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**Antitrust Developments in the Digital Sector
in Europe Post-Brexit**

14 June 2021

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Presenters



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Agenda

- European Union
- France
- Germany
- United Kingdom

European Union



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And what does the EU do?

- Expanding the scope of investigations: from platform power to data power
- Interim measures
- Multi-instrument and multi-sector approach
- No change of merger thresholds but new interventionism
- *Ex ante* regulation
- “Gatekeeper” rules: DMA and DSA
- Reversal of burden of proof

The Digital Act Package

- Two directives proposed: Digital Services Act (DSA) and Digital Markets Act (DMA)
- DSA: reform on the e-commerce directive
- DMA: new regime for certain digital platforms
- Status: Public consultation period ended Feb 2021, legislative process expected to last until mid 2022
- Ongoing discussions at EP and council level: final content remains uncertain
- Enhanced supervisory and investigative powers to the EC

DSA: General provisions

- Application to all digital intermediaries (EU and non-EU) serving EU residents
- Overall stricter requirements for content handling:
 - Accountability of intermediaries for harmful/illegal content
 - Mandatory legal representative in the EU for non-EU intermediaries
 - Disclosure obligations on data restrictions
- Harmful content includes:
 - Political disinformation
 - Hoaxes and manipulation during pandemics
 - Illegal products
 - Otherwise illegal content

DSA: Additional obligations

- Hosting services:
 - Mechanism to notify illegal content
 - Priority notification for trusted flaggers
 - Complaint handling systems with possible suspension for infringers
 - Alternative dispute resolution
- Online platforms:
 - Transparency: Criteria for content removal
 - Transparency: Information to users regarding online advertising
 - Monitoring: ensuring compliance of traders with consumer protection rules

DSA: Very Large Platforms (VLPs)

- Digital platforms with more than 45M active users
- Additional enhanced duties:
 - Risk assessment (illegal content, privacy violations, etc.)
 - Transparency on Content Presentation Rules (algorithms used, possibility to modify parameters...)
 - Online advertising repository (information regarding all ads displayed in the past year).
 - Designation of Compliance Officer
 - Data Access Requirement (national authority and researchers)

DMA: The Gatekeeper status

- Core platform services: Online intermediation, online search engines, social networking, video-sharing, operating systems, cloud services and advertising services.
- Significant impact on the internal market:
 - Turnover above EUR 6.5bn OR valued above EUR 65M
 - Active in min. 3 Member States
- Important Gateway to customers:
 - Over 45M monthly active end-users
 - Over 10,000 yearly active business users established in the EU
- Entrenched and durable position (criteria above met for 3 past years)
- Rebuttable presumption if above criteria are met

DMA Gatekeeper obligations (the Closed List)

- Precise and directly applicable obligations after 6 months of gatekeeper designation
- Prohibition:
 - Combine personal data across service offerings
 - Impose MFN clauses
 - Steer end-users
 - Restrict complaints
 - Bundle core services with ID services or other core services
- Obligation:
 - Provide for transparency of online advertising prices and remuneration

DMA Gatekeeper obligations (the Open List)

- Subject to regulatory dialogue between gatekeeper and EC and further specifications
- Prohibition:
 - Use data generated by business users via the gatekeeper's services
 - Rank gatekeeper services more favorably
- Obligations:
 - Allow end-users to uninstall pre-installed apps
 - Allow side loading of third-party apps and app stores
 - Use FRAND rules for ranking practice and access to search data
 - Maintain device neutrality and interoperability
 - Provide access to performance measuring tools to advertisers and publishers
 - Ensure portability of and access to data by business users

DMA: Compliance and enforcement

- Obligation to notify the EC of any acquisition of a provider of information society services
- Obligation to provide the EC an audited description of consumer profiling techniques used
- EC Enforcement powers similar to anti-trust powers (RFI, dawn raids, interviews...)
- Possibility to impose interim measures
- Fines upon finding of infringement: up to 10% of global turnover
- Structural and behavioral remedies for systematic non-compliance

The background features a dark blue space filled with a complex network of glowing lines and points. The lines are thin and radiate from a central point, creating a sense of depth and perspective. The points are small, bright spheres in various colors, including blue, purple, and red. The overall effect is that of a digital or data landscape, with the lines and points appearing to rise from a flat surface and recede into the distance.

France

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Introducing the notion of “structuring companies”

- List of “structuring companies”:
 - an organisation:
 - that provides online intermediation services aimed at exchanging, buying or selling goods, content or services; and
 - which holds structuring market power
- Market power determined based on criteria including
 - Dominance on one market
 - Number of users & access to essential data
 - Influence on connected markets
 - Network effects

Special competition regime for “structuring companies”

- Duties on “structuring companies” to inform the Competition Authority of all transactions a month before their closing
- Possibility to require notification upon investigation
- Reversal of burden of proof

The background is a dark, almost black, space filled with a complex network of glowing lines and dots. The lines are thin and appear to be made of small, closely spaced dots, creating a sense of depth and movement. They curve and rise from a wavy, undulating base that resembles a digital landscape or a data visualization. The colors of the lines and dots are primarily cool tones like blue and purple, but there are also warmer tones like red and orange scattered throughout, particularly in the lower right and middle sections. The overall effect is that of a futuristic, high-tech environment, possibly representing data flow, network connectivity, or digital infrastructure.

Germany

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Modernization of German Competition Law

- 10th amendment of German Act against Restraints of Competition
- Major changes on abuse control that aim to regulate digital platforms
 - Intermediation power as criterion for market dominance
 - Data access as essential facility
 - New concept of *paramount significance for competition across markets*
 - Expansion of the concept of relative market power
 - Introduction of provisions on data access
 - Anti-tipping provisions
- New, far reaching intervention powers for the German Federal Cartel Office

Paramount significance for competition across markets (1/2)

- FCO can order an undertaking to be of paramount significance for competition across markets
- Includes the right to prohibit such undertaking from certain practices:
 - Treating the offers of competitors differently from its own offers when providing access to supply and sales markets (e.g., by giving preference to its own offers in the presentation, or the exclusive pre-installation of its own software/apps on hardware devices).
 - Taking measures that hinder other companies in their business activities on procurement or sales markets, if the undertaking's activities are important for access to these markets (e.g., measures that lead to an exclusive pre-installation or integration of the undertaking's offers or that make it more difficult for other companies to advertise their own offers or to reach customers).
 - Directly or indirectly hindering competitors on a market on which the undertaking can rapidly expand its position, even without being dominant (e.g., through certain product bundling).
 - Processing competitively sensitive data collected by the undertaking to create or appreciably raise barriers to market entry or otherwise hinder other companies, or to require terms and conditions that permit such processing (e.g., by making the use of services conditional on users consenting to the processing of data from other services of the undertaking or a third-party provider without giving users an adequate choice as to the circumstance, purpose, and manner of processing).
 - Hampering the interoperability of products or services or the portability of data if this leads to an impediment of competition.
 - Providing other companies with insufficient information about the scope, quality, or success of the service provided or commissioned, or otherwise making it difficult for them to assess the value of this service.
 - Requesting advantages for the treatment of another company's offers that are disproportionate to the reason for the demand (e.g., by unreasonably requesting the transfer of data or rights for the presentation of the other company's offers or the quality of such presentation).

Paramount significance for competition across markets (2/2)

- No *per se* prohibition, but burden of proof for objective justification is on the undertaking concerned.
- Lower thresholds for interim measures
- Special role of Federal Supreme Court
- FCO has initiated several cases since the effectiveness of the new provision
- Interaction between German concept and EU DMA unclear

Expansion of concept of relative market power

- No longer limited to the protection of small-and medium-sized enterprises
 - Large enterprises may be dependent as well on digital platforms (e.g re access to data needs).
 - Dependency of large undertakings ceases if it has sufficient bargaining power itself
- Dependency comprises access to data relevant for a company's own business
- Introduction of anti-tipping provision designed to prevent platforms with market power from restricting competitor efforts to generate their own positive network effects, and thereby impair competition

Anti-tipping provision – First practical experience

- Litigation between two digital real estate platforms
- First ever decision (preliminary injunction) on anti-tipping provision (Regional Court Berlin Az. 16 O 73/21 Kart)
- Rebate scheme in the center of the litigation
 - List-All rebates
 - List-First rebates
- Court preliminarily found list-all rebates to comply with anti-tipping provision, while list first rebates would infringe such provision.

United Kingdom

The background features a dark blue space filled with numerous vertical lines of varying heights, each topped with a small, glowing dot in shades of blue, purple, and red. These lines are connected at the base by a series of horizontal, wavy lines that create a sense of depth and movement, resembling a data visualization or a digital terrain.

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Overview of developments in the UK

- Post-Brexit enforcement agenda
- Regulatory background for digital markets
- Launch of a new competition law regime and the Digital Markets Unit (DMU)
- Mandatory merger filing requirements for firms with 'strategic market status'
- Recent investigations into big tech

The CMA's post-Brexit agenda

- Following Brexit on 31 January 2020, the Transition Period came to an end on 31 December 2020.
- Chapter I of the Competition Act 1998 (CA98) is the functional equivalent of Article 101 and Chapter II CA98 is the functional equivalent of Article 102.
- Post-Brexit, the UK's Competition and Markets Authority (CMA) is keen to make its mark on the world stage and is assessing carefully where it can add value.
- The CMA says it is '*actively scanning*' the market participants, the complaints the CMA has received, and where there are gaps in the work of the Commission.
- The CMA '*continues to coordinate closely*' with the Commission, but it is also entering the race to shape standards for tech giants going forward.

Regulatory background

- In July 2020, the CMA published a **market study** into online platforms and digital advertising, identifying three key competition concerns with respect to digital advertising:
 - Impact on prices;
 - Market specific barriers to new competition and innovation;
 - Effect on the new industry.
- In order to address these concerns, the CMA called for a new “pro-competitive” regulatory regime for online platforms.
- The UK Government responded to these proposals in November 2020. In December 2020, the CMA issued its advice to the UK Government on the design and implementation of the new regime which would:
 - Create a code of conduct to govern platforms designated as having **strategic market status** (SMS);
 - Establish a dedicated **Digital Markets Unit** (DMU);
 - Grant the DMU necessary powers to enforce a **code of conduct**.

Digital Markets Unit

- The DMU was officially established on 7 April 2021 in 'shadow' form to focus on operationalising and preparing for the new regime.
- The non-statutory DMU is an interim solution pending UK Government consultations throughout 2021.

Concept of 'strategic market status'

- Overarching ambition of the DMU: to monitor competition in digital markets more widely.
- Only firms designated as having SMS in relation to a particular activity will be subject to the new proposed regime.
- The CMA proposes that the SMS test should comprise two limbs:
 - **Limb 1:** substantial and entrenched market power;
 - **Limb 2:** strategic position (i.e. where effects of market power are widespread/significant).
- The CMA expects only a small number of firms to meet both limbs of the test, and recommends that the DMU should take into account as part of its assessment:
 - The firm's revenue (focusing on firms with annual UK/global revenue of £1/25 bn respectively);
 - The type of activity undertaken by the firm.

Other functions of the DMU

- The DMU was officially established on 7 April 2021 in 'shadow' form to focus on operationalising and preparing for the new regime.
- The non-statutory DMU is an interim solution pending UK Government consultations which are expected to take place throughout 2021.
- SMS firms will be subject to a specific **code of conduct**, which the DMU will oversee and enforce, as well having **wide-reaching powers to impose remedies** to tackle sources of market power.
- The CMA also hopes that the DMU will be granted powers to introduce a range of **"pro-competitive" interventions**, potentially including a whole host of data-related, consumer choice, default and separation interventions.
- Algorithms paper published by the CMA in January 2021: the DMU's legislative powers may also include the ability to **investigate, suspend, block or reverse conduct through algorithmic practices**.

Proposed merger requirements for SMS firms

- The UK currently has a voluntary merger filing regime. However, the CMA has recommended that certain measures are implemented with respect to SMS firms specifically, including:
 - Obligation to report **all** transactions to the CMA within a short period of signing;
 - Pre-closing **mandatory** notification where certain **minimum thresholds** are met;
 - Establishing a **suspensory** obligation;
 - Introducing a **lower standard of proof** for establishing a substantial lessening of competition (SLC).
- The CMA also **updated its merger guidance** in March 2021, which applies to all firms more generally. Many aspects of the revised guidance are targeted at the digital sector, including:
 - Further clarity concerning mergers that are more likely to result in SLC;
 - More emphasis on assessing evidence based on how competition is expected to develop in the future;
 - Greater consideration of non-price factors;
 - A more flexible approach to market definitions.

Investigations in the digital sector

- The CMA has said it is “hedging” its position by launching new investigations pending the DMU’s statutory powers.
- In 2021, the CMA opened a number of investigations under Chapter II of the Competition Act 1998 for alleged abuse of dominance.

Key take aways

The background is a dark, deep blue space filled with a complex network of glowing lines and dots. The lines are thin and vary in color, including shades of blue, purple, pink, and red. They form a grid-like pattern that recedes into the distance, creating a sense of depth and perspective. The dots are small, bright points of light, some of which are larger and more prominent than others. The overall effect is that of a digital landscape or a data visualization, with the lines and dots representing connections and data points.

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Cross-cutting topics

- A sliding evolution of core notions of antitrust
 - from “dominance” to “key competitive edge”
 - from “essential facility” to “gatekeepers” and “referees”
- A greater availability but also enforcement of interim measures
- A gradual reversal of the burden of proof
- A shift to *ex ante* control mechanisms

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Biography



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Joanna Christoforou focuses her practice on EU and UK competition law and antitrust, including competition law litigation. Joanna defends clients in cartel or abuse of dominance investigations, competition disputes, dawn raids, damages actions, advises clients on competition compliance matters and represents clients in complex merger control, restructuring and joint ventures. She represents clients before the European Commission, the European Courts, the Competition and Markets Authority (CMA), the Financial Conduct Authority (FCA), the Competition Appeal Tribunal (CAT), the Court of Appeal, the Supreme Court, as well as antitrust authorities in other jurisdictions. Joanna works across a broad range of industries, including life sciences, technology, retail, grocery, ecommerce, financial services, commodities, and healthcare.

Joanna is a member of the team that scored a landmark victory in the Supreme Court and the Court of Appeal for Sainsbury's against Visa (2020). Joanna is also a member of the team awarded Behavioural Matter of the Year-Europe for 'Challenges to CMA Search Warrants' (2018) by GCR.

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Christina Renner concentrates her practice on European Union and German merger control, competition, and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, and EU state aid laws. Christina regularly advises clients concerning mergers reviewed by the European Commission and the German Federal Cartel Office, as well as the French, Austrian, and Belgian competition authorities. She has experience handling multi-jurisdictional filings for a variety of clients and regularly advises on complex competition compliance matters.

Christina also represents diverse international clients in antitrust investigations before the European Commission and other national competition authorities, including in litigation before European courts.

Christina has an established EU regulatory practice which spans across a variety of industries, including telecommunications, transportation, energy, life sciences, as well as retail and ecommerce.

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Michael Masling advises clients on all aspects of EU and German competition law. Michael obtains merger clearances from national and international competition authorities in complex transactions, defends clients in government and private investigations and cross-border litigation, provides antitrust counseling including on distribution systems and compliance systems. In addition, he counsels on European and German foreign direct investment rules.

Michael's work spans a variety of industries, including automotive, chemicals, financial services, as well as healthcare and life sciences.

Additionally Michael regularly speaks at seminars and publishes articles on developments in European and German competition law. He is an editor of a section on international antitrust developments of Germany's leading antitrust law journal *Wirtschaft und Wettbewerb*.

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Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

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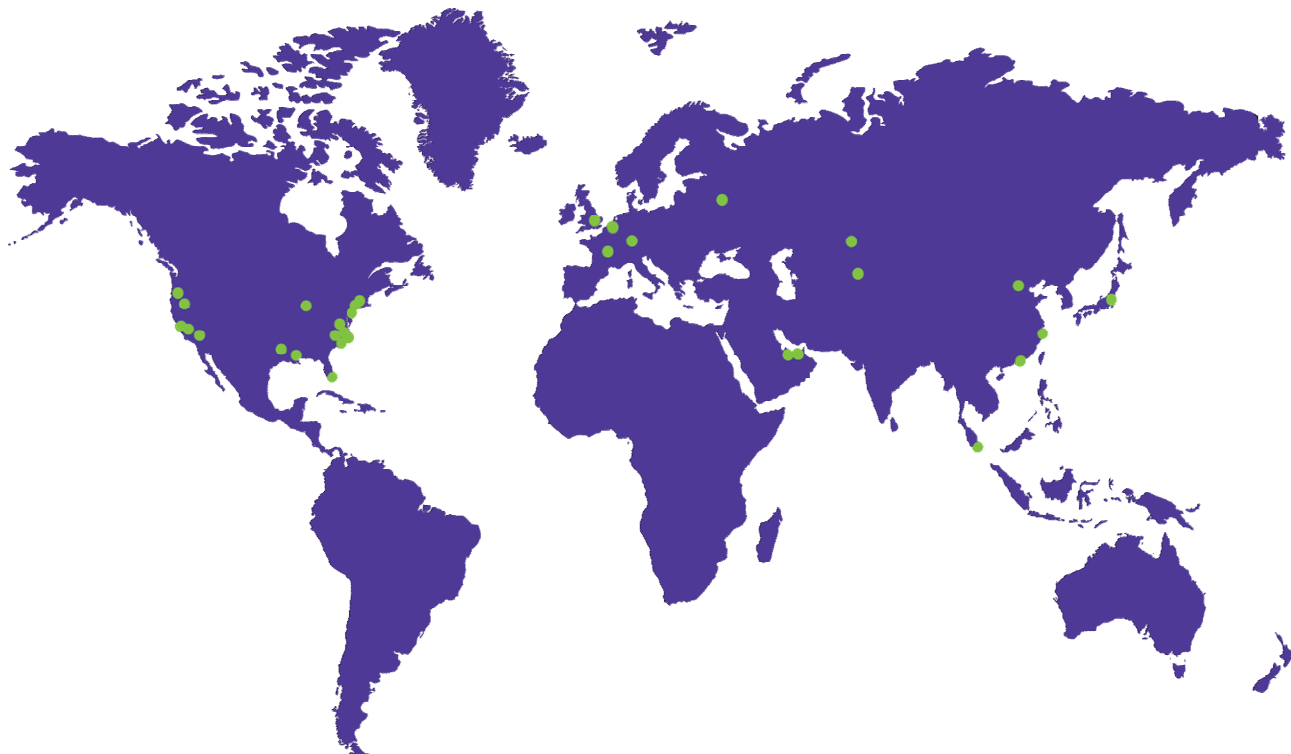


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