at the beginning of 2021:

- **Alphabet/Google**, **Amazon**, and **Meta** have been designated as having a "paramount significance for competition across markets" (the German "gatekeeper" threshold);
- the Amazon decision is pending before the court; and
- the gatekeeper designation proceedings against **Apple** are ongoing.

Most recently, the FCO terminated conduct-related proceedings regarding Google News Showcase (GNS), only a few weeks after it had reached an amicable solution with Meta regarding the investigation into its Quest 2 Virtual Reality headsets.

The Google News Showcase Case

On 21 December 2022, the FCO **closed its investigation** into GNS, which was largely based on Section 19a ARC (see also accompanying **FAQs**). GNS is a program which offers press publishers the opportunity to offer their readers deeper storytelling and more context with features like timelines within stylized news panels, related articles, and bullets.

Acting upon a complaint by collecting society Corint Media, the FCO had opened an investigation into various aspects of GNS in June 2021. The FCO has now terminated the proceedings without issuing an order, after Google informally proposed to implement certain measures. For example, with respect to potential self-preferencing, Google agreed to publicly clarify that it currently has no plans to integrate GNS content into Google's general search page. It will also improve transparency pertaining to the requirements for participation in GNS, based on which the FCO set aside its initial concern that Google might provide GNS access to press publishers in a discriminatory manner. The FCO's termination of the proceedings means that Google can continue to offer its GNS program in Germany.

Separate to and independent of GNS, Google has an additional licensing program (called Extended News Preview – ENP) in the EU. It is intended to remunerate press publishers for the display of short text excerpts (called "snippets"), including the display of snippets on the Google search result page. Such snippets are potentially protected by the EU Directive 2019/790, which EU Member States have already transposed into national copyright laws or are due to do so. In its press release, the FCO made clear that it decided to not intervene in a broader copyright law dispute pending between Corint Media and Google. Contrary to Corint Media's allegations, the FCO sees no necessity to examine the appropriateness of Google's ENP offers under Section 19a ARC or traditional competition law.

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The Meta Quest Case

In late 2020, the FCO initiated an investigation into Meta's plans to make it mandatory for users to have or create an account on Facebook in order to set up the Quest 2 Virtual Reality headsets. The investigation started under traditional competition law and was later expanded to the newly introduced Section 19a ARC.

The FCO's **preliminary view** is that Meta's plans were incompatible with Section 19a ARC, which, inter alia, prohibits the linking of the use of one offer with the automatic use of another (see also the **case summary**). The FCO points out that, contrary to traditional competition law, the undertaking under investigation does not have to be dominant on either of the markets affected by the linking of offers; the underlying objective of Section 19a ARC is not limited to the prevention of leveraging a dominant position, but also covers measures to expand and strengthen the gatekeeper's ecosystem by integrating new offers.

Meta has now presented an amicable solution to the FCO. It introduced a Meta account, which allows users to use the Quest 2 Virtual Reality headsets without having an account on Facebook or other Meta services such as Instagram. While this suffices to address the FCO's preliminary concerns, the FCO has not yet closed the proceedings because it intends to monitor and examine the specific design of Meta's proposed solution. In addition, there is a broader dispute between the FCO and Meta since 2016 regarding the accumulation of user data gathered across different Meta services; this case is currently pending before the European Court of Justice with respect to data protection laws implications. Until a final decision has reached in this matter, Meta has agreed, subject to certain exceptions, to keep the data gathered during the use of the Quest 2 Virtual Reality headsets separate from the data gathered during the use of other Meta services.

Outlook

Five additional conduct proceedings against Alphabet/Google, Amazon, and Apple under the new Section 19a ARC are currently still on-going. It is expected that the FCO will proceed at a fast pace and conclude several Section 19a ARC cases this year.

COURT OF JUSTICE CONFRONTED WITH QUESTIONS ON PARITY CLAUSES, MARKET DEFINITION FOR ONLINE TRAVEL AGENTS

The District Court of Amsterdam has **referred** important questions to the European Court of Justice (ECJ) as it seeks clarity on two issues that are highly pertinent for the hotel accommodation distribution sector: the appropriate market definition applicable to Online Travel Agents (OTAs) and the extension of the ancillary restraints doctrine to price parity clauses. These preliminary questions stem from an ongoing proceeding in the District Court initiated by Booking.com against 63 German hotels seeking a declaration that it did not act unlawfully by including parity clauses in agreements with these hotels.

Parity or "most-favoured-nation" clauses that require a business to offer the same or better conditions to its contracting party as those offered to other trading partners are referred to as "wide" parity clauses. When the business is required to offer the same price as it does through its own direct sales channels (for example, its own website), but is free to offer lower prices through different channels, it is called a "narrow" parity clause.

In recent years, there has been considerable debate on both wide and narrow parity clauses. Some competition authorities believe that wide parity clauses infringe competition law and have required OTAs to stop using them in their agreements with hotels. Member States like Austria, Belgium and Portugal (see article below) have prohibited the use of both wide and narrow parity clauses, although a European Commission **study** has now found that these bans have not led to substantial changes in hotel distribution practices.

Other authorities and courts have held that narrow parity clauses do not raise competition concerns. For instance, the Dusseldorf Higher Regional Court has previously ruled that narrow parity clauses are ancillary restraints that are required for countering free riding by hotels on the platforms of OTAs. Ancillary restraints do not fall foul of the prohibition of anti-competitive agreements if they are a necessary element of an agreement that is not otherwise anti-competitive. However, Germany's Federal Court of Justice overruled the Higher Regional Court and held that even narrow party clauses are not compatible with competition law. In contrast, the UK Competition Appeals Tribunal (CAT) recently **annulled** the UK Competition and Markets Authority (CMA)'s decision against wide parity clauses used by Compare the Market in home insurance. The CAT found that the CMA had failed to demonstrate anti-competitive effects of the parity clause.

Considering that the approach to the competition law assessment of parity clauses has so far been fragmented across Europe and since the ECJ has not yet ruled in this area, the Amsterdam District Court has asked the ECJ if parity clauses qualify as ancillary restraints. As per the Amsterdam District Court, the ECJ case law on the threshold for invoking the ancillary restraints doctrine seems to imply that there is no need to demonstrate that, in the absence of price parity, an OTA business model would not be altogether viable. Instead, the case law suggests that it is sufficient to show that the OTA business model would be "jeopardized' which is a lower threshold. Beyond the hotel distribution sector, the District Court's question on parity clauses is equally relevant for a variety of online marketplaces, e-commerce, airline ticket booking, etc., where such clauses are used as well.

The Amsterdam District Court has also sought clarification on whether OTAs constitute a market of their own or if that market is broader indicating that OTAs and a hotel's own sales channels are substitutes for each other. The District Court refers to research highlighting that consumers are regularly multi-homing by visiting multiple websites (including directly visiting accommodations' websites) and meta-search engines and additionally also rely on offline options.

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The question on market definition is relevant as narrow parity clauses are automatically exempted under the European Commission's new vertical block exemption regulation (VBER) provided that neither party to the agreement has a share of more than 30% of the relevant market. Therefore, to assess if the market share threshold of the VBER is not exceeded, it is necessary to determine if the market is wider than just OTAs. While the hotels contend that direct booking through their own websites belongs to a different market, they also argue that parity clauses eliminate horizontal competition between OTAs and the hotels themselves. The District Court clearly articulates this tension between hotels claiming OTAs operate in a narrow OTA-only market whilst also claiming that price parity clauses limit their ability to compete with the OTAs.

The District Court further acknowledges that the issue of market definition in the platform economy is challenging due to platforms operating on multi-sided markets. Notably, guidance on the complex task of defining a market for multi-sided platforms was only issued for the first time by the EC in its recently **unveiled** draft revised market definition notice which was subsequently subject to **public consultation** and is still to be finalised. Thus the ECJ's response on market definition will not only have relevance for online hotel booking but also for other multi-sided operators like online marketplaces, social media platforms, price comparison services and credit card providers.

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REGULATORY RESTRICTIONS ON ACCOMMODATION PLATFORMS IN PORTUGAL

Portuguese competition law restricts OTAs offering goods and services at a price lower than the retail price "agreed with accommodation providers", even if the lowering of the price is borne by the online platform. Furthermore, a recent amendment to the legislation also forbids any parity clauses on price and other conditions of sale in agreements between OTAs and hotels. These provisions mean that OTAs cannot prevent hotels from offering rooms, through their own channels (narrow parity) or those of a third party (wide parity), at equal or better prices or conditions than those agreed with the OTAs.

In November 2022, EU Travel Tech (an association representing and promoting the interests of online travel distributors) lodged a complaint against Portugal before the European Commission alleging that the bans on applying parity clauses and from offering prices lower that the ones agreed with accommodation providers breach EU competition law.

Interestingly, the Portuguese Competition Authority (PCA) issued an **opinion** at the time the amendments to the legislation were proposed, suggesting that they should be eliminated for a variety of reasons:

- As regards lowering prices, the PCA considered that the ban would be contrary to EU and Portuguese competition law as well as the decisions of the PCA and the Commission. In particular, the PCA noted that this ban favours resale price maintenance (RPM) agreements, as it forces online platforms to respect the price to be charged to the end consumer set by the supplier. It pointed out that RPM agreements are considered a hard-core restriction under EU and Portuguese competition law and presumed not to meet the requirements for exemption. The PCA warned that this modification could favour collusion, hinder competition and result in higher prices for consumers. In addition, the positive effects of the limitation to lowering prices that could justify such competition concerns are not clear.
- As regards parity clauses, the PCA noted that if, after a case-by-case analysis, it is concluded that parity clauses can result in efficiency gains (i.e., an improvement in the distribution or benefit for consumers), such clauses should be considered in line with EU and Portuguese competition law. The PCA is aligned in this respect with the majority position of national competition authorities in the EU (although as noted above, there is considerable debate in this area). Indeed, the PCA advocates for a case-by-case analysis of the effects of parity clauses on competition and considers narrow parity clauses to be objectively necessary to ensure the financial viability of OTAs and avoid free-riding by hotels. On the other hand, the PCA points out that the benefits from wide parity clauses might not be enough to offset their negative effects on competition.
- The PCA also warned that the amendments could create an asymmetry between legal regimes (national versus EU) since the PCA could sanction the use of parity clauses in agreements under domestic law but might not be able to do so under EU competition law. This asymmetry could lead to a partitioning of the internal market. Finally, along the same lines, the PCA warned that the ban on parity clauses could be contrary to Regulation (EC) 1/2003 which prohibits Member States from applying national competition law leading to prohibition of agreements which may affect trade between Member States but which would not be prohibited under EU competition law.

It now remains to be seen whether the European Commission will pursue the complaint.

THE ITALIAN REGIONAL ADMINISTRATIVE COURT DECISIONS ON USE OF CUSTOMER DATA BY APPLE AND GOOGLE

On 18 November 2022, the Italian Regional Administrative Court upheld the appeal brought by Apple and rejected that of Google against the Italian Competition Authority's decision imposing on each company a fine of EUR 10 million for (a) failing to inform users immediately or sufficiently clearly of the collection of their data for commercial purposes and (b) having pre-empted users' consent to the collection of their personal data for commercial purposes.

Overturn of the fine imposed on Apple

The Regional Administrative Court overturned the decision of the Italian Competition Authority (ICA), stating that the creation of an Apple ID does not give rise to the personalisation of marketing e-mails. The Court found that personalisation instead takes place in relation to the content of each store and only after the user has interacted with the store itself. Moreover, the "personalisation" of the stores does not equate to an immediate and direct exploitation of the information collected: Apple will only generate a profit if users make a subsequent purchase or through the sale of advertisements via the 'search ads' function, which concerns the apps in the store.

Furthermore, according to the Regional Administrative Court, Apple's pre-activation of the consent to the transfer of users' personal data for commercial purposes cannot be defined as a misleading and aggressive commercial practice, since it is not capable of producing an 'undue influence' on the consumer, given that it does not in itself lead to the transfer and use of the data by Apple, since it is in any case necessary for the user to carry out further activities.

Rejection of Google's appeal

The Regional Administrative Court stated that the users' choice to authorise Google to process their data for advertising purposes constitutes a decision of a commercial nature requiring the clearest and most complete information possible from the professional. The Court found that there was no mention in the summary of Google's Privacy Policy at the time of account creation of the use for commercial and advertising purposes of information on browsing preferences.

The Regional Administrative Court also found that the information was not immediately perceptible to consumers, since it was placed on pages that could only be reached through links, and that the pop-up information was not clear, since it did not include explicit indications on the use for commercial purposes of the data collected by Google.

With respect to the pre-setting of consent to the transfer of users' personal data for commercial purposes, the Regional Administrative Court reached a decision that was the opposite of the one taken against Apple. The Court held that there was a direct relationship between this activity and the exploitation of users' data, given that the acceptance mechanism set up by Google provided, at the account creation stage, that the consumer would find pre-selected, on a generalised and preventive basis, the box for acceptance of the transfer and/or use of his data for commercial purposes.

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CMA'S RECENT FINAL REPORT IN MUSIC AND STREAMING MARKET STUDY FOUND THAT COMPETITION OPERATES EFFECTIVELY IN THE SECTOR

Introduction

On 29 November 2022, the Competition Markets and Authority (CMA) **published** its final report in connection with its market study into music and streaming services (the Final Report). The CMA **launched** the market study on 27 January 2022 to examine the market "from creator to consumer, paying particular attention to the roles played by record labels and music streaming services". From this study, the CMA was to, amongst other things, determine whether any potential lack of competition between music companies could affect musicians, singers and songwriters. The CMA found that competition operates effectively in the sector and is delivering good outcomes for stakeholders.

KEY FINDINGS

Difference in the revenue split between songwriters and music companies is not a competition issue

Songwriters and their representatives argued that rights to the underlying song and lyrics (publishing rights) are undervalued in comparison with rights to the recording of a song (recording rights) which leads to an unfair revenue split. They argued that major music companies suppress publishing revenues in favour of the recording part of their business. The CMA disagreed with this argument and noted that there had been an increase in revenue shares going to songwriters between 2008 and 2021, which was an indicator of competition. Instead, the CMA noted that the revenue split is likely due to a combination of historical costs of physical distribution and "licensing negotiation friction" preventing those now reduced physical distribution costs from immediately feeding through into the split between publishing and recording rights.

Legal arrangements between the main record companies and music streaming companies are complex but do not significantly hamper competition and innovation

The CMA analysed certain clauses in legal agreements between record companies and music streaming services, including most-favoured nation, non-discrimination and must carry clauses. However, the CMA was not convinced that CMA-enforced contractual changes would significantly increase innovation or have a material impact on the market. Instead, the CMA thought that the issue was related to music streaming services' need to reach an agreement with multiple rightsholders on the terms they can use their content.

Artists' concerns are not driven by concentration in the recorded music sector

The CMA heard concerns from a range of artists about their inability to make a sustainable income from music streaming and considered whether these outcomes are being caused by competition issues in the market. The CMA found that outcomes for artists as a whole seem to be improving, while acknowledging that competition appears to be particularly focused on artists who are already popular or likely to be so.

The Final Report considers that outcomes for artists are largely driven by factors that are more inherent to digitisation in the music sector, which has allowed for a significant increase in the number of artists sharing their music. Furthermore, through its profitability analysis, the CMA did not find evidence of substantial and sustained excess profits by the so-called "majors" in the UK. The CMA therefore concluded that a competition intervention (for example, through a change to the structure of the market) is unlikely to result in a material increase in revenues for artists.

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Next steps for music streaming in the UK

While the Final Report acknowledges that changes in the sector have made it harder for some creators to succeed, it also concludes that "it is unlikely that the alleged poor outcomes that concern many stakeholders are primarily driven by how firms compete with each other". The CMA therefore declined to make a market investigation reference, considering the "greater risk of a competition intervention causing unintended consequences, for both creators and consumers".

Nevertheless, the CMA noted that the issues raised by creators could be further considered by the Government and policymakers as part of their ongoing work following the UK Parliament's Digital, Culture, Media and Sport Select Committee's (DCMS Committee) **inquiry** into the economics of music streaming. On 13 January 2023, the DCMS Committee called for the establishment of a national strategy for music. Amongst other things, the strategy would aim to assess the "impact of digital technology on musicians, songwriters and composers, and on the UK music industry's potential for future growth".

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