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DIGITAL MARKETS: CLOSING THE REGULATORY GAP ON ALL FRONTS?

October 2020

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The European Commission (EC or Commission) is opening multiple fronts to adapt and increase regulatory oversight of digital players in the EU Internal Market. At the same time, EU member states such as Germany and France on the one hand, as well as the United Kingdom on the other, are taking separate initiatives at the national level. This activity is all taking place while legislators and regulators in the United States are likewise focused on digital markets.[1] This White Paper gives an overview of the initiatives, highlighting differences and common features.

Acknowledging that regulating the digital sector requires a multifaceted approach, and confirming its commitment to scrutinize this dynamic sector, the EC has recently launched three parallel initiatives involving three Directorates General: "DG COMP", "DG CNECT" and "DG GROW."[2] First, the EC intends to introduce a potential new competition tool to deal with structural competition concerns, regardless of whether an actual infringement has taken place. Second, the EC has indicated it will actively regulate digital platforms *ex ante* – in particular so-called "gatekeepers." Third, the EC aims to update and extend existing rules on ecommerce.

EU: A NEW COMPETITION TOOL: ADDRESSING STRUCTURAL SHORTCOMINGS

DG COMP is leading this initiative and aims to take enforcement action regarding certain structural competition problems in the digital sector *before* an infringement has actually taken place. In practice therefore, it would be up to the undertakings affected by the EC's decision in the context of this new tool, to prove that they have *not* engaged in the alleged behavior. This marks a significant shift from the general rule that places the burden of proof for an infringement on the antitrust regulator. The Commission draws inspiration from the powers of the UK Competition and Markets Authority (CMA) and wants to be able to impose behavioral as well as structural remedies before a competitor definitively forecloses a given market. The new competition tool would tackle, on the one hand, structural *risks for competition*, to prevent the creation of an entrenched market position by early intervention. On the other hand, this tool would serve to fight structural *lack of competition* through systemic market failures, which go beyond the conduct of a particular company. This refers to highly concentrated and oligopolistic markets, markets with high entry barriers, or markets where lack of access to data or data accumulation raises competition concerns, or markets with increased transparency due to a prevalence of algorithm-based solutions.

DG COMP is currently looking into four possible policy options to address these structural competition problems.

The first set of two options would grant the Commission power to intervene when it identifies alleged unilateral anticompetitive behavior by a *dominant company*.[3] DG COMP is currently evaluating whether

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[1] See most recently the report that was presented by the House Judiciary Committee's Democratic leadership on October 6, 2020.

[2] DG COMP is the acronym for the Directorate General for Competition; DG CNECT is the acronym for the Directorate General for Communications Networks, Content and Technology; and DG GROW is the acronym for the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs. (SMEs is the acronym for Small and Medium Sized Enterprises.)

[3] Dominance is generally defined as a firm's ability to behave independently of its competitors, customers, suppliers and, ultimately, final consumers. As a rule of thumb, a business may be considered as dominant if it has a market share of around 40% or more in a properly defined relevant market, although in some instances a lower share will suffice if the relative market positions of competitors is weak. While a firm is not prohibited from becoming dominant through legitimate means, it is an infringement for it to *abuse* its dominance. (*See* Article 102 of the Treaty on the Functioning of the European Union (TFEU) and equivalent EU member state provisions).

such a tool should apply indiscriminately to all business sectors (option 1) or be limited to sectors in which these concerns typically arise (option 2).

Conversely, the third and fourth options would grant power to the Commission to impose behavioral or structural remedies on actors on a specific market where a *structural* risk for competition exists. In other words, enforcement action here would *not be limited to dominant undertakings*, but would apply more widely. Similar to the first two options, DG COMP is evaluating whether such a tool should apply indiscriminately to all business sectors (option 3) or be limited to sectors in which these structural concerns are most prevalent (option 4).

From a procedural point of view, the EC is also exploring whether it should be empowered to deploy "interim measures" (i.e., injunctive measures) to prevent irreparable harm, while the review under options 1 to 4 is ongoing. Under the current framework, for example, a recent case has seen the first imposition of interim measures in 18 years,[4] responding to certain criticism of the perceived slow handling of complaints by the Commission in fast-moving technology markets. Another topic under discussion is, therefore, whether the new enforcement powers should be subject to strict legal deadlines, as opposed to current antitrust investigations.

As a further extension of its current enforcement powers, the EC is also consulting on whether the legislation should include the power to force companies to reply to information requests, and impose fines on those that fail to do so. Similarly, the EC is contemplating extending its current investigative powers to its future *ex-ante* intervention, notably the power to interview company management, or to raid premises or impose sanctions if companies obstruct such measures.

EU: EX-ANTE REGULATION OF PLATFORMS AND IN PARTICULAR GATEKEEPERS: DRAWING LESSONS FROM TELECOMS REGULATION

The Commission's starting point is its view that, while over 10,000 online platforms operate in Europe's digital economy, most of which are SMEs, a small number of large online platforms are able to control increasingly significant digital ecosystems.

For the Commission, the alleged economic power of certain large platforms is compounded by their ability to (i) accumulate large quantities of data, (ii) easily access different technical assets, (iii) easily expand into new markets and leverage their advantage from their services, (iv) take over competitors or, finally, (v) benefit from their deep resources. Some of these large platforms connect a multitude of businesses with customers and are in a position to bundle a broad range of platform and other digital services into a single, seamless, data-driven offer. The Commission's view is that these platforms act as so-called "*gatekeepers*" and that they are similar to companies operating network infrastructures in utilities, such as telecoms or energy networks, which are necessary to compete in an upstream or downstream market (so-called "*essential facilities*").

Complementing the new Competition tool, DG CNECT and DG GROW are also proposing to update and extend existing rules applying to online platforms. The three policy options for the regulation of online platforms under consideration are:

[4] See Case AT.40608 – *Broadcom*, October 16, 2019.

1. Adding some targeted prescriptive horizontal provisions for all online intermediation services to the Platform-to-Business Regulation[5] (P2B Regulation), covering practices such as certain types of alleged self-preferencing; data access policies and unfair contractual provisions.

2. Creating a regulatory body at the EU level with the power to obtain and compile information from large platforms. This option would be purely for information gathering purposes to provide insight into the platforms' business practices. It would not include enforcement powers beyond that.

3. Adopting a new *ex-ante* regulatory framework applicable to so-called "gatekeepers" only. This would apply to a more limited subset of platforms based on clearly defined criteria in the P2B Regulation, the relevance of which is yet to be determined in the impact assessment (e.g., significant network effects, size of user base, ability to leverage data). A new competent EU body would enforce these new rules. This new *ex-ante* framework would allow for two types of enforcement measures:

(a) Introduction of so-called "blacklisted" practices

Gatekeepers, as defined by the revised P2B Regulation, would be required to abandon certain prohibited or restricted practices that the Commission considers would give rise to unfair trading (e.g., certain forms of self-preferencing or the acceptance of supplementary commercial conditions that have no connection with the underlying contractual relationship). This would include principle-based prohibitions applicable to all sectors, as well as more issue specific rules, targeted, for example, at operating systems, algorithmic transparency or issues relating to online advertising services.

(b) Imposing tailor-made remedies where necessary and justified

The Commission explicitly draws from the experience in the *ex-ante* regulation of the telecoms sector, given the similarities deriving from network control and network effects. It therefore suggests remedies such as platform specific non-personal data access obligations, specific requirements regarding personal data portability, or interoperability requirements.

EU: UPDATING THE ECOMMERCE DIRECTIVE: EXTENSION TO ONLINE INTERMEDIARIES

DG CNECT's ecommerce and platforms unit is leading this third initiative. It aims to evaluate and update the ecommerce directive, which has remained fundamentally unchanged since 2000, and seeks to introduce new horizontal rules defining the responsibilities and obligations of digital services providers in keeping with the business reality of today's digital world. This move also aims to address the fact that largescale online intermediation of information has created an entirely new set of issues, in particular where prominent online platforms function as new public spaces.

Three policy options are under consideration by the Commission:

1. Harmonized procedural obligations of online platforms throughout the EU with regard to sales of illegal products, services, dissemination of illegal content, or other illegal activities of users. This would essentially render the provisions of the 2018 Recommendation[6] binding and include effective notice-and-action mechanisms to report as well as redress obligations such as counter

[5] Regulation EU 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

[6] Commission Recommendation on measures to effectively tackle illegal content online, March 1, 2018.

notice procedures and transparency obligations, without, however updating liability rules for platforms or other online intermediaries.

2. Alternatively, a more comprehensive enforcement, which would introduce binding liability and safety obligations, in particular for online platform services, such as, transparency and auditing requirements. This enforcement power would extend to digital services established outside the European Union but directed towards the EU's single market.

3. Finally, a third and complementary option under discussion is to provide dissuasive sanctions for systematic failure to comply, notably through harmonized and strengthened powers for regulatory oversight, enforcement and cooperation across EU member state authorities.

SIMILAR INITIATIVES IN GERMANY, FRANCE, THE UNITED KINGDOM, AND THE UNITED STATES

Germany

As early as January 2020, the German government had published a draft bill on the 10th amendment to the German Act against Restraints of Competition (German Draft Competition Bill). In particular, the German Draft Competition Bill aims to establish a "digital regulatory framework" to address challenges associated with the increasing digitization of the global economy and the related extensive use of data. In this regard, the German Draft Competition Bill focuses on the tightening of the provisions on abuse of dominance with respect to undertakings handling large data sets, and digital platform operators, including gatekeepers. These undertakings shall be subject to stricter rules than those that currently apply to dominant or strong companies.

(a) Large data sets as essential facility

Under the proposals, the refusal of a dominant undertaking[7] to grant access to data will be treated the same as a refusal to grant access to essential (physical) network facilities. Access will be subject to a reasonable remuneration (unless refusal is objectively justified). This will be particularly relevant for platforms that Germany's Federal Cartel Office (FCO) may consider to have market power in intermediary markets.

(b) Prescriptive regulation of undertakings with paramount market importance

The German Draft Competition Bill, among others, proposes the introduction of a novel concept of "paramount market importance" which would provide new, far-reaching intervention powers to the FCO, even if a company's market power falls short of a dominant position. Procedurally, before applying its proposed intervention powers, the FCO would first need to declare through an order (valid for between 5-10 years) that an undertaking is of *paramount significance for competition across markets*. Aspects to be considered for such a declaration are the relevant undertaking's market position, its financial strength, vertical integration and activities on related markets; the importance of its activities for third parties (e.g., its access to procurement or sales markets); and, last, but certainly not least, its access to competitively relevant data. Where the FCO finds that an undertaking is of *paramount market importance*, the FCO may prohibit the undertaking from preferring its own offers over those of competitors, using

[7] German antitrust rules stipulate a rebuttable presumption of dominance if an undertaking holds a market share of more than 40% (Art. 18 (4) of the Act against restrictions of competition – GWB)

competitively relevant data collected on a market where it is dominant on another market where it is not dominant, or hampering the interoperability of products or services or the portability of data.

However, as is the case with *ex ante* regulation at the EU level, this involves a noteworthy reversal of the burden of proof[8] since, under the proposals, it will be *the undertaking* under investigation that must prove that there is objective justification for its behavior and/or that its conduct does not harm competition.

(c) Extension of the concept of relative market power

German (and French) rules already sanction behavior of companies upon which other companies are dependent (and who, as a result, are considered to hold so-called "*relative market power*").[9] In Germany, abuse of dependency claims are currently open to SMEs only. In the future, this will be available to all undertakings, regardless of their size, the assumption being that large(r) companies can also be dependent on digital platform operators, if they hold relative market power.

(d) Lowering the bar for interim measures

Similar to the EC's initiatives, Germany has also stated that it will be more active in imposing interim measures. In particular, this will be the case when (i) a violation of the Competition Act is very likely (whereas previously such a violation had to have occurred or to be imminent), and (ii) there is a need to protect competition more generally, or to shield another company from imminent and serious harm. Here again, there is a reversal of the usual burden of proof: it will be the undertaking under investigation that would bear the burden of proof. This may cause concerns, not least for companies headquartered outside of Germany.

The German Draft Competition Bill is currently still subject to parliamentary consultation; adoption is expected later this year – subject to a possible delay due to the coronavirus (COVID-19) pandemic.

France

Throughout 2019, it became apparent that merger control reforms in the digital sector were at the forefront of the French Competition Authority (FCA) and, more broadly, of the French government agendas.

Indeed, the FCA and the Digital State Secretary initially suggested new merger thresholds for deals raising "serious competition concerns", mandatory notifications for digital platforms, and an *ex-post* review mechanism for some transactions. Ultimately, discussions culminated in the adoption of a draft legislation by the French Senate early in February 2020 and again in early July 2020 and will now go for deliberation before the French National Assembly. This bill provides for some noteworthy changes in merger control.

(a) Mandatory notification of transactions by "structuring operators"[10]

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[8] See Section I.

[9] Dependency is assessed on a case-by-case basis and exists if sufficient and reasonable possibilities of switching to other undertakings do not exist.

[10] Translated from the French "entreprises structurantes," which is itself an unusual term in French. The idea seems to be to capture transactions by parties considered by the FCA to be omnipresent and significant in the digital sector, reminiscent but not identical to the historic concepts of unavoidable trading partners and essential facilities, pursuant to EU case law on the definition of what constitutes dominance.

Specific companies active in the digital sector will have to inform the FCA of each of their acquisitions at least a month before completion, regardless of the size of the transaction. These specific companies, referred to as "structuring operators," will be determined and listed by the FCA based on criteria including dominance on one or more markets, number of users, vertical integration and influence on connected markets, importance of network effects, access to essential data to enter a market or develop an activity, and influence on a third party's business(es).

In addition, upon receiving information regarding a planned acquisition as mentioned above, the FCA will have the competence to request from structuring operators a full merger notification made in accordance with the French merger control regulation. The FCA will then be able to conduct a complete merger investigation into the acquisition.

(b) Reversal of the burden of proof

Furthermore, the new bill reverses the burden of proof usually imposed on the investigating authorities. Like other merger authorities, the FCA currently has to provide evidence that a merger would have a negative effect on the competitive landscape of a market when deciding to forbid an acquisition. If approved, the new bill will impose an obligation on the structuring operator (the notifying party) to prove that the acquisition will *not* lead to a lessening of competition on a market.

Finally, the bill broadens the telecommunication regulatory authority and the FCA's investigation powers, allowing them to request access to and detailed information about algorithms and the data used for their operation.[11]

United Kingdom

In 2018, the UK government established a Digital Competition Expert Panel, led by economist Jason Furman, to consider the application of competition law in the emerging digital economy. The panel's report (Furman Report), accepted by the UK government in March 2019,[12] set out strategic recommendations to promote competition in the digital sector, including the following:

- The UK government should establish a Digital Markets Unit (DMU) to create a digital platform code of conduct (Code of Conduct) applicable to digital platforms designated as having a "Strategic Market Status." The DMU would also be empowered to pursue so-called procompetitive interventions in the digital sector.
- The UK's Competition and Markets Authority (CMA) should take more frequent and firmer action to challenge digital mergers.
- The CMA's enforcement tools against anticompetitive conduct should be updated and be used more effectively.
- The CMA should conduct a market study into the digital advertising sector.

Pursuant to these recommendations, the CMA in July 2020 published a report following its market study into the digital advertising sector (CMA Report).[13]

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[11] A proposal for a similar cooperation between the competition authority and the telecom regulator in order to supervise dominant digital companies more closely is currently also under consideration in Austria.

[12] Report of the Digital Competition Expert Panel, "Unlocking digital competition", dated March 2019.

[13] CMA Market Study final report, "Online platforms and digital advertising", dated July 1, 2020.

(a) CMA Report: "Code of Conduct" and platforms having a "Strategic Market Status"

The CMA effectively adopted the Furman Report's recommendations to establish an enforceable Code of Conduct to govern the behavior of platforms funded by digital advertising that are designated as having Strategic Market Status. However, the CMA Report does not provide a clear definition of the meaning of "Strategic Market Status". It simply says that it is "*a position of enduring market power or control over a strategic gateway market with the consequence that the platform enjoys a powerful negotiating position resulting in a position of business dependency.*"[14]

The Code of Conduct would establish high-level principles intended to address alleged exploitative and/or exclusionary conduct by a platform having a Strategic Market Status. Such platforms must provide sufficient information to allow users to make informed decisions. The DMU would have the power to suspend, block, or reverse decisions of firms having a Strategic Market Status, as well as to order such firms to comply with the Code of Conduct.

The existing EU and UK antitrust regimes prohibit exclusive and exploitative unilateral conduct by a firm with a "dominant position" on a relevant market.[15] The CMA's proposals are a material departure from established EU and UK competition laws. The Strategic Market Status criterion appears to set a lower threshold than market dominance at a critical juncture when the United Kingdom is grappling with Brexit[16] and the question whether and in what form EU competition law may remain relevant in the United Kingdom.

(b) CMA Report: The DMU would have the ability to intervene, including the power to break up firms

The CMA Report recommends that the DMU should have the power to:

(i) adopt so-called "pro-competitive interventions" to transform competition in the digital platform sector, to tackle sources of alleged "market power" directly, by overcoming barriers to entry and expansion;

(ii) implement a range of data-related remedies including data mobility, systems with open standards and open data; and

(iii) impose separation measures, ranging from operational separation to full ownership separation (in a departure from the Furman Report, which advised against separation measures).

Of particular note is the CMA's proposal that "*orders arising from pro-competitive interventions could in principle be applied to a broader range of market participants,*" thereby not limiting them to alleged dominant firms, or indeed platforms having so-called Strategic Market Status.

[14] A separate digital markets taskforce is responsible for considering the practical application of the measures set out in the Furman Report, and will advise on a potential methodology to designate digital platforms having "Strategic Market Status". This taskforce is aiming to publish a final report for the government in the fourth quarter of 2020.

[15] Article 102 of the TFEU and its UK functional equivalent, Chapter II of the Competition Act 1998, prohibit the *abuse* of a dominant position; *see* note 2 above.

[16] Following the United Kingdom's departure from the European Union on January 31, 2020 ("Brexit"), EU rules continue to apply in the United Kingdom until the end of the Brexit transition period on December 31, 2020 (unless extended).

(c) Furman Report: Proposed changes to the UK merger control regime with regard to digital mergers

Under the existing UK merger control regime, merger filings are voluntary, although the CMA has jurisdiction to review a transaction (including not notified and/or completed transactions) on its own initiative within four months of the merger announcement or completion (whichever is later), provided the merger satisfies the relevant thresholds.[17]

The Furman Report made the following recommendations that would modify the UK's current voluntary merger notification regime with regard to mergers in the digital sector:

(i) The CMA should prioritize the scrutiny of mergers in the digital sector and consider if they are likely to "*give rise to harm to innovation and impact on potential competition,*" both with regard to its case selection to review mergers that have not been notified to it, as well as in its assessment of a proposed merger.

(ii) Digital companies designated as having a Strategic Market Status should be required to make the CMA aware of all intended acquisitions.

(iii) In assessing digital mergers, the CMA should move away from the existing substantive test of whether a merger would give rise to a substantial lessening of competition. Instead, it should adopt a new "balance of harms" test that would take into account the scale as well as the likelihood of harm in mergers involving potential competition and harm to innovation – in other words, a regime that would be able to evaluate so-called "killer acquisitions."

For its part, the CMA Report states that the current UK merger control regime is "fit for purpose," but that the CMA is nonetheless considering the need for legislative changes to address potential harm to consumers arising from digital markets. According to the CMA, it will continue to work closely with the European Commission. Moreover, post-Brexit the CMA will apply European Commission antitrust decisions taken during the transition period even after the transition period.

(d) Furman Report: Lowering the bar for interim measures

The Furman Report recommends updating the CMA's existing enforcement tools against anticompetitive conduct, in order to "*facilitate greater and quicker use of interim measures to protect rivals against significant harm.*"

(e) Furman Report: Raising the bar for appeal

The Furman Report also recommends *restricting* the extent to which the UK courts may review the CMA's antitrust decisions and interim measures, by limiting the grounds of appeal only to whether the CMA's decision is reasonable, procedures were appropriate, or a decision contains material errors of fact or law.

It is unclear at this stage to what extent the UK government will adopt the CMA Report's and the Furman

[17] Mergers are generally notifiable in the United Kingdom where (i) the UK turnover of the target business exceeds £70 million ("turnover test"); or (ii) as a result of the transaction, a share of 25% or more in the supply or consumption of goods or services of a particular description in the United Kingdom (or in a substantial part of the United Kingdom) is created or enhanced ("share of supply test"). However, as described in our recent Lawflash: New UK Powers In Transactions Impacting National Security, and Lawflash: New Powers for the UK Government to Intervene in Transactions Impacting Public Health Emergencies and National Security, further to recent amendments to the UK merger control regime, lower thresholds apply to enable the UK government to intervene in certain acquisitions with a view to maintaining domestic capability to combat and mitigate the effects of public health emergencies, as well as to intervene in acquisitions in the artificial intelligence, cryptographic authentication, and advanced materials sectors, which are considered relevant to the UK's national security. There are also proposals to increase the screening of certain foreign takeovers. See our Lawflash: Potential UK Reforms Could Increase Screening of Certain Foreign Takeovers.

Report's recommendations. If it does so, there will be a material departure from existing EU and UK established precedent, giving the post-Brexit UK antitrust authority material additional powers in the digital markets sector.

United States

In the United States, competition regulators at both the federal and state level (e.g., the Federal Trade Commission (FTC), the Department of Justice (DOJ), and state attorneys general) have opened investigations into the competitive conditions in various technology sectors. While the precise contours of the investigations are unknown, the agencies appear to be evaluating the alleged market power and business practices of large technology companies. Some of the key questions involve the role of "big tech" as alleged gatekeepers in the areas of mobile software applications, self-preferencing, online speech and social networking, digital advertising, ecommerce, and the use of data to obtain or preserve market power. Agencies have also stated a willingness to reconsider the competitive effects of already-consummated acquisitions that may have created or preserved the acquirer's power in the market at issue.

Moreover, large tech companies face a unique political climate involving both Democrats and Republicans in the United States Congress. Democrats in the House of Representatives have opened investigations into digital markets and appear to be evaluating whether the existing antitrust framework, including the longstanding consumer welfare standard, is equipped to address conduct in the digital economy, where technology companies largely offer innovative products and services "for free" or at lower prices than competitive alternatives. While regulators traditionally focus on (low) prices and (high) output as key indicators of a competitive market, some commentators are advocating for a more interventionist approach in digital markets so that antitrust claims may be asserted even in markets where prices are low (or zero) and service output is high (and virtually unconstrained). Such alternative theories may focus more on non-price indicators, such as privacy and data protection issues, or qualitative judgments about whether markets are as innovative as they should be.

While Republicans in Congress have generally reaffirmed their support for the consumer welfare standard (because low prices and high output reflect healthy competition), they have raised questions about alleged anti-conservative bias at tech companies, based mostly on one-off instances of alleged bias. It is far from clear how such concerns raise competition law concerns, but, nonetheless, some Republicans have suggested that tech companies tend to suppress conservative voices and raised questions as to whether this reflects an abuse of market power.

ANALYSIS

The aim of the Commission's initiatives is to gain the power to make up for what it considers to be lost time in the fast moving digital markets.

A key issue of controversy will certainly be the policy change towards *ex-ante* regulation. With the new competition tool allowing for enforcement measures even before an infringement has taken place, the rights of defense are at issue. Large and emerging players alike in quickly developing markets may soon be obliged to challenge rebuttable presumptions that are vigorously enforced, relieving competition authorities of the often-insurmountable task of designating essential facilities. The return of Commission interim measures further asserts the desire to act fast. In addition, speed should also allow the measures to have a structural impact. The Commission clearly wants to move away from the current practice of "cease and desist" measures and impose remedies that allow restoring a situation *qua-ante*.

The second game-changing element of the proposals is the prescriptive *ex-ante* regulation of so-called "gatekeepers." Blacklisting certain common practices could give the Commission a legal basis to intervene, regardless of whether such practice has actually had a detrimental effect. Ultimately, to the extent that alleged gatekeepers will also be subject to sanctions or "appropriate" remedies, this approach

allows the Commission to change gears, by drawing a parallel with the regulation of natural essential facilities in network industries.

Finally, the extension of updated and reinforced ecommerce rules to non-EU-based digital service providers closes another large regulatory gap in the current framework applying to digital services providers established outside the European Union.

The Commission's proposals come as member states, such as France and Germany, are contemplating similar proposals nationally, as is the United Kingdom, which, following Brexit, will no longer be an EU member state and appears keen to make its mark on the world stage.

As a result, digital players may see a paradigm shift in major European jurisdictions from *ex-post* towards *ex-ante* regulation, from operating an essential facility to holding a gatekeeper role for access to data sets and markets, edging towards a concept sitting somewhere between unavoidable trading partners and essential facilities, from lengthy investigations to more frequent and truly remedial interim measures. Last, but not least, is the proposal for a fundamental shift in the burden of proof. This would be a significant challenge for operators established outside of the European Union.

Parallel efforts at EU and member state levels may pose a threat to harmonization since regulators are putting forward similar and overlapping, but not identical, concepts aimed at tackling the same competition issues arising, in particular, from Digital Platforms. The proposals refer to "structuring operators" in France, entities of "paramount market importance" in Germany, "gatekeepers" at the EU level, and companies having a "Strategic Market Importance" in the United Kingdom. If passed, these new regulations would require significant cooperation efforts among competition authorities, and potentially an agreed upon definition for digital platforms. It may also lead to a situation in which the European Union follows the lead of member states, even though it is typically the other way around at present. The head of Germany's FCO has stressed the need for the EU rules to be coordinated and adjusted in the wake of multiple national and bloc-wide initiatives, with a view to building a coherent legal framework in the bloc.[18]

The consultation and legislative process ahead at the EU level, as well as in Germany and France, will show whether and how significant this paradigm shift will become a reality for businesses operating or investing in the digital space. In the United Kingdom, there is the added uncertainty of what will happen as a result of Brexit, while in the United States the impending presidential elections might also effect the situation. Only time will tell if these proposed shifts in competition law policy in various jurisdictions will lead to more competition, or, alternatively, increase prices for consumers and slow down innovation and investment due to concerns of governmental intrusion in the operation of the markets.

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[18] Statement of Andreas Mundt at the Global Enforcers Panel, Georgetown's 14th annual global antitrust enforcement symposium, virtual, Oct. 5, 2020.

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