

Webinar on Competition law and policy approaches towards digital platforms and ecosystems in cooperation with the BRICS Competition Law and Policy Centre and the Brazilian Administrative Council for Economic Defense (CADE)

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Competition Law and Policy Approaches Towards Digital Platforms and Ecosystems:

Remedial issues

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Context

- 'Novel' and not that novel theories of harm
- Matching remedies?
 - Speed
 - Structure - expertise
 - Monitoring
 - Effectiveness
 - Reversing market tipping
 - Restorative element
- Competition v regulatory (DMA) remedies: interplay and effectiveness



SNAPSHOT OF EU COMPETITION LAW ENFORCEMENT IN THE DIGITAL ECONOMY

Google

Theories of Harm	Antitrust Cases	DMA Provisions
Favouring/ Self preferencing	Shopping (EU) AdTech (EU) News (Germany) AdTech (France) Android Auto (Italy) AdTech (UK) Google Play (UK)	
Favouring/ Self preferencing in ranking	Shopping (EU)	6(5) Obligation not treat more favourably, in ranking and related indexing and crawling, its own products and services and shall apply transparent, fair and non-discriminatory conditions to such ranking. Self preferencing on Google Search
Favouring/ opacity of information	AdTech (EU) AdTech (UK)	5(9) – (10) Obligation to provide information to publishers and advertisers 6 (8) Obligation to provide advertisers and publishers with access to gatekeeper’s performance measuring tools and necessary data to undertake their own independent verification of the advertisements inventory

Google cc'd

<p>Tying</p>	<p>Android (EU) AdTech (UK)</p>	<p>6(3) Obligation to allow end users to easily un-install any software applications on the gatekeeper's OS, unless they are essential for the functioning of the OS or the device and cannot be technically offered on a standalone basis by third parties.</p> <p>6(4) Obligation to allow end users to easily change default settings on gatekeeper's OS, virtual assistant and web browser.</p>
<p>Exclusivity</p>	<p>AdSense (EU)</p>	
<p>Terms and Conditions (opaque, unfair, discriminatory, unreasonable)</p>	<p>News (Germany) AdWords (France) News (France)</p>	
<p>Preferential Use of Data/Privacy/ Data Processing</p>	<p>Data Processing (Germany) Privacy Sandbox (UK)</p>	<p>5(2) Combining personal data from the relevant CPS with personal data from any other CPS or any other gatekeeper's services or with personal data from third-party services;</p>
<p>Restrictions of interoperability</p>	<p>Maps (Germany) AdTech (France) Android Auto (Italy) AdTech (UK)</p>	<p>6(7) Obligation to ensure interoperability for service and hardware providers and business users</p>

Amazon

Theories of Harm	Antitrust Cases	DMA
Preferential Use of Data	Marketplace (EU) Marketplace (UK)	6(2) Prohibition on using, in competition with business users, non-public generated or provided by business users when using the relevant CPS
Preferential Treatment of own services	Marketplace (EU) Marketplace (UK)	6(5) Obligation not treat more favourably, in ranking and related indexing and crawling, its own products and services and shall apply transparent, fair and non-discriminatory conditions to such ranking. DMA investigation?
Preferential/ Discriminatory Treatment of third parties on the platform	Marketplace (EU) Marketplace (Italy) Marketplace (UK)	
Terms and Conditions (opaque, unfair, discriminatory, unreasonable)	Marketplace (Germany)	5(6) Prohibition on preventing or restricting users from raising any issue of gatekeeper's non-compliance with competent authorities and courts

Facebook

Theories of Harm	Antitrust Cases	DMA
Preferential Use of Data	Marketplace (EU) Classified Ads/ Online Dating (UK)	5(2) [processing end users' personal data that use third parties' services (who use gatekeepers' CPS), for providing online advertising services, subject to consent]
Preferential Treatment of own services	Marketplace (EU) Classified Ads/ Online Dating (UK)	6(5) Obligation not treat more favourably, in ranking and related indexing and crawling, its own products and services and shall apply transparent, fair and non-discriminatory conditions to such ranking.
Tying	Marketplace (EU) VR Market (Germany)	
Terms and Conditions (opaque, unfair, discriminatory, unreasonable) – privacy interplay	Social Network (Germany)	5(2) [prohibition on combining personal data from the relevant CPS with personal data from any other CPS or any other gatekeeper's services or with personal data from third-party services, subject to users' consent] “pay or consent model”
Terms and Conditions (opaque, unfair, discriminatory, unreasonable)	Online Advertising Services (France) Online Ad Verification (France)	

Apple

Theories of Harm	Antitrust Cases	DMA
Anti-steering	App Store (EU) App Store (UK)	<p>5(4) Obligation to allow business users, free of charge, to communicate and promote offers, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper</p> <p>5(5) Obligation to allow end users to access and use, through its core platform services, content, subscriptions, features or other items, by using the software application of a business user.</p> <p>6(4) Obligation to allow the installation and effective use of third-party software applications or software application stores on its operating system and allow these to be accessed by means other than the relevant gatekeeper's core platform services.</p> <p>Apple's rules on steering in the App Store</p>
Restricting interoperability/ favouring	Apple Pay (EU)	6(7) Obligation to ensure interoperability for service and hardware providers and business users
Use of Data/ Favouring	ATT (Germany)	
Unfair terms	Online Dating Apps (Netherlands)	
Unfair terms/IAP	App Store (UK)	5(7) Prohibition on requiring users to use, offer, or interoperate with a gatekeeper's identification service, web browser or payment service (eg. payment systems for in-app purchases) in the context of services provided by the business users when using core platform services provided by the gatekeeper.

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Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act

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Today, the Commission has opened non-compliance investigations under the Digital Markets Act (DMA) into **Alphabet's rules on steering in Google Play and self-preferencing on Google Search, Apple's rules on steering in the App Store and the choice screen for Safari and Meta's "pay or consent model"**.

The Commission suspects that the measures put in place by these gatekeepers fall short of effective compliance of their obligations under the DMA.

In addition, the Commission has launched investigatory steps relating to Apple's new fee structure for alternative app stores and Amazon's ranking practices on its marketplace. Finally, the Commission has ordered gatekeepers to retain certain documents to monitor the effective implementation and compliance with their obligations.



THEORIES OF HARM AND REMEDIES: SOME EXAMPLES

Self-preferencing

- Google Shopping (EU)
 - Infringement decision, 27 June 2017
 - Protracted investigation
 - Fine + Cease and desist and equal treatment
 - Effectiveness of the remedy?
 - DMA investigation
- Amazon Marketplace (EU)
 - Commitment decision, 20 December 2022
 - Equal treatment
 - Restrict use of non public seller data
 - DMA investigation?

Tying

- Google Android
 - ▣ Infringement decision, 18 July 2018
 - ▣ Fine
 - ▣ Cease and desist
 - ▣ Market tipping → restorative remedies?

Anti-steering

- App-Store (EU)
 - ▣ Infringement decision, 4 March 2024
 - ▣ Fine (inflated for deterrence) + cease and desist (but how?)
 - ▣ Compliance?
 - DMA investigation

Preferential use of data – unfair terms

- Facebook Marketplace
 - SO, 19 December 2022
 - Terms and conditions for the use ads-related data from competitors for the benefit of Facebook Marketplace may be unjustified, disproportionate and not necessary for the provision of online display advertising services on Meta's platforms
- Amazon Marketplace (EU)
- Facebook (DE)
 - DMA investigation

Structural remedies?

- AdTech (EU)
 - ▣ SO, 14 June 2023
 - ▣ Mentioning the remedy – already in the SO

Concluding remarks

- Responsive remodelling - Flexible remedies
- Timing of intervention
- Reflecting on remedy design early on
- Involvement of different stakeholders
- Participatory antitrust
- Testing remedies prior to implementation
 - DMCC Guidance
- Market investigations

Questions?

Thank you for your attention!