COMPETITION POLICY IN DIGITAL MARKETS

THE COMBINED EFFECT OF EX ANTE AND EX POST INSTRUMENTS IN G7 JURISDICTIONS

OECD

G7 ITALIA 2024

1 Introduction

In recent years, regulators have become increasingly concerned about large digital platforms' market power and their growing influence within and beyond the respective markets. A number of expert studies and the perception that competition law enforcement was not as effective in solving digital competition concerns spurred the debate about whether and, if so, how to regulate, and proposals to intervene with ex ante regulation multiplied (see also (OECD, 2021[1])).

In this context, in 2022 the OECD Competition Division was entrusted by Germany's G7 presidency with the task of compiling an inventory of proposed or enacted legislative reforms that were developed to address digital competition issues in G7 jurisdictions (hereinafter, the "Inventory"[1]). The aim of the detailed Inventory is to provide an objective comparison of "ex ante" regulations in digital markets in selected jurisdictions, based on their status, scope, institutional setting and content. In addition, an analytical note[2] was prepared to accompany the Inventory and assist the reader in understanding its content, while drawing some high-level findings. This work continued to develop in 2023 under Japan's presidency, expanding to non-G7 jurisdictions as well.

Currently, while some jurisdictions are debating the most effective way to move ahead with digital regulation, and others deal with the implementation of their recent reforms,[3] competition authorities continue to tackle concerns around digital platforms' conduct through traditional ex post enforcement.

This note, prepared for the 2024 Joint Competition Policy Makers and Enforcers Summit under the Italian presidency in continuity with previous work, aims at expanding the scope of the analysis by considering the combined effect of ex ante and ex post instruments,[4] in order to provide a picture of how G7 jurisdictions are addressing large platforms' use (and misuse) of market power.

Following the 2023 analysis of convergences and divergences between the various regulatory regimes proposed to date, this exercise focuses instead on the substance of the key competition concerns at the heart of multi-jurisdictional efforts in digital markets, and on the patterns that can be identified in terms of both platforms' conduct and enforcement activities in G7 countries.

The following chapters analyse a number of recent antitrust cases, to understand what conducts have been deemed most problematic and have been the focus of competition authorities thus far, and what remedies were implemented to address the concerns. These trends and patterns are then observed in light of the prohibitions and obligations contained in recent ex ante reforms, in order to appraise the complementarities and overlaps between the two types of instruments. Further, the note aims at gathering preliminary evidence around large platforms' compliance strategies and whether extraterritorial effects are arising, to shed some light on the global implications of national enforcement activity in digital markets.

For the purpose of this note, cases were selected according to a number of criteria: the jurisdiction, limiting the scope to G7 countries and EU; the timeframe, considering investigations opened from 2015 onwards in order to frame the exercise; the entity, looking mainly at those digital platforms to which the ex ante regulations implemented thus far would apply.

The remainder of this note, based exclusively on publicly available information as of September 1st 2024, is structured as follows. Chapter 2 will focus on lessons from traditional enforcement against selected digital platforms, with regard to aspects that are also covered in the applicable ex ante regulations, to gain

insight on how the most problematic conducts are captured, patterns of anticompetitive behaviours across jurisdictions and the types of remedies imposed to address them. Chapter 3 will provide insights on whether companies' compliance efforts, in response to both new regulations and remedies imposed in enforcement cases, are tailored and limited to the jurisdiction at stake or if extraterritorial effects can be identified. Chapter 4 concludes.

2 The combined effect of ex ante and ex post instruments

Alongside the development of new rules for digital markets in certain jurisdictions, G7 authorities have engaged in significant ex post enforcement of competition law in digital markets. This enforcement has focused on a broad range of conducts, which, in several instances, overlap with those covered by the various ex ante regimes proposed or implemented to date. Notably, remedies put in place in response to competition law investigations may be similar to those contemplated under ex ante reforms.

This section identifies the types of conduct and remedies which have been the focus of ex post enforcement in G7 jurisdictions, and considers how these issues are, or could be, addressed under ex ante provisions. The global nature of digital platforms' operations means that it is common for the same conducts to raise competition concerns and be subject to investigation in multiple jurisdictions at any particular time. Certain conducts have featured heavily in enforcement action, with substantial remedies put in place across multiple cases and jurisdictions, while other conducts are still under investigation or have received less attention from enforcers. In each case, the potential impact of ex ante reforms is likely to vary.

Anti-steering practices and MFNs

In the majority of G7 jurisdictions, competition authorities have focused significant attention on digital platforms' restrictions on their business users. This includes anti-steering rules, which prevent business users from offering consumers access to their services via alternative channels, and most-favoured-nation clauses (MFNs), which prevent business users from providing offers on more favourable terms (e.g. at a lower price) via alternative channels.

In certain cases, such restrictions can be justified in order to limit free-riding, whereby users benefit from the service provided by the platform but avoid the payment of fees on the actual sale (OECD, 2021[1]). However, these restrictions can impact competition – limiting the ability of alternative providers to reach consumers, reducing consumer choice and entrenching users' reliance on the digital platform. These concerns have generally been addressed under competition law provisions, with G7 competition authorities recently scrutinising Apple's anti-steering requirements for app developers and Amazon's MFN requirements for retailers.

Enforcers have targeted the anti-steering requirements in Apple's app store terms, which prohibit app developers from informing consumers about alternatives to Apple's in-app payment system (such as purchasing via the developer's own website), including within the app itself or via other means (such as email). In 2021, an investigation by the Japan Fair Trade Commission (JFTC) identified that Apple's specific prohibition on app developers linking consumers to their own websites (to make a purchase) could be in violation of Japan's Antimonopoly Act.[5] Also in 2021, the *Epic Games vs Apple* decision in the United States (US) found that Apple's broader anti-steering provisions were anti-competitive, hiding critical information from consumers and illegally stifling consumer choice.[6] More recently, in March 2024, the European Commission (EC) concluded that Apple's anti-steering provisions, as applied to music streaming

apps,[7] were an abuse of dominance and amounted to unfair trading conditions, which were neither necessary nor proportionate and negatively affected the interests of users of Apple's mobile operating system (OS).[8]

As part of a complaint filed in 2023, the US Federal Trade Commission (FTC) alleged that Amazon illegally maintained its monopoly power by 'punishing' third-party retailers whose products are available at lower prices elsewhere, such as by downgrading their rankings,[9] despite ceasing to apply contractual price parity obligations (MFNs) in 2019. Similarly, in 2020, the Canadian Competition Bureau announced an investigation into potential abuse of dominance by Amazon, including examining whether Amazon's policies may impact third-party retailers' willingness to offer their products for sale at a lower price elsewhere, including via their own websites or on rival marketplaces.[1011]

These cases follow previous enforcement actions by the EU[12] and Japan[13] in 2017, in which enforcers considered that Amazon's contractual MFNs for e-book publishers could amount to an abuse of dominance and/or distort competition. Concerns were also raised about similar contractual obligations for third-party retailers on Amazon Marketplace in Japan[14] in 2017 and by the United Kingdom (UK)[15] and Germany[16] in 2013.

In most cases, the remedies and/or commitments that were used to eliminate the competition concerns have required the platform to remove (or not enforce) the relevant contractual provisions. In 2021, to close the JFTC's anti-steering investigation, Apple implemented voluntary measures on a global basis to allow certain apps to include an in-app link to their own websites.[17] In the US *Epic Games vs Apple* ruling in 2021, Apple was ordered to remove its broader anti-steering provisions in the US,[18] and the same remedy was imposed for music streaming apps by the EC in March 2024.[19] Similarly, Amazon has progressively removed its price parity obligations on a voluntary basis in direct response to enforcement actions in different jurisdictions.[20]

The concerns discussed above are also in scope of new ex ante rules that have been implemented or proposed in G7 jurisdictions. For instance, the EU's Digital Markets Act (DMA)[21] contains a prohibition against anti-steering in its Article 5(4), under which Apple and Google, as designated gatekeepers for their app stores, are required to remove their anti-steering provisions from their respective app store rules[22]. Following a non-compliance investigation against both Apple and Google to determine whether their app store rules are in breach of the DMA,[23] on 24 June 2024, the EC informed Apple of its preliminary view that Apple's App Store rules are in breach of Article 5(4) of the DMA, as they prevent app developers from freely steering consumers to alternative channels for offers and content.[24] The DMA also prohibits MFNs,[25] which is consistent with the changes made by Amazon following investigations in the EU and Japan.

Meanwhile, Japan's Mobile Software Competition Act (MSCA) prohibits designated smartphone app store operators from engaging in anti-steering practices, while the 2020 Act on Improving Transparency and Fairness of Digital Platforms (TFDPA) requires designated platforms to disclose the details and reasons for including MFNs in their terms and conditions. In Germany, Section 19a of the German Competition Act,[26] allows to prohibit covered undertakings from restricting other firms from advertising their offers via alternative channels, [27] and, more generally, from taking measures that impede other firms in carrying out their business activities, where the covered undertaking's activities are of relevance for accessing the relevant markets.

Anti-steering practices and MFNs have been a major focus of both traditional competition law enforcement and new ex ante rules in G7 jurisdictions, where in place. The remedies that have been imposed to address authorities' competition concerns have generally required platforms to remove the offending contractual provisions. However, these platforms remain under ongoing scrutiny by competition authorities and regulators regarding the effectiveness of their compliance – particularly where the platforms may have introduced alternative constraints on business users' activities.[28] While authorities will continue to assess the effectiveness of these remedies, at this stage there does not appear to be much divergence in the

substance of the remedies chosen to address these competition concerns under ex post enforcement or ex ante regulations, or from jurisdiction to jurisdiction.

Use of data

Large platforms' continuous accumulation and combination of users' data, together with the well-known features of digital markets, has allowed them to strengthen their market power and leverage their position into other markets, thus expanding and entrenching their ecosystems over time (OECD, 2021[1]). This can give rise to anti-competitive effects, for instance by enabling foreclosure strategies at different points of the ecosystem, as well as exploitative abuses. As discussed in (OECD, 2024[2]), this is also particularly relevant for first movers in the development of generative AI, "which may enjoy a competitive advantage over other firms", particularly if they have been able to train their models in "legally grey areas".

Antitrust enforcement in G7 jurisdictions has targeted a range of competitive harms arising from the use of data by digital platforms, including concerns around Amazon and Meta's use of their business users' data to obtain a competitive advantage in related markets, where they may be in competition with those users.

Competition authorities in the UK and the EU have investigated data-related concerns arising from Amazon's Marketplace platform, which Amazon's own retail business and third-party retailers use to sell their products. In 2022, the EC found competition concerns with regard to Amazon's use of non-public, commercially sensitive data about third-party retailers from Amazon Marketplace to inform its own retail business' decisions (e.g. what products to sell, stock levels and prices).[29] The Competition and Markets Authority (CMA) in the UK conducted a similar investigation in 2023.[30]

Similarly, in June 2021, the EC and CMA both announced investigations into Meta, which operates the social networks Facebook and Instagram and is a dominant supplier of online display advertising.[31] These investigations targeted concerns around Meta's use of third-party advertisers' data, i.e. businesses using Meta's advertising services, for instance on Facebook Marketplace. In particular, the authorities were concerned that Meta could use such ad data to develop and improve its own products, where Meta competes directly with those advertisers, thus obtaining an unfair competitive advantage and distorting competition.

To address competition concerns in these cases, authorities accepted behavioural commitments from Amazon (in the UK and EU) and Meta (in the UK). Amazon's commitments in both jurisdictions prevent it from using non-public data from retailers for any decisions relating to its retail business. Meta's commitments in the UK prohibit it from using advertisers' data when developing products that compete with those advertisers.[32] The EU's investigation into Meta is still ongoing at the time of writing of this report.[33]

There is considerable convergence between the commitments made by Amazon and Meta and the relevant ex ante rules' provisions in the EU and the UK. In a press release, Amazon noted that its commitments in the EU enforcement case came about in the context of the upcoming DMA,[34] which coming into force would have covered those business practices, among others,[35] as also highlighted by the EU.[36] Additionally, in the UK, Amazon and Meta's commitments to the CMA specify that they will cease to apply if the CMA decided to impose obligations pursuant to Digital Markets, Competition and Consumers Act 2024 (the DMCC Act) addressing the same concerns. Similarly, Japan's MSCA prohibits smartphone software service providers from using acquired data, such as usage information and sales numbers, for their own services in competition with third parties.

The need to address unfair competitive advantages stemming from dominant platforms' use of data is a key element of most implemented and proposed ex ante reforms in G7 jurisdictions. Beyond the cases discussed above, these rules will also extend to other aspects of data collection and use which have not been subject to widespread enforcement action across multiple jurisdictions. For example, the DMA's

Article 5(2) prohibits gatekeepers from combining user data across their ecosystems without consent, to ensure that, among other things, they do not unfairly undermine the contestability of core platform services, in light of their significant advantages in terms of accumulation of data.[37]

This is similar to new provisions in Section 19a of the German Competition Act, which followed the Bundeskartellamt's 2019 decision against Meta (formerly Facebook).[38] In the 2019 case, the authority prohibited Meta's practice of combining user data across multiple services without their consent, and making this a condition of accessing its services (see also (OECD, 2024[2])). In addition to the exploitative effects, it was also found that this practice could place rivals at a competitive disadvantage. Germany closed a similar case against Google under Section 19a in 2023, emphasising the close cooperation with the Commission in the course of the proceeding and the coherence between commitments made by Google and its obligations under the DMA. Moreover, Google's commitments extended Google's obligations under Article 5(2) DMA to additional Google services.[39]

Data portability and interoperability have also received considerable attention as potential remedies to address, among other issues, the role of data as a source of market power for dominant platforms.[40] However, there are fewer examples of data portability or horizontal interoperability remedies being implemented in response to traditional antitrust investigations,[41] although vertical interoperability remedies have been proposed in some antitrust cases where dominant platforms have impeded competition by imposing interoperability restrictions on their competitors in downstream markets (discussed further below).

To conclude, multiple platforms have made commitments in different G7 jurisdictions to resolve competition concerns arising from their use of their business users' confidential data, where they may be in competition with those users. However, there have been fewer remedies focused on addressing emerging competition issues relating to the combination and use of user data or imposing data portability requirements.

This may point to a complementary role for ex ante rules in addressing the full range of competition issues arising from the use of and access to data. These ex ante rules may differ from the remedies that have been imposed so far in traditional competition law enforcement cases, including by introducing broader positive obligations for digital platforms (e.g. to provide data portability) and/or applying to new services that may not have been captured by targeted remedies or commitments. Competition authorities may also choose to adopt similar remedies or approaches as part of future enforcement actions.

Self-preferencing

Self-preferencing concerns in digital markets can arise when platforms use their position in one market to favour their own products in an ancillary market (for example, by giving them a preferential ranking), thus distorting competition in the related market. While self-preferencing concerns have recently increased in prominence, they can be seen as similar to traditional leveraging theories of harm in which firms leverage market power in one market (e.g. the intermediation platform) to foreclose competitors in a related market (e.g. a downstream retail market) (OECD, 2021[1]).

Competition authorities have taken a range of cases targeting these practices, with many of these investigations still underway and as yet unresolved. Self-preferencing behaviour by Amazon and Google has been a particular focus for authorities, with increasing attention on recent practices by Apple.

In 2021, Italy concluded a major case against Amazon, finding that Amazon abused its dominance by giving favourable rankings to products from retailers using Amazon's delivery services.[42] Specifically, these products were more likely to appear in the 'Buy Box' than the products of other third-party retailers – offers in the 'Buy Box' are displayed prominently and enable consumers to quickly purchase the item by clicking a 'buy' button. This issue also forms part of the ongoing Amazon cases in the US and Canada, and the EU and UK commitments decisions discussed in the previous sections, with enforcers in the EU and UK finding

that Amazon was also self-preferencing its own retail products. These cases followed the EC's well-known Google Shopping decision in 2017, which found that Google had abused its dominance in general internet search to favour its own comparison shopping service.[43] [44]

Recently, investigations in many G7 jurisdictions have targeted Google's self-preferencing conduct in the ad tech supply chain. Ad tech services are used by advertisers and publishers to buy and sell large volumes of online display advertising inventory in real time. France's investigation, which concluded in 2021, focused on concerns that Google had abused its dominant position in France in one part of the supply chain (publisher ad server) by giving preferential treatment to another of its ad tech services (ad exchange), to the detriment of rival ad exchanges and publisher customers.[45] Ongoing cases in the EU[46] and UK[47] incorporate similar allegations, while also examining concerns that Google had used its dominant position in advertiser buying tools to also favour its ad exchange, at the expense of rivals. Google's leveraging conduct in ad tech services is also under investigation in Canada.[48]

In France,[49] Germany[50] and Italy,[51] Apple is currently subject to investigation for self-preferencing concerns and/or discriminatory conditions relating to the introduction of its App Tracking Transparency (ATT) framework. In April 2021, Apple introduced an additional consent dialogue for user tracking on its mobile OS, which applied only to third-party apps. Authorities are concerned that Apple has abused its dominant position by implementing a discriminatory policy which disadvantages its rivals (for example, third-party apps with business models that rely on user tracking) and benefits its own products, as Apple does not seem to be restricted in its ability to engage in the types of user tracking covered by the ATT framework. Germany's investigation is based on the new Section 19a of the German Competition Act,[52] as well as traditional competition law provisions.

As many of these cases are still underway, there is less certainty about the nature of the remedies that may be implemented to address competition authorities' self-preferencing concerns, as well as what constitutes effective compliance with such remedies.[53] Some investigations have been closed with behavioural commitments, including the Amazon Buy Box cases (Italy, EU, UK) and Google ad tech case (France). For example, Amazon made commitments in the UK and EU to ensure equal access to the Buy Box for all retailers using Amazon Marketplace.[54] This is in line with Article 6(5) of the DMA, which prohibits gatekeepers from treating more favourably, its own products over similar ones of a third party, specifically in relation to ranking and related indexing and crawling.[55] The UK DMCC Act enables the CMA to impose behavioural remedies to address platforms' self-preferencing behaviour.[56]

In contrast, in the EU's Google ad tech antitrust enforcement cases, enforcers are considering structural remedies to address the underlying cause of the self-preferencing concerns such as the inherent conflicts of interest, which may involve requiring Google to divest some of its ad tech services.[57] Such remedies would also be possible under the DMCC Act in the UK, with the CMA able to impose pro-competitive interventions, which could include structural remedies, to remedy, mitigate or prevent adverse effects on competition.[58] Under the DMA, structural remedies are only available where designated gatekeepers systematically infringe their obligations,[59] while, for instance under antitrust rules in the EU and Germany,[60] structural remedies are only available in cases in which behavioural alternatives are insufficient or less effective.[61]

Overall, there is a high volume of cases across G7 jurisdictions that address competition concerns arising from self-preferencing behaviour from a number of digital platforms. However, many of these cases are still ongoing and it remains to be see if remedies will be implemented and what form these will take. Due to the number of ongoing cases, including several prominent cases seeking structural remedies, there is likely to be a strong continuing role for traditional antitrust enforcement in driving outcomes to address concerns around self-preferencing behaviour.

Additionally, while self-preferencing has been extracted as a key concern for most proposed and implemented ex ante regimes, not all of these include a general prohibition on self-preferencing, meaning that traditional antitrust frameworks will remain relevant for those practices not caught by the ex ante rules.

For example, the EU's self-preferencing prohibition in the DMA relates specifically to ranking on certain platforms (e.g., social networks, online marketplaces and search engines). In Japan, the MSCA prohibits self-preferencing within search engine results' rankings, while the TFDPA focuses on requirements for platforms to disclose the details and reasons for any self-preferencing behaviour.

Tying and bundling practices and interoperability restrictions

Tying and bundling practices are a common feature of digital markets, due to the interconnected nature of digital products. Tying occurs when a firm requires its customers to purchase additional product(s) alongside the product they wish to purchase. This can be accomplished through technical tying – for example, restricting interoperability with rivals' products, or through contractual tying, which obligates customers to purchase the products together (OECD, 2020[3]). Bundling occurs when a firm offers multiple products together as a single package.[62]

Tying and bundling strategies may benefit consumers,[63] however, they may be harmful when used to foreclose competition, including by excluding competitors from the market or denying them scale (OECD, 2020[4]). Competition concerns may also arise in situations where dominant firms place interoperability restrictions on suppliers, customers, or rivals. As such, tying conduct and related interoperability restrictions have been a longstanding focus of digital competition enforcement, and a range of investigations are currently underway in G7 jurisdictions. Recent enforcement action has focused particularly on Apple and Google's mobile operating systems (OS) and app stores.

In the EU's Google Android decision in 2018, the EC found that Google had engaged in anti-competitive tying and bundling practices, including by requiring mobile device manufacturers to pre-install Google Search and Google Chrome in order to license Google's app store.[64] The US Department of Justice (DoJ) filed a major lawsuit targeting similar concerns in 2020. In August 2024, the US District Court for the District of Columbia's ruled[65] that Google had unlawfully maintained its monopolies in the product markets for general search and general search text ads by implementing and enforcing exclusionary agreements with manufacturers.[66] The JFTC is also investigating these issues as a suspected violation of the Antimonopoly Act.[6768]

In August 2020, Epic Games in the US filed separate lawsuits against Apple[69] and Google[70], alleging that they had engaged in tying conduct which substantially forecloses competition – including tying their app stores to their in-app payment systems, requiring app developers to use their systems and incur fees on all in-app purchases of digital goods. Epic Games was not successful in its case against Apple, however a jury found in its favour against Google in December 2023. Google also settled a similar lawsuit with various state attorneys general in September 2023,[71] and this conduct has been subject to investigation in the EU[72] (Apple only) and the UK[73] (Google and Apple).

Apple has also faced scrutiny in the EU[74] and US[75] over other interoperability restrictions, particularly concerns that it has prevented third parties from accessing the hardware necessary to deliver tap-to-pay services, in order to foreclose competitors of its digital wallet product, Apple Pay. Statements from the EC and DoJ highlight the impact of these interoperability restrictions on innovation and consumer choice. The DoJ's Apple case also alleges that Apple has blocked the functionality of a range of other app categories, including "super apps", mobile cloud streaming services and messaging apps, with the aim of maintaining its monopoly power while extracting maximum revenue.

Some of the above enforcement investigations are still ongoing, and there have been a range of outcomes across the cases which have concluded. Google has made changes to its practices to address competition concerns raised by enforcers in several jurisdictions[76]. For instance, as part of its compliance efforts following the EC Google Android case, Google implemented a "choice screen" for users in the EU in 2019, allowing users to select their default search provider on its mobile OS where the Google Search app is preinstalled.[77] More recently, in its 2023 settlement with the state attorneys general in the US, Google

committed to allowing alternative payment options on its mobile OS,[78] and proposed similar commitments to the CMA in the UK. However, the CMA rejected this proposal in August 2024, stating that it was not satisfied that the proposed commitments effectively addressed its competition concerns, and that it expects to consider the issue further under the new digital markets competition regime.[79]

Additionally, in July 2024, the EC accepted binding commitments from Apple in response to its Apple Pay investigation.[80] Apple and Google are also subject to a range of interoperability requirements under the DMA, including requirements to allow third-party in-app payment systems on its mobile OS.[81]

Tying practices by digital platforms are a longstanding concern for competition authorities in G7 jurisdictions, with a number of substantial remedies being imposed on dominant platforms. However, with several major open investigations across different jurisdictions, and the implementation of enforcement remedies and ex ante provisions still in progress, there is considerable uncertainty about the nature and extent of remedies that will be agreed upon to address competition concerns on an ongoing basis. It appears likely that both traditional competition law enforcement and ex ante regulation will play a role in determining final outcomes, although this raises the risks of divergences (discussed further in Chapter 3 below).

Summary – key concerns

- G7 authorities have engaged in significant ex post enforcement in digital markets over many years. More recently, some of these jurisdictions have proposed or enacted new ex ante regulations applying to large digital platforms, which target similar competition concerns as these enforcement actions. This includes anti-steering practices and MFNs, the use of data, self-preferencing behaviour, and tying, bundling and interoperability practices.
- Anti-steering practices and MFNs have been a key focus for G7 enforcers, with substantial remedies put in place to address these concerns. At this stage, there does not appear to be much divergence in terms of substance between these remedies and platforms' new obligations under the ex ante regimes. However, there remains ongoing scrutiny regarding the effectiveness of these remedies and platforms' approach to compliance.
- Addressing unfair competitive advantages arising from the use of data is a key element of the ex ante reforms in place in certain G7 jurisdictions. In this area, ex post enforcement efforts so far have focused particularly on competition concerns from platforms' use of their business users' confidential data, with some jurisdictions also tackling emerging issues such as the combination and use of end users' personal data. This may point to a complementary role for ex ante rules, some of which were inspired by previous antitrust cases, to address additional and emerging issues arising from access to large amounts of user data in the future.
- A large number of enforcement cases are underway targeting self-preferencing behaviour in digital markets, although there is uncertainty about whether remedies may be imposed and what form these will take. Due to the volume of ongoing cases, there is likely to be a strong continuing role for traditional antitrust enforcement in addressing concerns arising from self-preferencing, alongside some potential impacts from the implementation of various ex ante rules.
- Tying practices and interoperability restrictions by large digital platforms have been a longstanding concern for G7 authorities, with a variety of ex post remedies and ex ante regulations now in place. However, given the number of investigations still open, there is some uncertainty about the nature of the remedies that may be implemented on an ongoing basis. In light of this, it is likely that both traditional competition law enforcement and ex ante regulation will both play a role in driving the response to these concerns.

3 Compliance and extraterritoriality

In light of the array of ex post enforcement and ex ante provisions canvassed in Chapter 2, platforms are adjusting their operations, services and practices to comply with the remedies imposed by competition authorities and their requirements under new ex ante regimes. Given the global nature of platforms' operations and ecosystems, these changes may have extraterritorial effects, i.e. where platforms make changes to their operations beyond the boundaries of the applicable jurisdiction. This could be for efficiency reasons, or to pre-empt or deter potential regulation or enforcement action in other jurisdictions (OECD, 2023[5]).

Extra-territorial effects are more likely to arise where it is not legally or technically feasible, or economically viable, for firms to adhere to different regulations in different jurisdictions (Bradford, 2012[6]). In the first instance, this will be driven by whether platforms have the ability to separate their operations in the particular jurisdiction. Secondly, firms will consider how beneficial it is for them to do so – i.e. whether the benefits of avoiding the particular regulation outweigh the costs of maintaining differentiated operations. Platforms' compliance strategies may also be influenced by additional concerns, such as whether the firm expects other jurisdictions to introduce similar regulations, or the potential reputational risk arising from users in some jurisdictions being perceived as 'not receiving as good a deal' as users in other jurisdictions (Fletcher, 2022[7]).

Evidence of extraterritorial effects

It has been speculated that rules applying to large digital platforms are likely to have extraterritorial effects, due to the nature of platforms' complex ecosystems which operate on a global basis (OECD, 2023[5]). However, it appears that, in practice, platforms are generally tailoring and limiting their compliance to the jurisdiction at stake, for both ex ante obligations and ex post enforcement remedies, with the reasons behind this still in question (discussed further below).

In their public statements and DMA compliance reports, Amazon,[82] Apple,[83] ByteDance,[84] Google,[85] Meta[86] and Microsoft[87] state that they are implementing most measures in Europe only,[88] with some specific exceptions.[89] This means that the measures discussed in Chapter 2, such as changes to Apple and Google's policies regarding in-app payments and anti-steering, will only take effect in Europe. The vast majority of the remedies in the ex post enforcement cases analysed in Chapter 2 are similarly applied on a geographically-limited basis.[90]

However, in some cases, platforms have changed their behaviour across multiple jurisdictions when multiple authorities have investigated the same competition concerns and reached similar conclusions. This results in a situation of "de facto" convergence where platforms incrementally adjust their behaviour from jurisdiction to jurisdiction – either because multiple jurisdictions impose similar remedies on the firm, or because the firm proposes similar commitments in direct response to each investigation (rather than making global changes on a purely voluntary basis).

Chapter 2 shows this situation, where competition authorities examine the same conducts by digital platforms, is relatively common. These investigations can occur simultaneously, such as various probes

into Apple's ATT practices in France, Germany and Italy. Occasionally, authorities will investigate conduct that has already been assessed in another jurisdiction, such as recent investigations into Google's conduct in the US and Japan which cover similar issues to the EU's 2018 Google Android decision. The evidence also shows that competition authorities often accept similar remedies in relation to the same competition concerns.[91]

This alignment most often occurs in situations where platforms offer authorities commitments or voluntary measures which are consistent across jurisdictions.[92] In one illustration of this, Google developed its 'User Choice Billing' (UCB) programme (which allows app developers to offer alternatives alongside Google's own payment service) and offered this solution in order to resolve competition concerns across multiple jurisdictions.[93] Similarly, Amazon has also taken the approach of progressively removing its MFN clauses on a voluntary basis in response to investigations in various jurisdictions, although similar changes to those applied in the EU were implemented in the US only in 2019, following heightened attention from lawmakers.[94]

It is unclear how much of this convergence is driven by the platforms themselves, who may be proactively designing and proposing similar remedies to authorities investigating similar concerns in different jurisdictions. However, it is ultimately the decision of the relevant authority on whether to accept any commitments or voluntary measures within its respective jurisdiction. In light of this, convergence could be occurring because authorities consider the particular solutions are well designed to address their competition concerns. That is, if the platform and the conduct is the same in each jurisdiction, it may be that the 'best' solution is the same, despite possible differences in domestic market characteristics. Competition authorities could also be giving weight to potential efficiencies flowing from streamlined implementation and reduced compliance costs for platforms and business users.

Authorities may also benefit from the ability to assess the effectiveness of particular remedies in other jurisdictions, as part of their decision about whether to accept them in their own jurisdiction. For example, the CMA's 2023 Amazon commitments decision and 2023 Google commitments consultation show that the CMA had regard to the implementation of similar remedies in other jurisdictions, although it did not always adopt an identical approach. Further, evidence of substantial cooperation between G7 authorities, including specifically on remedies, emerges in a number of cases.[95] Competition authorities may tend to cooperate and closely coordinate their investigations and assessment of possible remedies to ensure consistent outcomes and streamlined solutions.

Outside of these circumstances, it is less common for platforms to voluntarily implement the same measures across multiple jurisdictions, or indeed on a global basis, although this does occur in some cases.[96] Often, this occurs where the platform is facing wider scrutiny from enforcers or lawmakers outside the jurisdiction.

For example, Apple made global changes to some of its anti-steering practices in 2021, in response to the JFTC's investigation.[97] However, these changes occurred in the broader context of heightened scrutiny from enforcers on this particular issue,[98] although other jurisdictions continued to have some concerns about Apple's practices. In another case Google made some changes to its ad tech operations on an EEA basis following the 2021 decision of the French Competition Authority (Autorité de la concurrence),[99] despite that decision applying only to France and while multiple other jurisdictions into Google's ad tech business were (and remain) open.

In a minority of cases, platforms may find that it is not economically feasible to keep their global operations separated. For example, in April 2024, Microsoft announced that it would unbundle its Teams software from its Office 365 and Microsoft 365 software suites on a worldwide basis, having previously done so in Europe in August 2023 in response to an EC investigation,[100] in order to support 'globally consistent licensing' for its customers.[101] Additionally, in 2022, the CMA accepted commitments from Google to mitigate competition concerns in relation to the implementation of Google's "Privacy Sandbox" browser

changes, which Google said it would apply on a global basis.[102] These cases demonstrate the relatively rare situation where the 'first moving' jurisdiction is in the position of driving outcomes at a global level.

Overall, it appears that digital platforms are able to implement changes required by enforcement remedies and/or ex ante rules only in the relevant jurisdiction, and it seems still rare for platforms to voluntarily implement the same measures more broadly. Where adjustments are applied to operations across multiple jurisdictions, this is often driven by "de facto" convergence, where platforms roll out similar changes in response to separate investigations in multiple jurisdictions.

Platforms' compliance strategies and resulting implications

Based on the cases considered, it appears that platforms' compliance strategies are influenced by the extent to which the benefits of maintaining differentiated operations and compliance outweighs the costs in each case.

It may be the case that the costs associated with separating operations by jurisdiction are relatively lower for digital goods, where platforms can more easily generate multiple versions of their software, website or app, as compared to physical goods, which may have a common supply chain for sales in different markets. It is therefore possible for platforms to offer different versions of their products to different customers, based on their increasingly sophisticated ability to use geo-identification technology to distinguish between customers located in different jurisdictions (Frankenreiter, 2022[8]), or even refrain from serving specific jurisdictions in response to regulatory interventions.

Large digital platforms may also have the internal legal resources to design and maintain different terms for users in different jurisdictions, (which may be required for various other reasons), making it relatively easier to limit contractual-based remedies to one jurisdiction (e.g. changes to MFN clauses). Further, the nature of the allegations in the cases considered suggests that the conduct is likely to be highly profitable for the platforms. For example, in the Apple music streaming case, the EC pointed to Apple's app store high commission fee, which may have led users to pay significantly higher prices for music streaming subscriptions. It is also possible that there are other reasons for platforms to limit their compliance to particular jurisdictions, such as security concerns or impacts on consumers and small businesses.[103]

As extraterritorial effects do not appear to be very common so far, it is possible that platform services, and outcomes for users, become increasingly fragmented across the G7 and globally. Ultimately, measures are considered by authorities within the context of their domestic circumstances, and some of this variation may be justified on the basis of unique market conditions or legislative frameworks in each jurisdiction. Further, there may be benefits from the sequential introduction of remedies and regulations, which may provide the opportunity for jurisdictions to learn from and identify refinements based on other jurisdictions' experiences (Fletcher, 2022[7]).

However, this divergence could also increase complexity for platforms and users, including business users or individual customers with international exposure (OECD, 2023[5]). For example, new entrants and business users seeking to access consumers via large digital platforms, may struggle to navigate complex platform operations and rules which vary by jurisdiction, limiting innovative entry, and high compliance costs for digital platforms may also impact innovation incentives (Fletcher, 2022[7]).

These considerations point to the importance of international coherence and cooperation to mitigate the costs of divergences.

4 Conclusions

The scope of the ex ante provisions proposed or implemented in G7 jurisdictions broadly reflects the key competition concerns which have been the focus of ex post enforcement cases to date. This is in line with the rationale behind the new digital regulations of providing competition authorities with a dedicated complementary instrument, considered better suited to address specific competition issues stemming from gatekeepers' power in digital markets.

The intensity of enforcement action, including the number of cases and platforms involved, and the alignment with proposed or implemented ex ante regulations, varies depending on the particular practice and competition concern. For some issues, such as those related to anti-steering practices and platforms' use of competitors data, there is considerable convergence between the numerous ex post enforcement remedies which are in place and the new ex ante obligations and prohibitions.

For other concerns, related for example to self-preferencing and tying practices, there is less certainty about the design and implementation of potential remedies, as a number of major investigations remain open. In these cases, traditional antitrust frameworks are likely to remain relevant, alongside ex ante regulation, in determining the ultimate outcomes in digital markets.

Finally, although relatively rare, there are also concerns and associated remedies which have arisen less frequently as an outcome of competition law enforcement, but are a significant component of ex ante frameworks. This is the case for example of data portability and interoperability obligations, which may see a more substantial application in the future, driven by the new regulations.

In terms of compliance with both ex post enforcement remedies and ex ante regulations, extraterritorial effects were not commonly found for the key patterns of conducts examined. Digital platforms generally seem to only implement the required changes in the relevant jurisdiction, and so far rarely extend these changes to other jurisdictions on a voluntary basis. Where similar adjustments take place in multiple jurisdictions, this is often driven by "de facto" convergence following investigations of the same conduct by the various competition authorities.

Due to the limited extraterritorial effects observed so far, and different regulatory landscapes at the G7 level, the prominence of competition law enforcement and ex ante regulations respectively is likely to vary going forward. It is possible that a number of jurisdictions might rely more significantly on the new reforms, either as a standalone solution or in parallel to ongoing investigations, while others, such as Canada, or the US, may prioritise traditional antitrust routes to investigate similar concerns around large platforms' market power.

The high amount of activity in this space, and the general lack of extraterritorial effects, also creates opportunities for enforcers and policy makers to learn from the progressive implementation of antitrust remedies and ex ante rules in other jurisdictions, including identifying which changes are most effective and efficient in improving competitive outcomes, to the benefit of platform users and consumers.

Authorities may also be able to leverage the work undertaken in other jurisdictions by choosing to adopt similar remedies as part of future enforcement actions or similar ex ante rules - effectively 'importing' remedies from other jurisdictions. Alternatively, depending on the situation, jurisdictions may also benefit from the flexibility to tailor remedies to best address harms in their domestic situation.

This can best be supported by different forms of international cooperation as well as expertise sharing via international fora such as the OECD. Such knowledge sharing is particularly important given the dynamic nature of digital markets - with ongoing monitoring and refining of remedies likely to be critical. Finally, a heightened level of coordination could also help address the risk of increasing fragmentation, as the number of cases and the variety of remedies and ex ante requirements increases globally.

Endnotes

[1] https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/competition-and-digital-economy/g7-inventory-of-new-rules-for-digital-markets-2023.pdf/

[2] https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/competition-and-digital-economy/analytical-note-on-the-G7-inventory-of-new-rules-for-digital-markets-2023.pdf

[3] In the United Kingdom, Digital Markets, Competition and Consumers Act enacted in May 2024; in the EU, Digital Markets Act enacted in September 2022; in Germany, Amendment to the German Act against Restraints of Competition "Section 19a: Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets" enacted in January 2021; in Japan, Act on Improving Transparency and Fairness of Digital Platforms enacted in June 2020 and Mobile Software Competition Act enacted in June 2024; in the United States, American Choice and Innovation Online Act S.2033, as reported by the Senate Judiciary Committee, and the Open App Markets Act S. 2710, as reported by the Senate Judiciary Committee, proposed.

[4] Note that some instruments may be considered both ex ante and ex post in certain contexts, and the boundaries between traditional competition law and new regulations might vary between jurisdictions. This note does not aim to strictly delineate between different tools, but presents the development and use of additional rules that address evolving issues in digital markets alongside traditional antitrust enforcement.

[5] JFTC press release, 2 September 2021, https://www.jftc.go.jp/en/pressreleases/yearly-2021/September/210902.html.

[6] Court order in Epic Games, Inc. v Apple Inc. (Case 4:20-cv-05640-YGR), 10 September 2021. This decision was upheld on appeal in 2023.

[7] In the Netherlands, the ACM concluded that Apple had abused its dominant position by imposing unreasonable contractual conditions, including the anti-steering requirements, on dating-app providers specifically (Decision ACM/UIT/559984, 24 August 2021).

[8] EC decision of 4 March 2024, AT.40437, Apple - App Store Practices (music streaming).

[9] Complaint in FTC v. Amazon (Case 2:23-cv-01495-JHC), 26 September 2023.

[10] Competition Bureau press release, 14 August 2020, https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html.

[11] Similarly, in the online hotel booking sector, the Italian Competition Authority is market testing Booking.com's commitments so that hotels joining its partner programme would not be prevented from offering better prices on their own websites or platforms of other online travel agencies.[11] In Italy, parity clauses are prohibited by law in this sector. See: AGCM press release of 22 March 2024, https://en.agcm.it/en/media/press-releases/2024/3/A558, and AGCM press release of 8 August 2024, https://en.agcm.it/en/media/press-releases/2024/8/A558.

[12] EC decision of 4 May 2017, AT.40153, E-book MFNs and related matters (Amazon).

[13] JFTC press release, Amazon e-books, 15 August 2017, https://www.jftc.go.jp/en/pressreleases/yearly-2017/August/170815.html.

[14] JFTC press release, Amazon Marketplace, 1 June 2017, https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601.html.

[15] CMA case, CE/9692/12, Amazon online retailer.

[16] Bundeskartellamt case report of 26 November 2013, B6-46/12, Amazon Marketplace.

[17] Specifically, this applied to "reader" apps, which provide access to content or content subscriptions which have previously been purchased for digital magazines, newspapers, books, audio, music, and video. See Apple press release, 1 September 2021, https://www.apple.com/newsroom/2021/09/japan-fair-trade-commission-closes-app-store-investigation/.

[18] This remedy came into effect in January 2024, once all appeal avenues were exhausted. In May 2024, an evidentiary hearing was held in relation to whether Apple had complied with the relevant court order.

[19] This remedy is applied in the EEA and the UK (in accordance with the EU-UK Withdrawal Agreement, the EU continues to be competent for this case, which was initiated before the end of the transition period). The EC has stated that it is currently assessing whether Apple has fully complied with the decision.

[20] MFNs were removed for e-book publishers in the EU (including the UK) and Japan in 2017, and for third-party retailers on Amazon Marketplace in the EU (including the UK) in 2013 and Japan in 2017. Amazon also removed MFNs for Amazon Marketplace in the US in 2019, following heightened attention from lawmakers.

[21] Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (hereinafter, DMA), Article 5(4).

[22] Since 7 March 2024.

[23] EC case openings of 25 March 2024, DMA.100109 – Apple – Online Intermediation Services – app stores – App Store – Article 5(4) and DMA.100075 – Alphabet – Online Intermediation Services – app stores – Google Play – Article 5(4).

[24] At the time of this report, both investigations are still ongoing. On 24 June 2024, the Commission opened an additional non-compliance investigation into Apple's new contractual terms for developers, including the new Core Technology Fee, EC press release, 24 June 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3433. On 8 August 2024, Apple announced several amendments to its App Store rules, including related to the steering rules (Apple blog post, 8 August 2024).

[25] DMA, Article 5(3).

[26] Germany's Act against Restraints of Competition (Competition Act – GWB). Section 19a aims to allow for a more effective oversight over large digital companies that are of so-called paramount significance for

competition across markets. Taking into account the specific conditions of digital markets, Section 19a aims at constraining economic power, keeping markets open and protecting the competitive process.

[27] Competition Act – GWB, Section 19a(2), No. 2(b).

[28] Such as the FTC's Amazon case and reviews of Apple's compliance with anti-steering remedies in multiple jurisdictions.

[29] EC decision of 20 December 2022, AT.40462, Amazon Marketplace.

[30] CMA decision of 3 November 2023, 51184, Amazon Marketplace.

[31] CMA case, 51013, Meta's use of data; EC case, AT.40684, Facebook Marketplace. The CMA and EC investigations were launched on the same day, with press releases from both agencies signalling that they would work together closely as the independent investigations develop.

[32] The CMA also accepted a specific commitment for Meta to provide a mechanism for advertisers to opt-out of their data being used specifically to improve the Facebook Marketplace service. In August 2024 the CMA accepted a variation to this commitment which will allow Meta to adopt a new approach, in which advertisers can be certain of their data not being used to improve the Facebook Marketplace service without having to opt in or out.

[33] The EC sent a Statement of Objections to Meta on 19 December 2022.

[34] Amazon press release, 20 December 2022, https://www.aboutamazon.eu/news/policy/amazons-statement-on-the-commitments-agreed-with-the-european-commission.

[35] DMA Article 6(2) prohibits gatekeepers from using, in competition with business users, any non-public data generated or provided by those businesses from their use of the platforms' services. Meta is also required to comply with these provisions.

[36] Remarks by Executive Vice-President Vestager, 20 December 2022, https://ec.europa.eu/commission/presscorner/detail/en/speech_22_7850.

[37] DMA, Article 5(2).

[38] Bundeskartellamt decision of 6 February 2019, B6-22/16, Facebook. See also: The intersection between competition and data privacy – Note by Germany, OECD Competition Committee, 13 June 2024.

[39] Bundeskartellamt decision of 5 October 2023, B7-70/21, Google.

[40] For example, data portability requirements take the form of positive obligations (EU and Japan), potential pro-competitive interventions (UK) or new prohibitions (Germany).

[41] In a rare example, Italy accepted commitments from Google in 2023 to improve its processes for exporting data to third parties, to address the AGCM's concerns regarding an alleged abuse of dominance (AGCM decision of 31 July 2023, A552, Google-Ostacoli), https://en.agcm.it/en/media/press-releases/2023/7/A552.

[42] AGCM decision of 9 December 2021, A528 FBA Amazon.

[43] EC decision of 27 June 2017, AT.39740, Google Search (Shopping). Also related to Google Search, Germany investigated competition concerns resulting from a possible preferential integration of Google News Showcase content into Google's search results (Bundeskartellamt case report of 1 August 2023, V-43/20, Google News Showcase).

[44] On 10 September 2024 the Court of Justice upheld the fine of €2.4 billion imposed on Google for abuse of its dominant position by favouring its own comparison shopping service, Judgment of the Court in Case C-48/22 P.

[45] Autorité de la concurrence decision 21-D-11 regarding practices implemented in the online advertising sector, 7 June 2021.

[46] EC case, AT.40670, Google - Adtech and Data-related practices.

[47] CMA case, 51145, Google ad tech.

[48] Competition Bureau press release, 29 February 2024, https://www.canada.ca/en/competition-bureau/news/2024/02/competition-bureau-expands-its-investigation-into-googles-advertising-practices.html .

[49] Autorité de la concurrence press release, 27 July 2023, https://www.autoritedelaconcurrence.fr/en/press-release/advertising-ios-mobile-applications-general-rapporteur-confirms-having-notified-apple .

[50] Bundeskartellamt press release, 14 June 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html .

[51] AGCM case, A561-A561B Apple App Tracking Transparency, https://en.agcm.it/en/media/press-releases/2023/5/A561-A561B .

[52] Competition Act – GWB, Section 19a(2) sentence 1.

[53] On 25 March 2024, the EC opened a non-compliance investigation into whether Google may still be self-preferencing, in particular, in relation to its vertical search services (including Google Shopping), in breach of the DMA (discussed further below) - see EC case opening of 25 March 2024, DMA.100193 - Alphabet - Online Search Engine - Google Search - Art. 6(5). This follows concerns that Google was not adequately complying with the remedies imposed in the 2017 EC Google Shopping decision.

[54] In the EU only (excluding Italy), Amazon has also committed to introducing a second Buy Box to give more choice to consumers and provide more opportunities to retailers. The EC stated that this additional commitment goes beyond the requirements of the DMA. See Remarks by Executive Vice-President Vestager, 20 December 2022, https://ec.europa.eu/commission/presscorner/detail/en/speech_22_7850.

[55] Gatekeepers are also required to apply transparent, fair and non-discriminatory conditions to such ranking.

[56] As above, Amazon's commitments will cease to apply if the CMA imposes obligations pursuant to the DMCC Act which would address the same concerns. Additionally, the CMA's Online platforms and digital

advertising market study sets out possible conduct requirements that could be imposed to address self-preferencing in ad tech services.

[57] EC press release, 14 June 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207; Remarks by Executive Vice-President Vestager, 14 June 2023, https://ec.europa.eu/commission/presscorner/detail/en/speech_23_3288. As mentioned in the remarks, the EC has closely cooperated with the US DoJ, which has separately filed a civil antitrust suit against Google for monopolizing and tying multiple digital advertising technology products in violation of Sections 1 and 2 of the Sherman Act. The DoJ lawsuit also seeks divestures, among other remedies, to address the anti-competitive harm. See Complaint in United States v. Google LLC (2023) (Case 1:23-cv-00108), 24 January 2023.

[58] Possible structural remedies to apply to Google's ad tech services were also contemplated in the CMA's Online platforms and digital advertising market study.

[59] DMA, Article 18(1). Structural remedies are also available under the DMCC Act in response to a breach of conduct requirements.

[60] For instance, according to Article 7 of EU Regulation 1/2003, "Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy."

[61] The Bundeskartellamt has specifically considered potential structural remedies in the area of online advertising in its 2022 sector inquiry into online advertising.

[62] It can do so either through pure bundling, which means that the products are only available for sale together, or mixed bundling, which means that the products can be purchased separately but are available together, generally at a discount (OECD, 2020, p. 10[3]).

[63] Including by generating substantial economics of scope or scale, enhancing network effects, or otherwise increasing quality or convenience.

[64] The EC also found that Google had enforced "anti-fragmentation agreements" in which it only granted licences to pre-install Google Search and the Google Play store to manufacturers that did not sell devices running on Android versions not approved by Google and that Google had made payments to mobile device manufacturers to ensure exclusive pre-installation of Google Search. EC decision of 18 July 2018, AT.40099 Google Android.

[65] Decision in United States v. Google LLC (2020) (Case 1:20-cv-03010), 5 August 2024.

[66] The DoJ's separate monopolisation case against Google regarding digital advertising technologies also alleged Google had engaged in unlawful tying in violation of Sections 1 and 2 of the Sherman Act; in particular, tying its ad exchange product to its publisher ad service product. See Complaint in United States v. Google LLC (2023) (Case 1:23-cv-00108), 24 January 2023.

[67] JFTC press release, 23 October 2023, https://www.jftc.go.jp/en/pressreleases/yearly-2023/October/231023.html.

[68] Germany is also addressing bundling conduct and interoperability restrictions in relation to Google Automotive Services and Google Maps Platform. Bundeskartellamt press release, 21 June 2023,

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/21_06_2023_Google.html .

[69] Epic Games, Inc. v Apple Inc. (Case 4:20-cv-05640-YGR).

[70] Epic Games, Inc. v. Google, LLC (Case 3:20-cv-05671-JD).

[71] Settlement agreement in State of Utah et al. v. Google LLC et al (Case 3:21-cv-05227-JD).

[72] However, in February 2023, the EC revised its Statement of Objections in its music streaming apps case to close the aspects of the case relating to Apple's in-app payment obligation.

[73] In August 2024, the CMA closed both investigations on the grounds of administrative priority, on the expectation that it would consider these concerns under the new digital markets competition regime (the DMCC Act), discussed further below. See CMA press release, 21 August 2024, https://www.gov.uk/government/news/cma-looks-to-new-digital-markets-competition-regime-to-resolve-app-store-concerns .

[74] EC case, AT.40452, Apple - Mobile payments.

[75] Complaint in United States v. Apple (2024) (Case 2:24-cv-04055), 21 March 2024.

[76] In a separate tying case, Meta changed its behaviour in the context of the proceedings by the Bundeskartellamt: it is no longer necessary to register with a Facebook account to use Meta's virtual reality headset. See Bundeskartellamt case summary, 23 November 2022, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2022/B6-55-20.html.

[77] Google Android blog, updated 12 June 2023, https://www.android.com/choicescreen/.

[78] Remedies are also forthcoming in the Epic Games vs Google case.

[79] See CMA press release, 21 August 2024, https://www.gov.uk/government/news/cma-looks-to-new-digital-markets-competition-regime-to-resolve-app-store-concerns .

[80] Beyond the G7, Apple has made changes in response to ongoing enforcement action from the Netherlands Authority for Consumers and Markets (ACM) to allow alternative payment systems for dating apps in the Netherlands. See ACM case ACM/21/053587.

[81] DMA, Articles 5(7) and 6(7). Concerns about tying practices and interoperability restrictions are also captured by section 19a of the German Competition Act and the DMCC Act in the UK. Japan passed the MSCA in June 2024, which prohibits platforms from preventing other application developers from using alternative in-app payment options Outside the G7, Korea passed the Telecommunications Business Act in August 2021, which obligates app store operators (including Google and Apple) to allow alternative in-app payment options.

[82] Amazon compliance report (March 2024).

[83] See Apple press release (January 2024) and compliance report (March 2024).

[84] ByteDance compliance report (March 2024).

[85] See Google blog post (January 2024) and compliance report (March 2024).

[86] See Meta press release (January 2024) and compliance report (March 2024).

[87] See Microsoft blog post (updated February 2024) and compliance report (March 2024).

[88] Depending on the platform, these changes may be described as applying in Europe, the EU, the European Economic Area (EEA), or the EEA and Switzerland.

[89] Measures such as expanded analytics reports (Apple), enhanced compliance frameworks for business users' data (Google), data portability tools (Meta) and the ability to uninstall select apps, excluding search and browser services (Microsoft), will be rolled out globally. TikTok and Google have also extended their new DMA data portability tools to the UK.

[90] This includes Apple's 2024 proposed commitments in the EU (EC case AT.40452), Meta's 2023 commitments in the UK (CMA case 51013), Google's 2023 commitments in Germany (Bundeskartellamt decision B7-70/21), Germany's 2019 decision regarding Meta (Bundeskartellamt decision B6-22/16) and the EU's 2018 Google Android decision (EC decision AT.40099).

[91] Similar remedies have been proposed or implemented across different jurisdictions to address concerns with Amazon's use of data and self-preferencing practices (the EU, Italy and the UK), Amazon's MFNs (EU and Japan), Apple's anti-steering practices (EU and US) and Google's in-app payment requirements (EU, UK and US). Most cases involved commitments offered by the platforms – only Italy's 2021 Amazon decision and the various Apple anti-steering decisions in the US (2021) and EU (2024) were imposed by the authorities or a court.

[92] However, there are still some divergences in the commitments offered by platforms to various authorities. For example, despite rolling out UCB in multiple jurisdictions, Google has only offered to implement 'alternative billing', in which app developers can offer alternative billing options *instead* of Google's payment service, in the EEA and the UK (note the CMA decided not to accept this proposal). Additionally, while the EU and the UK accepted similar commitments from Amazon to address their self-preferencing concerns in 2022 and 2023 respectively, Amazon's commitment to introduce a second Buy Box only applies in the EEA (excluding Italy – due to the Italian Competition Authority (AGCM)'s separate Amazon case).

[93] Google offered UCB in its settlement with the state attorneys general in the US, in the EEA in compliance with the DMA and in its proposed commitments in the UK (note the CMA decided not to accept this proposal). Google has also offered UCB in Korea and India in response to local regulatory developments, and on a pilot basis for non-gaming apps in Australia, Brazil, Indonesia, Japan, South Africa and the United States.

[94] Complaint in FTC v. Amazon (Case 2:23-cv-01495-JHC), 26 September 2023.

[95] For example, in relation to its ad tech enforcement case, the EC noted in 2023 that it had benefited from France's recently finalised investigation, as well as the work of other European competition authorities and its regular contact with the DoJ and the CMA. In particular, the EC highlighted "close and fruitful" cooperation with the DoJ and their alignment on how best to remedy the relevant competition concerns (see Remarks by Executive Vice-President Vestager, 14 June 2023 https://ec.europa.eu/commission/presscorner/detail/en/speech_23_3288). Moreover, at the intersection

between DMA and competition law enforcement, the European Commission (in its role as sole DMA enforcer) and national competition agencies are cooperating closely.

[96] Examples include the Amazon MFN cases by Germany and the UK that led to changes across Europe, and the 2019 German Amazon case resulting in an amendment of Amazon's terms of business for sellers worldwide (Bundeskartellamt case summary of 17 July 2019, B2-88/18, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.html).

[97] Apple made changes to allow developers of "reader" apps (see chapter 2) to include an in-app link, in response to the focus of the JFTC's investigation.

[98] At the time of announcing the changes to its practices (September 2021), Apple has just been sanctioned in the Netherlands (August 2021), Korea had just passed the Telecommunications Business Act (August 2021) and cases were ongoing in the EU and the US (*Epic Games vs Apple*). In addition, Australia had just published its March 2021 report which recommended measures to address the consequences of Apple (and Google)'s power in the app market.

[99] Google blog post, 7 June 2021, https://blog.google/around-the-globe/google-europe/some-changes-our-ad-technology/

[100] EC case, AT.40721, Microsoft. The EC investigation targets concerns that Microsoft may be abusing and defending its market position in productivity software by restricting competition for communication products, and that it may be engaging in anti-competitive tying or bundling.

[101] Microsoft licensing news, 1 April 2024, https://www.microsoft.com/en-us/licensing/news/Microsoft365-Teams-WW

[102] CMA decision of 11 February 2022, 50972, Google Privacy Sandbox. The CMA was concerned that the "Privacy Sandbox" proposals would increase concentration of online advertising spending to Google, weaken competition, and ultimately harm consumers and undermine the ability of online publishers to produce valuable content, reducing the public's choice of news sources.

[103] For example, "Apple is not offering these capabilities outside of the EU because they introduce new complexity and significant risks to the privacy and security of the user experience." (Apple Developer Q&A); "We encourage other countries contemplating such rules to consider the potential adverse consequences — including those for the small businesses that don't have a voice in the regulatory process." (Google blog post, 5 April 2024).

References

Bradford, A. (2012), "The Brussels Effect", *Northwestern University Law Review*, Vol. 107/1, https://ssrn.com/abstract=2770634. [6]

Fletcher, A. (2022), "International Pro-Competition Regulation of Digital Platforms: Healthy Experimentation or Dangerous Fragmentation", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4112210. [7]

Frankenreiter, J. (2022), "The Missing 'California Effect' in Data Privacy Law", *Yale Journal on Regulation*, Vol. 39/3, https://ssrn.com/abstract=3883728. [8]

Marotta-Wurgler, F. and K. Davis (2024), "Filling the Void: How E.U. Privacy Law Spills Over to the U.S.", *Journal of Law and Empirical Analysis (Forthcoming)*, https://ssrn.com/abstract=4733036. [9]

OECD (2024), *The Intersection between Competition and Data Privacy, OECD Competition Policy Roundtable Background Note*, https://doi.org/10.1787/20758677. [2]

OECD (2023), *G7 inventory of new rules for digital markets: Analytical note*, https://www.oecd.org/competition/analytical-note-on-the-G7-inventory-of-new-rules-for-digital-markets-2023.pdf. [5]

OECD (2021), *Ex ante regulation of digital markets, OECD Competition Policy Roundtable Background Note*, https://web-archive.oecd.org/2021-12-01/616997-ex-ante-regulation-and-competition-in-digital-markets-2021.pdf. [1]

OECD (2020), *Abuse of dominance in digital markets, OECD Competition Policy Roundtable Background Note*, https://web-archive.oecd.org/2021-10-31/566602-abuse-of-dominance-in-digital-markets-2020.pdf. [4]

OECD (2020), *Conglomerate effects of mergers, OECD Competition Policy Roundtable Background Note*, https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf. [3]

OECD

G7 ITALIA 2024