



A short guide to competition law for digital rights litigators



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1. Introduction

1. Digital innovation has transformed the ways in which products and services are produced and sold. These innovations have, in turn, fundamentally altered the structure of a number of existing markets, particularly via the introduction of new business models. It is easy to think of sectors, such as transport, which have been “disrupted” by large digital players.
2. Another important development is that the introduction of new technologies has resulted in the creation of a number of new markets. The structure of those markets can in some circumstances look quite different to traditional markets. This is especially the case for markets which are now dominated by platforms, and the development of ecosystems means that consumers are increasingly accessing multiple products and services from one provider at any given time. As explained in a recent report published by the European Commission:¹

“... a few ecosystems and large platforms have become the new gateways through which people use the Internet. Google is the primary means by which people in the Western world find information and contents on the Internet. Facebook/WhatsApp, with 2.6 billion users, is the primary means by which people connect and communicate with one another, while Amazon is the primary means for people to purchase goods on the Internet. Moreover, some of those platforms are embedded into ecosystems of services and, increasingly, devices that complement and integrate with one another. Finally, the influence of these gateways is not only economic but extends to social and political issues. For instance, the algorithms used by social media and video hosting services influence the types of political news that their users see while the algorithm of search engines determines the answers people receive to their questions.”

¹ *Competition Policy for the Digital Era, a report by Jacques Crémert, Yves-Alexandre de Montjoye and Heike Schweitzer*, at page 13. Available online at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

3. Against this backdrop, it is unsurprising that some of the largest firms in the world by market capitalisation are in the digital sector, namely Apple, Amazon, Microsoft and Alphabet.²
4. One of the key implications of increased digital innovation is that, in a number of cases, it has changed the ways in which companies compete. To take an example, the increased prevalence of platforms means that certain markets are dominated by a single company, and it may well be uneconomic to have multiple platforms offering the same products or services. In those circumstances, the dynamics of competition are different: competition does not solely focus on consumer demand, but instead firms compete “for the market” (i.e. to be the dominant platform). In addition, convincing customers to switch platforms can be particularly difficult due to network effects: the convenience of using technology or a service (such as a social networking site) increases with the number of users that adopt it. Consequently, it is not enough for a new entrant to a market to offer better quality and/or a lower price than the dominant player; it also has to convince users to coordinate their migration to its own services.
5. One of the key questions that arises from the above is: what is the role of competition law in protecting and promoting the benefits of competition in this “digital era”? The developments outlined above have posed a number of difficult questions for competition law enforcers. In short, the challenge is in determining how established concepts, doctrines and methodologies, which have been applied for many years in a number of different contexts, should be adapted to these new business models and market structures to ensure that competition continues to benefit consumers.
6. From the perspective of those involved in Digital Rights Litigation, the importance of these developments is twofold:
 - a. It is now increasingly likely that you will encounter issues relating to competition law in your work, especially as competition enforcement in the digital and technology sectors continues to grow as a result of a number of recent high-profile cases, which are explained further below; and
 - b. There is also an important opportunity for those working in this field to contribute to the ongoing debate around the role of competition law in regulating digital innovation.
7. Consequently, the purpose of this *Short Guide to Competition Law for Digital Rights Litigators* (the **Guide**) is to provide individuals working in the digital rights litigation field with an overview of the main principles of EU competition law. It has three main objectives.

² *Ibid.*

8. **The first objective is to provide an overview of the key principles of EU competition law.** As explained further in this Guide, competition law regulates four types of conduct:
 - a. Anti-competitive agreements, decisions and concerted practices
 - b. Abuse of a dominant market position
 - c. Mergers
 - d. State aid
9. However, those working in the digital rights litigation field are most likely to encounter, and most likely to consider taking further steps in relation to: (i) anti-competitive agreements, decisions and concerted practices; and (ii) abuse of a dominant market position. These types of conduct are most likely to have a direct, and more immediate, impact on the individuals you represent. As a result, the Guide focuses predominantly on those two types of conduct.
10. Where possible, the *Guide* will explain the key principles of EU competition law with specific examples from the digital and/or technology sectors. Nevertheless, it is worth noting two points at the outset:
 - a. There are a number of broad principles of EU competition law which apply to all sectors. Therefore, an understanding of these principles is essential in order to consider how they might apply in the specific context of the digital and technology sectors. Outlining these principles will be the main focus of the Guide; and
 - b. Despite the broad nature of these principles, the specific characteristics and aspects of the digital and technology sectors have required established concepts, doctrines and methodologies to be adapted and refined. The application of competition law in this area remains at an early stage of development, and it is expected that this process will continue for many years to come.
11. **The second objective is to explain what steps can be taken if you encounter conduct that you consider to be a potential infringement of competition law:** there are a range of different routes available in order to pursue suspected breaches of competition law, including litigation and complaints to regulatory authorities. This Guide will provide an overview of these different options and will summarise the costs and benefits involved.
12. **The third objective is to identify ways in which digital rights litigators can become involved in issues relating to competition law more generally.** There are a number of ways to become involved in advocating on issues relating to competition law outside of intervening in respect of specific potential breaches of the legal rules. For example, this might involve providing submissions in

response to consultations on issues arising in the technology sector/digital space. The input of digital rights litigators into these types of initiatives will be very useful as competition law continues to adapt to the challenges posed by increased digitisation. The Guide therefore provides a summary of the ways in which digital rights litigators could become involved in this way.

13. In addition, as competition law is a vast, and often technical area of law, the Guide contains a section containing other useful resources should you wish to find out more about this area.
14. This *Guide* is not intended to be a detailed explanation of the relevant legal principles of EU competition law. Instead, it seeks to identify and provide an overview of the key principles in order to help digital rights litigators enhance their understanding of how competition is regulated in the EU. In other words, the aim of this *Guide* is to provide readers with a high-level understanding as to the types of conduct they should look out for that might infringe competition law, and to provide practical guidance on the steps that might be taken to pursue these matters further.³
15. The rest of this *Guide* is structured as follows:
 - a. **Section 2** contains an introduction to competition law;
 - b. **Section 3** provides an overview of the rules governing anti-competitive agreements, decisions and concerted practices;
 - c. **Section 4** summarises the rules regulating the abuse of a dominant market position;
 - d. **Section 5** identifies and explains the routes available to pursue a suspected infringement of competition law. It also details the broader routes via which digital rights litigators can engage with competition law issues.
 - e. **Section 6** provides a list of useful resources which readers can consult for further information.

³As a result, this *Guide* does not constitute, and should not be used as a substitute for, proper legal advice. The interpretation and application of competition law can prove to be complex, and will often involve detailed consideration of issues that are specific to each case, such as the effects of particular conduct on given market(s). Therefore, if you are considering taking further steps in relation to a suspected infringement of competition law, we strongly suggest that you seek specialist legal advice.

2. Introduction to competition law

16. This section provides an overview of competition law, addressing three questions in particular:
- a. What does competition law regulate?
 - b. What are the legal rules applicable in the field of EU competition law, and where can they be found?
 - c. Who enforces competition law in the EU?

2.1 What does competition law regulate?

17. In short, competition law exists to protect and promote the benefits of competition. It reflects a policy choice to organise an economy as a free-market economy in which firms compete with each other for customers.
18. The underpinning of that policy choice is that competition will produce beneficial outcomes, such as:
 - a. Increased price competition, leading to more efficient production and lower prices for consumers; and
 - b. Enhanced competition on quality, which may result in increased innovation and consumer choice.
19. The prevalence and importance of competition law has grown significantly in recent years, such that there are now more than 130 systems of competition law in the world.⁴ Some of those systems have been in place for a substantial period of time: for example, the EU's competition rules were included in the Treaty of Rome of 1957, whereas other systems have been introduced recently.
20. The purpose of competition law is to ensure that markets function properly and places limits on the extent to which certain actions by firms in pursuit of competition with each other would be permissible. Another way of putting this is that competition law exists to limit the situations in which firms may restrict or distort competition.
21. There are four main categories of restrictions of competition. The first category is **anti-competitive agreements, decisions or concerted practices**: the most well-known example of this type of conduct is a cartel between competitors, for example to fix prices, share markets or restrict output. However, there are also less serious types of agreements, decisions or concerted practices which may nevertheless harm competition. For example, an agreement between two firms at different levels of the market,⁵ such as between a manufacturer and a retailer, which restricts the price at which the retailer may sell goods, or restricts the extent to which that retailer may sell competing products, could constitute a prohibited restriction of competition. This category of conduct is discussed further in Section 3 below.

⁴Whish and Bailey, *Competition Law* (9th Edition, OUP, 2018), p.1.

⁵These are known as "vertical agreements" and are discussed further at paragraph 55 below.

22. The second category concerns **abuse of a dominant market position**: where a firm acquires substantial market power (or a “dominant position”) it may be able to use that power in a way that harms competition. For example, it may reduce its prices to below cost in order to drive a competitor out of the market, or it may use its dominant position in one market in order to protect itself against competition in another market, for example by tying or bundling products together. This category of conduct is discussed further in Section 4 below.
23. The third category encompasses **mergers**: in some circumstances, mergers between firms can restrict competition by creating bigger firms which may be in a position to harm competition, for example by controlling prices and/or restricting supply. As a result, most systems of competition law enable a competition authority to investigate mergers that could be harmful to the competitive process.
24. Competition regulators have regularly investigated mergers in the technology and digital sectors. An example is the acquisition of WhatsApp by Facebook, which was approved by the European Commission after an investigation.⁶ In particular, one of the issues considered by the European Commission was whether the merger would reduce competition given that both companies offered applications for smartphones which allow customers to communicate by sending text, photo, voice and video messages. The European Commission found that the two companies were not close competitors and that consumers would have a wide choice of alternative consumer communications apps after the transaction.
25. It is worth noting that there is an ongoing debate on the role of merger control in the digital era. One of the points arising concerns whether it needs to be adjusted to better address concerns relating to the early elimination of potential⁷ rivals. For example, a particular issue is how to address acquisitions by dominant platforms of small start-up companies with a quickly growing user base and significant competitive potential.⁷ The difficulties in this regard may be particularly acute if dominant platforms engage in systematic patterns of such acquisitions. A report published by the European Commission highlighted two particular issues:⁸
- a. Many of these types of acquisitions will not be scrutinized by the European Commission under the EU’s Merger Regulation,⁹ because when they take place the start-ups do not yet generate sufficient turnover to meet the thresholds set

⁶ European Commission, “Mergers: Commission approves acquisition of WhatsApp by Facebook”. Available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088.

⁷ See further *Competition Policy for the Digital Era*, note 1 above at Chapter 6.

⁸ Note 1 above.

⁹ The EU’s Merger Regulation details the principles governing the assessment of mergers. It is Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1-22.

out in the Regulation.¹⁰ This is because many digital start-ups attempt first to build a successful product and attract a large user base while sacrificing turnover and therefore profits. As such, the competitive potential of these start-ups may not be reflected in their turnover. Moreover, thresholds based on turnover will not take account of the value of the assets of the companies involved, and in particular the value of the data in its control.

- b. The substantive test for assessing mergers under the EU Merger Regulation concerns whether the merger is compatible with the internal market, which requires an analysis of whether it would “*significantly impede effective competition, in the [internal] market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position*”.¹¹ There is a live question as to whether, and to what extent, this test would effectively address concerns that might arise in relation to mergers in the technology/digital space, and in particular cases where a dominant platform acquires a company with low turnover but a large and/or fast growing user base and therefore a high future market potential.

26. The fourth category concerns **public restrictions of competition (or “state aid”)**: the state may create restrictions of competition, for example through certain legislative or regulatory measures, or as a result of providing financial support such as subsidies.

27. A recent example of the state aid rules being applied in the technology sector can be found in a decision adopted by the European Commission in 2016, whereby it concluded that Ireland granted undue tax benefits to Apple of up to €13 billion. This was held to be illegal under EU state aid rules “because it allowed Apple to pay substantially less tax than other businesses. Ireland must now recover the illegal aid”.¹² The European Commission’s decision is currently under appeal before the EU Courts.

¹⁰ The Merger Regulation sets out when mergers should be investigated by the Commission. Broadly, mergers with a Union dimension should be pre-notified to the Commission and it is unlawful to conclude a merger without prior clearance from the Commission (subject to limited exceptions). Whether or not a merger has a Union dimension is determined by reference to the turnover of the parties involved in the transaction. The main test for whether a merger will be considered as having a Union dimension concerns whether: (i) the combined aggregate worldwide turnover of all the parties (known as “undertakings”) concerned is more than €5,000 million; and (ii) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

¹¹ See Articles 2(2) and 2(3) of the EU Merger Regulation.

¹² European Commission, “*State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion*”. Available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923.

- 28.** As will be explained further in this Guide, there is a range of conduct which may affect competition in some way, some of which may produce both positive and negative outcomes. As a result, the key role of competition law is to delineate between permissible and impermissible aspects of competition, and consequently to prohibit competitive activity that is deemed to be impermissible.
- 29.** However, one of the key difficulties in designing a system of competition law is that it can be challenging to codify a set of rules that distinguishes clearly between permissible forms of competition and conduct that is deemed unacceptable. In fact, the question of whether a particular form of conduct may be prohibited by competition law will often depend on an analysis of its effects on a given market and/or on consumers. This process often requires a complex and detailed assessment. Consequently, the legal rules governing competition are quite broad in their formulation, which will then need to be applied in a specific factual context.

2.2 What are the legal rules governing competition in the EU?

- 30.** In any Member State of the EU, there will normally be two systems of competition law in effect:
- a.** EU competition law, which results from the provisions of the Treaty on the Functioning of the European Union (TFEU); and
 - b.** A domestic system of competition law, implemented in that Member State's legal system.
- 31.** The key point of distinction between these two systems of competition law is that they have different territorial scopes:
- a.** EU competition law applies to conduct that has an appreciable effect on trade between Member States (known as inter-state trade);¹³ whereas
 - b.** Domestic competition law will apply to conduct that affects trade within that country.
- 32.** Typically, these two systems are quite similar in their substantive content and approach to the types of conduct that would be prohibited or permitted, and a number of domestic systems of competition law in Member States follow the EU equivalent. As such, while this Guide provides an overview of EU competition law only, it is possible that the principles may be equally applicable to a given system of domestic competition law.
- 33.** The EU competition rules are contained principally in Articles 101 – 109 TFEU. By way of summary, they cover the following areas:
- a.** Article 101 TFEU prohibits anti-competitive agreements, decisions and concerted practices;
 - b.** Article 102 TFEU prohibits the abuse of a dominant position;
 - c.** Articles 103 – 105 TFEU concern matters of procedure and enforcement; and
 - d.** Articles 106 – 109 TFEU address certain public restrictions of competition (including the rules on “state aid”).

¹³ As a result of the European Economic Area Agreement (EEA Agreement), EU competition rules apply to the whole EEA. This includes all Member States of the EU along with Iceland, Liechtenstein and Norway. Therefore, references to “inter-state trade” are in effect references to trade between members of the EEA.

- 34.** The provisions of the TFEU are supplemented in a number of ways. There is an array of secondary legislation passed by the EU legislature which gives effect to the competition rules in specific circumstances. For example, there are a number of so-called Block Exemption Regulations which have been enacted to provide for exemptions to EU competition law for certain sectors of the economy or certain types of conduct, provided the relevant conditions are satisfied. In addition, the rules concerning the regulation of mergers in the EU are contained in the EU Merger Regulation.¹⁴
- 35.** In addition, the European Commission (the **Commission**) publishes a number of notices or guidelines on the interpretation of the relevant rules and adopts decisions in respect of particular agreements and conduct.¹⁵
- 36.** Finally, the provisions of the TFEU are ultimately interpreted and applied by the EU's Courts, namely the General Court of the European Union¹⁶ and the Court of Justice of the European Union (**CJEU**).

¹⁴ Note 9 above.

¹⁵ The Commission's website contains a section which identifies the relevant legislation and guidance. See: https://ec.europa.eu/competition/publications/legislation_en.html.

¹⁶ Formerly known as the Court of First Instance.

2.3 Who enforces competition law in the EU?

2.3.1 Public vs Private Enforcement

37. Competition law in the EU is enforced by two principal mechanisms:
- a. **Public enforcement** by competition authorities which are tasked with investigating suspected infringements of competition law and imposing sanctions; and
 - b. **Private enforcement** by parties that are affected by such infringements, usually by way of court proceedings.
38. The main body responsible for the public enforcement of EU competition law is the Commission, and specifically its Directorate General for Competition. The Commission has a range of powers to enforce competition law, which include:
- a. Where it conducts an investigation into suspected anti-competitive conduct, the Commission has powers to request information and conduct inspections of business and other premises;
 - b. Following an investigation, the Commission can take decisions finding an infringement of the competition rules and ordering its termination. It may also impose certain behavioural and structural remedies in order to ensure that an infringement is brought to an end;
 - c. The Commission may impose a fine of up to 10% of the undertaking's worldwide turnover in the preceding year where it finds that an infringement has been committed intentionally or negligently; and
 - d. The Commission can also adopt interim measures, commitment decisions,¹⁷ and decisions finding that Article 101 TFEU and/or Article 102 TFEU are inapplicable to particular conduct.
39. The public enforcement of EU competition law follows a “decentralized” structure, meaning that the national competition authorities (or **NCA**s) of each Member State are also empowered to apply Article 101 TFEU and Article 102 TFEU in full. They have powers to investigate suspected infringements and to take decisions:

¹⁷ A “commitment decision” results from an entity offering commitments to address competition concerns identified by the Commission. If the Commission accepts these commitments, it adopts a commitment decision making them legally binding on the parties without establishing the existence of an infringement.

- a. Requiring an infringement to be brought to an end;
 - b. Ordering interim measures;
 - c. Accepting legally binding commitments from an entity in lieu of taking an infringement decision;¹⁸ and
 - d. Imposing fines, periodic penalty payments or any other penalty provided for in their national law.
40. The decentralised enforcement of EU competition law is facilitated by secondary legislation adopted by the EU, which contains a number of provisions designed to enable cooperation between the Commission and NCAs. Furthermore, the Commission has established a network of competition authorities, called the European Competition Network (or **ECN**), to further facilitate cooperation between NCAs with a view to ensuring the harmonised application of EU competition law.¹⁹
41. A decision adopted by the Commission is binding on the parties to whom it is addressed, and may be appealed to the General Court of the EU. Similarly, a decision adopted by an NCA is normally subject to appeal via a route laid down in national law.

2.3.2 The consequences of infringing EU competition law

42. The consequences for breaching EU competition law can be severe. In the case of infringements of Article 101 TFEU or Article 102 TFEU, the sanctions might include:
- a. A fine imposed either by the Commission or an NCA, which could be up to 10% of that entity's worldwide turnover from the previous business year;²¹
 - b. An agreement or decision that infringes Article 101 TFEU will be considered void;²² and/or
 - c. A number of countries impose personal penalties for involvement in infringements of competition law. For example, in the UK, participation in a cartel is considered a criminal offence which may lead to the imposition of a prison sentence, a fine, or both. Some countries have also introduced director disqualification as a sanction for breaching certain provisions of competition law.

¹⁸ An "infringement decision" is a decision finding that an entity, or entities, have participated in an infringement of competition law.

¹⁹ For more information see Commission Notice on co-operation within the Network of Competition Authorities, OJ C 374, 13.10.2016, p.10.

²⁰ In addition, a national court would have the power to refer questions concerning the interpretation of EU competition law to the CJEU via the preliminary reference procedure in Article 267 TFEU.

²¹ These fines can be substantial, as can be seen from the fines imposed on Google in the examples contained in Section 4.3.2 below.

²² See Article 101(2) TFEU. Depending on the circumstances, this may result in the whole agreement or decision being void, or alternatively only the infringing part of the agreement/decision may be considered void if it can be severed from the non-infringing parts.

43. In addition, a firm that has participated in an infringement of Article 101 TFEU or Article 102 TFEU may be exposed to private actions for damages by persons that have suffered loss as a result of that infringement. For example, if an infringement has resulted in an increase in the price charged to customers for a particular product (often known as an overcharge), those customers may bring proceedings in order to recover that overcharge by way of damages. Similarly, it is possible that competitors may seek damages where their business has been harmed by anticompetitive conduct. There are two main types of actions for damages:
- a. **“Follow on” actions**, which are based on a decision adopted by the Commission or an NCA finding an infringement of competition law. In essence, a claimant would rely on that decision as proof that an infringement of competition law has occurred, and seeks damages for the losses suffered as a result; and
 - b. **“Standalone” actions**, whereby a claimant alleges, and must prove, both the existence of an infringement of competition law, and the losses suffered as a result.
44. It is also worth noting that competition law can be used as a defence in legal proceedings. For example, in an action for breach of contract, the defendant may seek to invoke a defence that the clause relied upon by the claimant was in breach of Article 101 TFEU and/or Article 102 TFEU and therefore unenforceable.

3. Article 101 TFEU: Anti-competitive agreements, decisions and concerted practices

45. This section provides an overview of the principles governing anti-competitive agreements, decisions and concerted practices. This conduct is regulated by Article 101 TFEU, which consists of three paragraphs:
- a. Article 101(1) TFEU identifies the conduct prohibited by this Article, namely agreements,²³ decisions by associations of undertakings and concerted practices which affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition.
 - b. Article 101(2) TFEU states that any agreements or decisions prohibited pursuant to Article 101 TFEU “*shall be automatically void*”.²⁴
 - c. Article 101(3) TFEU sets out the conditions that must be satisfied in order for conduct prohibited by Article 101(1) TFEU to be granted an exemption.

²³ This *Guide* will use the term “agreement” as shorthand for agreements, decisions by associations of undertakings or concerted practices unless the context otherwise requires. Similarly, the words “prevention”, “restriction” or “distortion” of competition are used interchangeably, as nothing turns on the difference between these words.

²⁴ Concerted practices will not be void because they are not legally enforceable.

3.1 Article 101(1) TFEU

46. Article 101(1) TFEU states as follows:

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

47. Article 101(1) TFEU can be broken down into four conditions, or questions, each of which must be satisfied in order for the prohibition to be infringed, they are:

- a.** Has the conduct to which Article 101(1) TFEU might otherwise apply been entered into by undertakings or an association of undertakings?
- b.** Have those undertakings entered into an agreement or concerted practice, or is there a decision by an association of undertakings?
- c.** Does the conduct have as its object or effect the prevention, restriction or distortion of competition?
- d.** Does that conduct affect trade between Member States?

3.1.1 Undertakings

48. EU competition law, including Article 101 TFEU, applies to the conduct of undertakings, rather than to companies or entities. The concept of an undertaking encompasses any natural or legal person engaged in an economic activity, regardless of their legal status and the way they are financed. An economic activity is defined as any activity consisting in offering goods and services on a given market.
49. The approach to identifying whether a person is acting as an undertaking is a “functional” approach: the crucial factor is the nature of the activity being undertaken by the person or entity in question, and whether it constitutes an economic activity. As a result, the term “undertaking” embraces everything from a multi-national company through to an individual person. The entity does not need to take any particular legally recognised form, and does not necessarily need to be profit-making.²⁵
50. It is possible that an entity may be acting as an undertaking in some circumstances, but not in others. Therefore, each activity must be assessed individually in order to consider whether an entity is acting as an undertaking for the purposes of that activity.
51. Another important consequence of the fact that competition law applies to undertakings is that companies within the same corporate group may be held to constitute a single undertaking.²⁶ If two companies are held to form part of a single undertaking, this has two important implications:
- a. Agreements between those companies will not fall within Article 101(1) TFEU, as the provision only applies to agreements between undertakings; and
 - b. It may result in a situation whereby a parent company is liable for infringements of competition law conducted by its subsidiaries, on the basis that they form part of the same undertaking.

3.1.2 Agreements, decisions by associations of undertakings, and concerted practices

52. Article 101 TFEU applies to agreements, decisions by associations of undertakings, and concerted practices. Each of those terms is explained below.

²⁵ It should be noted, however, that an employee is not considered a separate undertaking to their employer, with the effect that anti-competitive conduct by an employee is attributable to their employer.

²⁶ For example, Alphabet Inc. and its subsidiary, Google LLC, have been considered by the Commission to constitute a single undertaking in the cases referred to in Section 4.3.2 below.

- 53.** The concept of an agreement has been given a wide interpretation by the EU Courts. It is not just confined to legally binding contracts, but encompasses situations where there is a concurrence of wills between at least two parties who have expressed their joint intention to act on the market in a specific way.
- 54.** It follows that agreements for the purposes of Article 101(1) TFEU can be written or oral, and may even be inferred from the conduct of the parties. The concept can also encompass informal arrangements and understandings whether or not they were intended to be legally enforceable.
- 55.** It is important to note that Article 101(1) TFEU applies to both horizontal and vertical agreements:
- a.** A horizontal agreement involves parties that are active at the same level of the production or supply chain, for example a price-fixing or market-sharing agreement between competing undertakings; and
 - b.** A vertical agreement involves parties at different levels of the production or supply chain, such as an agreement between a manufacturer and a distributor which fixes the prices at which the latter can sell the former's products. In the digital context, the concept of a vertical agreement might extend, for example, to agreements entered into via operators of platforms with users. In particular, some platforms are considered to be two-sided platforms, whereby they connect the ultimate buyer and seller of goods.²⁷ Agreements between both: (i) the seller and the platform; and (ii) the buyer and the platform, would likely be considered as vertical agreements.
- 56.** The concept of “decisions by associations of undertakings” is intended to encompass anti-competitive conduct through the medium of organisations such as trade associations. The concept of a “decision” is broad, and would apply to the constitution or regulations concerning the operation of that association, as well as recommendations or decisions. Each of these types of conduct may limit members’ commercial freedom of action.
- 57.** The term “concerted practice” is also given a wide scope, and covers other practical forms of coordination between undertakings which, without having reached the stage where an agreement exists, knowingly substitutes practical cooperation for the risks of competition. This ensures that anti-competitive conduct falling short of an agreement will nevertheless fall within the scope of Article 101(1) TFEU. For example, an understanding reached among competitors to provide advanced disclosure of their prices to each other, where there is an underlying understanding that the others would amend their own pricing accordingly, might constitute a concerted practice prohibited by Article 101(1) TFEU.

²⁷ Examples would be Amazon (whereby Amazon operates a marketplace allowing sellers to list their products for sale to consumers), or Uber (connecting “drivers” with “riders”).

3.1.3 Conduct which has as its object or effect the prevention, restriction or distortion of competition

58. The question of whether conduct prevents, restricts or distorts competition will depend on a careful analysis of the facts, including the nature of the conduct along with the structure and characteristics of the market in which it is implemented.
59. Article 101(1) TFEU applies to agreements which have as their object or effect the prevention, restriction or distortion of competition. These conditions are alternative: it is sufficient to find that an agreement either restricts competition by its object, or by its effects.
60. The proper approach to this is to start by considering whether an agreement has an anti-competitive object, and if it does, there is no need to consider whether it has the effect of restricting competition. In other words, if an agreement has an anti-competitive object, no detailed analysis of its effects is necessary.
61. Restrictions of competition “by object” are the most serious restrictions of competition which can be regarded by their very nature as being harmful to the proper functioning of competition such that it is unnecessary to demonstrate any actual effects on the market.
62. Examples of the types of conduct that constitute restrictions of competition by object include the following:
- a. Horizontal agreements that may involve:
 - i. Fixing prices for products and/or services;
 - ii. Exchanging commercially sensitive information that reduces uncertainty about future behaviour;
 - iii. The sharing of markets (including collusive tendering);
 - iv. Limiting sales and/or output; and
 - v. Paying competitors to delay the launch of competing products.
 - b. Vertical agreements that may involve:
 - i. Imposing fixed or minimum resale prices; and
 - ii. Imposing bans on exporting products and/or services.

63. Where an agreement does not have as its object the restriction of competition, it is necessary to conduct a detailed assessment of the effects of the agreement in its market context and, in order to be caught by Article 101(1) TFEU, it is necessary to find that competition has been prevented, restricted or distorted to an appreciable extent.²⁸ For example, the conduct under analysis may be found to have an appreciable adverse impact on one or more of the parameters of competition, such as price, quantity and quality of goods or services.
64. A key part of assessing the effects of an agreement entails identifying the “counterfactual”, that is, the competitive situation which would exist in the absence of the agreement in issue. This enables a greater insight into the competitive effects of a given agreement.

3.1.3.1 Conduct in the digital / technology sector that might infringe Article 101(1) TFEU

65. Article 101(1) TFEU has important implications for the digital and technology sectors. Key examples of conduct that might infringe Article 101(1) TFEU are provided below.

Online sales and advertising

66. Certain types of restrictions imposed on online sales and advertising of products and/or services may constitute restrictions of competition prohibited by Article 101 TFEU. Examples are:
- a. A complete prohibition of online sales and advertising of a particular product or service.²⁹ However, it may be permissible to prohibit an authorised reseller of goods from selling through third-party platforms where such a restriction is designed to preserve the quality and proper use of the goods sold;
 - b. Restrictions which fix or impose a minimum price at which goods or services can be sold online;
 - c. Restrictions on the territories into which online sellers may advertise or sell products, including a requirement to redirect customers from a particular territory to other websites; and
 - d. Restrictions on the use of manufacturers’ brand names and trademarks for the purposes of online search advertising. This might include, for example, a prohibition from using or bidding on brand names and trademarks as keywords in online search advertising auctions such as Google AdWords.³⁰

²⁸ This may involve considering the actual and/or potential effects of an agreement, and whether it forms part of a network of similar agreements which might have a cumulative effect on competition. It may also be based on an assessment of the effects of an agreement on both existing and potential competition.

²⁹ This would include a prohibition on selling online without first obtaining a specific authorisation.

³⁰ See, for example, a Decision adopted by the Commission in December 2018, whereby it fined Guess, a clothing company, €40 million for restricting retailers from online advertising and selling cross-border to consumers in other EU Member States. For a summary of this Decision, see European Commission, “*Antitrust: Commission fines Guess €40 million for anticompetitive agreements to block cross-border sales*”, available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6844.

67. A particular concern with these types of restrictions might be that they would reduce intra-brand competition (i.e. competition between resellers of the same brand).

Data

68. The increasing importance of data has attracted scrutiny of competition authorities. For example, data sharing has become increasingly prevalent, and there are some concerns this could encompass sharing of commercially sensitive data which (as discussed in paragraph 62 above) could constitute an infringement of Article 101 TFEU.
69. There are also concerns that the use of certain types of data might infringe EU competition law. For example, in July 2019, the Commission opened an investigation into Amazon in order to assess whether its use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules.³¹
70. As is well known, Amazon has a dual role as a platform: (i) it sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products to consumers.
71. The Commission's potential concerns about Amazon's conduct is described as follows:³²

When providing a marketplace for independent sellers, Amazon continuously collects data about the activity on its platform. Based on the Commission's preliminary fact-finding, Amazon appears to use competitively sensitive information – about marketplace sellers, their products and transactions on the marketplace.

72. According to the information published by the Commission, it will consider, as part of its investigation:
- a. The agreements between Amazon and marketplace sellers, which appear to allow Amazon's retail business to analyse and use third party seller data. In particular, the Commission will focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition; and

³¹ European Commission, "Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon". Available online at: https://europa.eu/rapid/press-release_IP-19-4291_en.htm.

³² Ibid

- b. The use of the “Buy Box”. This is displayed prominently on Amazon and allows customers to add items from a specific retailer directly into their shopping carts. According to the Commission “[w]inning the “Buy Box” seems key for marketplace sellers as a vast majority of transactions are done through it.” The Commission will investigate the role of data in the selection of the winners of the “Buy Box” and the impact of Amazon’s potential use of competitively sensitive marketplace seller information in that selection.

73. The Commission explains further that, if proven, these practices may breach Article 101 TFEU and/or Article 102 TFEU. However, it is also emphasised that the opening of a formal investigation does not prejudice its outcome.

Algorithms

74. There are increasing concerns that algorithms may play a part in conduct that might amount to an infringement of Article 101 TFEU. A recent report released by the Digital Competition Expert Panel in the United Kingdom noted two concerns regarding the potential for algorithms to enable collusion:³³

- a. Pricing algorithms might help make explicitly collusive agreements more stable, for example by making it easier for businesses to automatically monitor the prices offered by their competitors and detect when they deviate from the collusive agreement; and
- b. Pricing algorithms could also lead to new forms of tacit collusion – where there is no explicit agreement between businesses to collude, but where pricing algorithms effectively deliver the same result.

75. The report also notes that the UK’s Competition and Markets Authority has already successfully investigated price fixing by two online sellers of posters and frames which used automated re-pricing software to monitor and adjust prices and ensure they did not undercut each other.³⁴

3.1.4 De Minimis Restrictions of Competition

76. The effects of a restriction of competition must be appreciable, and it will fall outside the scope of Article 101(1) TFEU if it has an insignificant effect on the market. However, restrictions of competition “by object” (see Section 3.1.3 above) are presumed to have an appreciable effect on competition.

³³ See *Unlocking digital competition: Report of the Digital Competition Expert Panel*, at paragraph 3.158. Available online at: <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>.

³⁴ CMA, “*Online sellers price-fixing case study*”, available online at: <https://www.gov.uk/government/case-studies/online-sellers-price-fixing-case-study>.

3.1.5 Effect on Inter-State Trade³⁵

77. As explained in Section 3.1 above, Article 101(1) TFEU is only applicable to agreements having an effect on trade between Member States. An assessment of whether an agreement affects inter-state trade requires a consideration of whether it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Any effect on trade must also be appreciable.
78. It is possible for an agreement between parties in the same Member State, which concerns only the supply of goods or services within that single Member State, to nevertheless have an effect on inter-state trade because it affects imports. Similarly, an agreement concerned solely with exports to and from the EU may also have an effect on inter-state trade.

³⁵ The Commission has issued guidelines on this criterion, see Commission Guidelines on the effect on trade concept contained in Arts 81 and 82 of the Treaty OJ C 101, 27.4.2004, pp.81-96.

3.2 Article 101(3) TFEU

79. As explained in paragraph 45 above, an agreement which falls within the Article 101(1) TFEU prohibition may be saved by the exemption in Article 101(3) TFEU. It states as follows:

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

80. Article 101(3) TFEU therefore contains four conditions, two positive and two negative. In other words:

a. The agreement must:

- i.** Contribute to improving the production or distribution of goods or to promoting technical or economic progress and;
- ii.** Allow consumers a fair share of the resulting benefit;

b. The agreement must not:

- i.** Impose upon the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
- ii.** Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

81. All four conditions must be satisfied in order for Article 101(3) TFEU to apply. In principle there is no agreement to which Article 101(3) TFEU cannot apply, although it will in practice be much more difficult to invoke this Article in respect of restrictions of competition “by object”.

- 82.** It is not possible to notify an agreement to the Commission for exemption; instead undertakings are expected to “self-assess” whether their agreement would satisfy the conditions of Article 101(3) TFEU. However, individual self-assessment may not be necessary where the agreement benefits from a Block Exemption Regulation, which is discussed in the next section.

3.2.1 Block exemption regulations

- 83.** It may be difficult to identify how Article 101(3) TFEU might apply to different types of conduct, as the conditions summarised in the previous section are quite broad. In order to remove some of this uncertainty, the Commission has adopted a number of Regulations which provide that Article 101(3) TFEU shall apply to certain types of agreements, provided the conditions in the Regulation are satisfied.³⁶ These are known as Block Exemption Regulations. There are a number of Block Exemption Regulations currently in force covering certain common agreements, such as:
- a.** Vertical agreements (which encompasses, among other things, exclusive distribution, selective distribution and franchising agreements);
 - b.** Research and development agreements;
 - c.** Specialisation agreements;
 - d.** Technology transfer agreements; and
 - e.** More specialised Regulations covering certain sectors such as motor vehicles and liner shipping companies.

³⁶ In other words, a Block Exemption Regulation provides that any agreement which satisfies the relevant conditions established in that Regulation is exempt from the application of Article 101(1) TFEU by virtue of Article 101(3) TFEU.

4.

Article 102 TFEU: Abuse of dominant position

4.1

Overview of Article 102 TFEU

84. This section provides an overview of the principles governing the abuse of a dominant position. This conduct is regulated by Article 102 TFEU, which states as follows:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

85. The terms “*undertaking*” and “*may affect trade between Member States*” are given the same interpretation under both Article 101 TFEU and Article 102 TFEU. They have already been discussed in Sections 3.1.1 and 3.1.5 respectively.³⁷ Therefore, the key questions to consider in applying Article 102 TFEU are:
- a. What constitutes a dominant position?
 - b. What types of conduct would constitute an abuse of a dominant position?

³⁷ It is also worth noting that Article 101 TFEU and Article 102 TFEU are not mutually exclusive, and an agreement can infringe both provisions.

- 86.** Each of those questions will be discussed in turn below. It should also be noted that, while Article 102 TFEU does not include an equivalent exemption provision to Article 101(3) TFEU, instead there is a defence whereby it can be argued that conduct which might amount to an abuse of dominant position will nevertheless not constitute an infringement of Article 102 TFEU where it has an objective justification.

4.2 Dominant position

87. The question of whether an undertaking holds a dominant position within a market is a complex one. Generally, the concept of dominance relates to a position of economic strength on a market, and has been defined by the CJEU as

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers.”³⁸

88. The starting point in determining whether an undertaking holds a dominant position is to define the relevant market. In other words, in order to determine whether an undertaking holds a dominant position, it is important, first, to answer the question: on which market? The relevant market consists of two elements:
- a. The relevant product market, i.e. the goods and services which form part of that market; and
 - b. The relevant geographic market, which involves a consideration of the geographic scope of the market.
89. Once the relevant market has been defined, dominance can be assessed by analysing the power of the undertaking on that market by reference to the overall test set out in paragraph 87 above. The assessment will include considering factors such as the market share of the undertaking; the position of other competitors; barriers which prevent the entry of new competitors into the market or the expansion of existing competitors;³⁹ and the bargaining strength of customers.
90. As a “rule of thumb”, dominance will generally not exist where an undertaking holds a market share of below 40%, but there is a rebuttable presumption of dominance where an undertaking holds a market share of 50% or more.

³⁸ Case 85/76 *Hoffmann-La Roche & Co AG v Commission* EU:C:1979:36 at [38].

³⁹ Barriers to entry within a market can be numerous and varied. Examples include state monopolies, government regulation such as licensing or authorisation requirements, intellectual property rights, sunk costs, economies of scale and scope, lack of access to essential inputs, switching costs, network effects and the strategic behaviour by incumbent entities. It may also be the case that superior access to data may constitute a competitive advantage, or barrier to entry, that may lead to market dominance.

4.3 The concept of an “abuse” of a dominant position

91. It is important to note that it is not prohibited to hold a dominant position. The prohibition in Article 102 TFEU applies to conduct amounting to an **abuse** of that dominant position. Similarly, Article 102 TFEU does not prohibit dominant undertakings from competing with other firms in the market,⁴⁰ even if this results in those firms being excluded.
92. Instead, a dominant undertaking is often described as having a “special responsibility” not to allow its behaviour to impair genuine, undistorted competition.
93. There is no single definition of an abuse of dominant position under Article 102 TFEU. Instead, the question of whether a particular activity is prohibited by Article 102 TFEU involves a detailed assessment of the conduct at issue. Nevertheless, the EU Courts and the Commission have developed legal tests or principles which apply to specific types of conduct (for example, the granting of discounts or rebates by a dominant undertaking) in order to determine the circumstances in which that conduct amounts to an abuse of dominant position. These legal tests, and the categories of conduct that might constitute an infringement of Article 102 TFEU, continue to evolve to take account of new practices and circumstances.
94. Despite the lack of any single definition of an abuse of dominant position, a number of commentaries on the subject have identified categories of abuses as useful shorthand terms. The most common categorisation is between:
 - a. Exploitative abuses, whereby a dominant undertaking takes advantage (i.e. exploits) its market power to gain advantages, such as by imposing excessive prices or unfair trading conditions on its customers; and
 - b. Exclusionary abuses, whereby the behaviour of the dominant undertaking is such as to improperly exclude other competitors from the market.
95. Not all types of conduct will fit into this categorisation, but nevertheless it can be a useful way of thinking about the types of actions that might fall within the scope of Article 102 TFEU.

⁴⁰ This is often referred to as “competition on the merits”.

96. The law on Article 102 TFEU is vast, and a comprehensive discussion of the various types of conduct that might constitute an abuse of dominant position is beyond the scope of this *Guide*. Instead, the sections that follow provide some examples of the types of conduct that *might* be prohibited by Article 102 TFEU, depending on whether the relevant legal tests are satisfied. This discussion begins, first, with some general examples, and this is followed by more specific examples from the digital and technology sectors.

4.3.1 Types of conduct that might constitute an abuse of dominant position

97. Examples of conduct that might constitute an abuse of dominant position include the following:
- a. Exclusive purchasing agreements, whereby a customer is required to purchase all or most of its demand for a product/service from the dominant undertaking. The concern with such conduct is that it would prevent the purchaser from acquiring a competing product/service from anyone other than the dominant firm. By way of an example, in January 2018, the Commission imposed a fine of €997 million on Qualcomm for abusing its dominant market position in LTE baseband chipsets⁴¹ by making substantial payments to Apple on the condition that it would exclusively use Qualcomm chipsets in its iPhone and iPad devices;⁴²
 - b. Tying arrangements, whereby a purchaser of one product is required to purchase another distinct product. Tying arrangements can take a number of forms, such as a contractual requirement to purchase another product (known as the “tied” product) and can even extend to situations where the tied product is integrated with the tying product. This was the case in *Microsoft*, where Microsoft was found to have abused its dominant position by including Windows Media Player with its Windows Operating System, which was held to harm competition on the market for streaming media players.⁴³ One of the main effects of tying arrangements is that they may be used by a dominant firm in one market to leverage its position into another market in a way that reduces competition;
 - c. In certain circumstances, the granting of rebates or discounts by a dominant undertaking may constitute an abuse of a dominant position. This is particularly likely where those rebates are conditional upon a customer purchasing all or most of their requirements from the dominant undertaking, on the basis this would create essentially the same effect as an exclusive purchasing agreement;
 - d. Charging excessively high prices which bear no reasonable relation to the economic value of the product or service supplied;
 - e. Predatory pricing, whereby a dominant firm deliberately reduces prices to a loss-making level when faced with competition from existing competitors or a new entrant to the market. Those prices may subsequently be increased after

⁴¹ Baseband chipsets enable smartphones and tablets to connect to cellular networks.

⁴² European Commission, “*Antitrust: Commission fines Qualcomm €997 million for abuse of dominant market position*” available online at: https://ec.europa.eu/commission/presscorner/detail/en/ip_18_421.

⁴³ See Section 4.3.2 below.

having foreclosed the entrant and/or existing competitor(s). By way of a recent example, in July 2019, the Commission fined Qualcomm, a manufacturer of 3G baseband chipsets,⁴⁴ for selling below cost to certain strategically important customers, such as Huawei and ZTE, with the aim of forcing its competitor out of the market;⁴⁵ and

- f. Price discrimination, which involves applying dissimilar conditions to equivalent transactions. For example, this may involve purchasing or selling different units of a good or service at prices which do not correspond to the cost of supplying them. The types of discrimination are twofold: (i) charging different prices for the sale or purchase of goods or services with the same description; and (ii) charging identical prices in circumstances where a difference in the cost of supplying them would justify a differentiated approach.

98. Another, more unusual, example of conduct that may amount to an abuse of dominant position is a refusal to supply goods or services, or providing such supply only on discriminatory terms. The refusal may be in respect of supplies of a given product or service or may consist in refusing access to resources or facilities. The application of competition law to a refusal to supply by a dominant undertaking has long been considered controversial, as it would constitute a serious inroad into the fundamental concept of freedom to contract and the right to choose one's trading partners.
99. Most of the cases in which Article 102 TFEU has been applied to a refusal to supply concern situations in which a supplier on an upstream market refuses to supply (or supplies only on discriminatory terms) a customer with whom it also competes on a downstream market. The EU courts have established this conduct can constitute an abuse of dominance where "exceptional circumstances" are present, namely: (i) access to the product/service must be indispensable to carrying on the requesting undertaking's business in the downstream market; (ii) the refusal must be likely to eliminate all effective competition in the downstream market; and (iii) the refusal must be incapable of being objectively justified.
100. A refusal to license intellectual property rights can, in some circumstances, constitute an abuse of dominant position. However, the conditions for establishing this are even stricter. In addition to the three factors identified above, it is also necessary to demonstrate that the effect of the refusal to supply would be to deprive customers of new products or services for which there is potential consumer demand. This approach was applied in the *Microsoft* case, whereby the Commission found that Microsoft's refusal to supply interoperability (interface) information on its Windows Operating System to undertakings wishing to develop work group server operating systems⁴⁶ for Windows PCs, constituted an infringement of Article 102 TFEU.

⁴⁴ For an explanation of baseband chipsets, see note 42 above.

⁴⁵ European Commission, "Antitrust: Commission fines US chipmaker Qualcomm €242 million for engaging in predatory pricing". Available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4350.

⁴⁶ A work group server operating system is an operating system that runs on central network computers which provides services to office workers around the world in their day-to-day work such as file and printer sharing, security and user identity management.

4.3.2 Examples of conduct that may constitute an abuse of dominant position from the digital and technology sectors

101. There are four examples of cases which demonstrate the application of Article 102 TFEU to the digital and technology sectors.

Microsoft

102. The first case is *Microsoft*, which has been partially discussed in the previous section. It involved a decision adopted by the European Commission in 2004, whereby it found that Microsoft had infringed Article 102 TFEU by “leveraging its near monopoly in the market for PC operating systems (OS) onto the markets for work group server operating systems and for media players.”⁴⁷
103. The Commission identified two infringements, namely: (i) restricting interoperability between Windows PCs and non-Microsoft work group servers;⁴⁸ and (ii) tying its Windows Media Player with its operating system. The Commission described its concerns with this conduct as follows:
- a. This illegal conduct has enabled Microsoft to acquire a dominant position in the market for work group server operating systems, which are at the heart of corporate IT networks, and risks eliminating competition altogether in that market. In addition, Microsoft’s conduct has significantly weakened competition on the media player market.⁴⁹
 - b. The ongoing abuses act as a brake on innovation and harm the competitive process and consumers, who ultimately end up with less choice and facing higher prices.
104. One of the particularly interesting elements of the case concerned the remedies imposed to address the infringement. In addition to imposing a fine, the Commission required the following:

⁴⁷ European Commission, “Commission concludes on Microsoft investigation, imposes conduct remedies and a fine”. Available online at: https://europa.eu/rapid/press-release_IP-04-382_en.htm?locale=en.

⁴⁸ The interoperability concerns resulted from a complaint lodged by Sun Microsystems in 1998, in which the company alleged that Microsoft had refused to provide interface information necessary for Sun to be able to develop products that would “talk” properly with Windows PCs, and this limited its ability to compete on an equal footing in the market for work group server operating systems. During its investigation, the Commission found that Sun was not the only company that had been refused this information, and the refusal to disclose interface information formed part of a broader strategy designed to shut competitors out of the market. As the Commission states: “[t]his relegated to a secondary position competition in terms of reliability, security and speed, among other factors, and ensured Microsoft’s success on the market.”

⁴⁹ In relation to the tying of Windows Media Player, the Commission explained that it was concerned that the “ubiquity which was immediately afforded to [Windows Media Player] as a result of it being tied with the Windows PC OS artificially reduces the incentives of music, film and other media companies, as well software developers and content providers to develop their offerings to competing media players.” This had the effect of foreclosing the market to competitors, and reducing consumer choice, since competing products are set at a disadvantage which is not related to their price or quality. A further concern is that the tying would tip the market in Microsoft’s favour, which might enable it to control related markets in the digital media sector, such as encoding technology, software for broadcasting of music over the internet and digital rights management.

- a. In relation to the restriction of interoperability, Microsoft was required “to disclose complete and accurate interface documentation which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers. This will enable rival vendors to develop products that can compete on a level playing field in the work group server operating system market.” The Commission also noted that to the extent any of the interface information might be protected by intellectual property in the EEA, Microsoft would be entitled to reasonable remuneration from any party to whom it licensed that information.
- b. As regards the tying practice, the Commission ordered Microsoft to “offer to PC manufacturers a version of its Windows client PC operating system without [Windows Media Player].” The Commission emphasised that Microsoft remained free to offer a version of its Windows Operating System with Media Player, but it must refrain from using any commercial, technological or contractual terms that would have the effect of rendering the unbundled version of Windows less attractive or performing. In particular, it must not give PC manufacturers a discount conditional on their buying Windows together with Windows Media Player.

105. The Commission also pursued a similar case against Microsoft relating to its concerns that Microsoft may have tied its web browser, Internet Explorer, with the Windows Operating System. This was resolved in 2009 by Microsoft offering legally binding commitments which included an agreement to offer consumers a “Choice Screen” enabling them to decide which browsers they want to install instead of, or in addition to, Internet Explorer.⁵⁰

Google

106. More recently, the Commission has adopted two Decisions concerning certain practices by Google, which were found to infringe Article 102 TFEU.

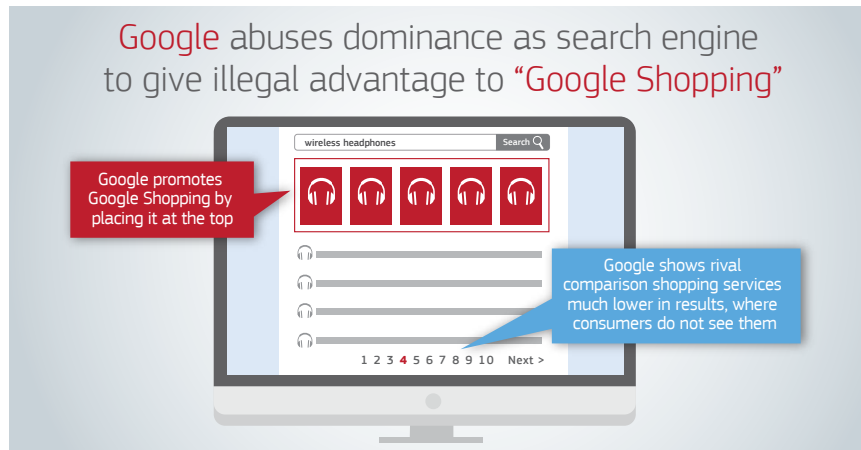
107. In June 2017, the Commission fined Google €2.42 billion for abusing its dominant position as a search engine by giving an advantage to another Google product, namely its comparison shopping service.⁵¹ This entailed two types of conduct:

- a. Systematically giving prominent placement to its own comparison shopping service. For example, when a user entered a query into the Google search engine, and in particular when it was a product-related query, Google’s comparison shopping service would be displayed at or near the top of the search results.
- b. Demoting rival comparison shopping services in its search results. Google included a number of criteria in its algorithms (which determined where shopping services would appear in Google’s search results) as a result of which rival comparison shopping services were demoted. By contrast, Google’s own shopping comparison service was not subject to Google’s search algorithms in the same way, meaning that it was not demoted in a similar manner.

⁵⁰ European Commission, “Antitrust: Commission accepts Microsoft commitments to give users browser choice”. Available online at: https://europa.eu/rapid/press-release_IP-09-1941_en.htm?locale=en.

⁵¹ European Commission, “Antitrust: Commission fines Google €2.42 billion for abusing dominance as a search engine by giving illegal advantage to own comparison shopping service”. Available online at: https://europa.eu/rapid/press-release_IP-17-1784_en.htm. Google’s comparison shopping service is described as enabling “consumers to compare products and prices online and find deals from online retailers of all types, including online shops of manufacturers, platforms (such as Amazon and eBay), and other re-sellers.”

108. As a result, the Commission found that Google’s comparison shopping service was much more visible to consumers in Google’s search results than rival comparison services. Consequently, Google had given its own comparison shopping service a significant advantage compared to its rivals. The press release announcing the Commission’s findings contained the following graphic describing the conduct:



109. The press release also contains an explanation of the impact of Google’s conduct as follows:

Google’s illegal practices have had a significant impact on competition between Google’s own comparison shopping service and rival services. They allowed Google’s comparison shopping service to make significant gains in traffic at the expense of its rivals and to the detriment of European consumers.

Given Google’s dominance in general internet search, its search engine is an important source of traffic. As a result of Google’s illegal practices, traffic to Google’s comparison shopping service increased significantly, whilst rivals have suffered very substantial losses of traffic on a lasting basis.

- Since the beginning of each abuse, Google’s comparison shopping service has increased its traffic 45-fold in the United Kingdom, 35-fold in Germany, 19-fold in France, 29-fold in the Netherlands, 17-fold in Spain and 14-fold in Italy.

- Following the demotions applied by Google, traffic to rival comparison shopping services on the other hand dropped significantly. For example, the Commission found specific evidence of sudden drops of traffic to certain rival websites of

85% in the United Kingdom, up to 92% in Germany and 80% in France. These sudden drops could also not be explained by other factors. Some competitors have adapted and managed to recover some traffic but never in full.

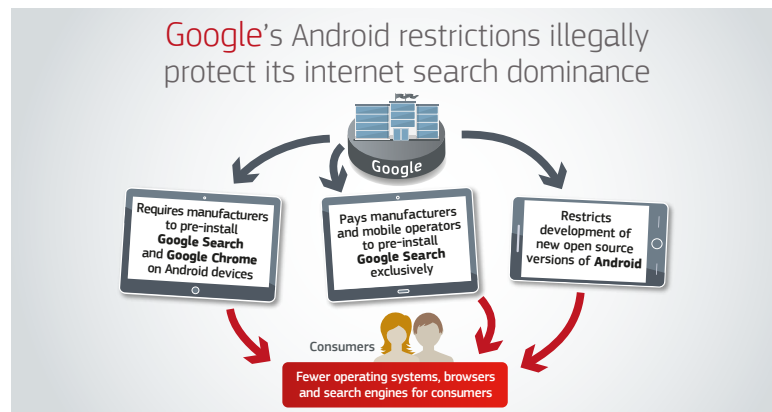
In combination with the Commission's other findings, this shows that Google's practices have stifled competition on the merits in comparison shopping markets, depriving European consumers of genuine choice and innovation.

- 110.** In addition to imposing a fine, the Commission ordered Google to comply with the principle of giving equal treatment to rival comparison shopping services and its own service, meaning that it has to apply the same processes and methods to position and display rival comparison shopping services in Google's search results as it gives to its own comparison shopping service.
- 111.** The following year, in July 2018, the Commission adopted a further decision fining Google €4.34 billion for abusing its dominant market position by imposing restrictions on Android device manufacturers and mobile network operators in order to reinforce its dominant position in the respect of general internet search. It was found to have used those restrictions to ensure that traffic on Android devices goes to the Google search engine rather than other competing search engines.⁵² In particular, the Commission found that Google:
- a.** Required manufacturers to pre-install the Google Search app and browser app (Google Chrome) as a condition for licensing Google's app store (the Play Store).⁵³ The Commission found that Google offers its mobile apps and services to device manufacturers in a bundle, which includes the Google Play Store, the Google Search App and the Google Chrome browser, and as such it is not possible for manufacturers to pre-install some apps but not others. The Commission found that Google engaged in two instances of illegal tying, namely: (i) tying of the Google Search app; and (ii) tying of the Google Chrome browser;
 - b.** Made payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices; and
 - c.** Prevented manufacturers wishing to pre-install Google apps from selling even a single smart mobile device running on alternative versions of Android that were not approved by Google.

⁵² European Commission, "Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine". Available online at: https://europa.eu/rapid/press-release_IP-18-4581_en.htm.

⁵³ This was considered particularly important because the Google Play Store was a "must have" app "as users expect to find it pre-installed on their devices (not least because they cannot lawfully download it themselves)."

112. As with the *Google Shopping* decision, discussed in paragraphs 107 – 110 above, the Commission’s press release included the following diagram describing the conduct found to infringe Article 102 TFEU:



Most favoured nation clauses

113. Another example of a restriction that might run contrary to Article 102 TFEU is a so-called Most-Favoured-Nation (MFN) or Most-Favoured-Customer Clause. For example, in June 2015, the Commission opened an investigation into Amazon regarding concerns about the MFN clauses it included in its e-books distribution agreements. The scope of that investigation was explained in a Press Release as follows:⁵⁴

The Commission opened an investigation in June 2015 because it had concerns about clauses included in Amazon’s e-books distribution agreements that could have breached EU antitrust rules. These clauses, sometimes referred to as “most-favoured-nation” clauses, required publishers to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to Amazon’s competitors. The clauses covered not only price but many aspects that a competitor can use to differentiate itself from Amazon, such as an alternative business (distribution) model, an innovative e-book or a promotion.

⁵⁴ European Commission, “Antitrust: Commission accepts commitments from Amazon on e-books”. Available online at: https://europa.eu/rapid/press-release_IP-17-1223_en.htm. The Commission considered the MFN clause in this investigation under Article 102 TFEU. However, MFN clauses may also fall within the scope of Article 101 TFEU. See, for example, a similar case involving commitments offered by Apple and four publishers: “Antitrust, Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for the sale of e-books”. Available online at: https://ec.europa.eu/commission/press-corner/detail/en/IP_12_1367.

The Commission considered that such clauses could make it more difficult for other e-book platforms to compete with Amazon by reducing publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative distribution services. The clauses may have led to less choice, less innovation and higher prices for consumers due to less overall competition in the European Economic Area (EEA) in e-book distribution.

- 114.** Amazon sought to address these concerns by offering a number of commitments, which were accepted by the Commission. This included a commitment not to enforce, introduce or change the terms of its agreements with publishers. The Commission adopted a decision in order to make those commitments legally binding, and as a result did not make a finding as to whether those contracts infringed EU competition law.
- 115.** A number of NCAs have ongoing investigations into MFN clauses under both Article 101 TFEU and Article 102 TFEU. These may provide further insight as to the extent to which these clauses will be prohibited under EU competition law.

4.3.3 Issues that might arise in the future

- 116.** It is likely that the provisions of EU competition law regulating the abuse of dominant position will be of particular interest to those working in the digital rights litigation field. As noted in the introduction to this *Guide*, one of the key features of digital innovation has been the increased prevalence of platforms and ecosystems. As a result:
 - a.** A single company and/or a single platform may hold a substantial share of a particular market (such as Google in the case of search engines), which may confer it a dominant market position; and
 - b.** The use of ecosystems, along with their associated products and services, may reinforce a dominant market position as it becomes particularly difficult for customers to switch platforms.
- 117.** As explained above, where a particular company holds a dominant position, the role of EU competition law is to ensure that such a position is not abused. However, there is an ongoing debate as to what types of conduct implemented by companies in the digital and technology space would constitute an abuse of a dominant position, and there have, so far, been a limited number of cases considering this issue. As such, the legal principles in this area will continue to develop.

- 118.** Some of the issues that may require consideration in the future include the following:
- a.** Where a particular platform holds a dominant market position, and there may only be room in the market for a limited number of other platforms, it will be important to scrutinize any conduct that may limit the threat of market entry by competitors. This will assist in protecting competition “for the market” in order to maintain incentives to supply goods and services on reasonable conditions and to innovate.
 - b.** Where a dominant platform sets up a marketplace, it may be necessary to consider whether competition on that marketplace is free and undistorted, so as to ensure a level playing field. Particular issues that might arise include:
 - i.** Steps taken by the operator of a platform to prefer some of its users over others; and
 - ii.** “Self-preferencing” whereby an operator of a platform confers upon itself advantages when competing on that platform with other users (for example, by giving preferential treatment to its own products or services when they are in competition with those of other users on the platform);
 - c.** Measures which seek to restrict multihoming or switching may require close scrutiny. This may include considering issues relating to data portability (i.e. the ability of users to transfer data from one platform to another);
 - d.** Leveraging conduct by the operator of a dominant platform. This might include, for example, an operator with a dominant position in one market exploiting that position to enhance its standing in another unrelated market; and
 - e.** The approach of dominant undertakings to granting access to data might come under scrutiny, although this is likely to prove controversial for the reasons given in paragraph 98 - 100 above. For example, questions might arise as to the extent to which a refusal to grant access to data (or granting access on less favourable terms) might constitute an abuse of dominant position. Furthermore, it may also be necessary to consider the extent to which a dominant undertaking may be required to ensure data interoperability. These issues are similar to those arising in *Microsoft*, discussed above.
- 119.** It must be emphasized that the above list should not be treated as containing conduct that would amount to an infringement of EU competition law. Instead, it intends to identify the types of conduct that might be considered by competition authorities in the future.

5. Routes to pursue a suspected infringement of EU competition law

120. As explained in Section 2.3.1 above, competition law in the EU is enforced by two principal mechanisms:
- a. **Public enforcement** by competition authorities which are tasked with investigating suspected infringements of competition law and imposing sanctions; and
 - b. **Private enforcement** by parties that are affected by such infringements, usually by way of court proceedings.
121. As a result, if you are considering taking further action in relation to a suspected infringement of competition law, this will involve engaging one (or both) of these methods of enforcement. This section provides a brief overview of each of those routes, and the steps that might be involved.

5.1 Public enforcement: complaints to a competition authority

122. The public enforcement of EU competition law entails either the Commission or an NCA investigating a suspected infringement of Article 101 TFEU and/or Article 102 TFEU and imposing sanctions for any breaches it discovers. Any person can ask the Commission (and, specifically, the Directorate General for Competition) to investigate a suspected infringement of competition law by submitting a complaint.⁵⁵
123. The Commission’s website explains that it “*encourages citizens and firms to inform about suspected infringements of competition law*”.⁵⁶ There are two ways to do this:
- a. Where a person is directly affected by a practice which they consider amounts to an infringement of Article 101 TFEU and/or Article 102 TFEU, and they are able to provide specific information, it is possible to lodge a formal complaint, which must adhere to certain requirements.
 - b. Alternatively, a complainant can provide market information in a more general form that does not involve a formal complaint, and is not subject to the same requirements. This information can be provided via email or post,⁵⁷ and should indicate “*your name and address, identify the firms and products concerned and describe the practice you have observed. This will help the Commission to detect problems in the market and be the starting point for an investigation.*”
124. Further details on the process of submitting a formal complaint to the Commission concerning a suspected infringement of Article 101 TFEU and/or Article 102 TFEU is set out below.

5.1.1 Formal complaints to the Commission

125. Any natural or legal person that can show a “legitimate interest” (which is discussed further below) is entitled to lodge a complaint to ask the Commission to investigate and find an infringement of Article 101 TFEU and/or Article 102 TFEU and to require that the infringement be brought to an end.

⁵⁵ There is a different process involved for making a complaint relating to State aid, which is not covered in this Guide. Further information can be found at: https://ec.europa.eu/competition/forms/intro_en.html.

⁵⁶ Ibid.

⁵⁷ The relevant contact details are available online at: https://ec.europa.eu/competition/contacts/electronic_documents_en.html.

5.1.1.1 Making a complaint to the Commission

- 126.** The Commission has issued a Notice (the **Complaints Notice**) which explains the process involved in making a formal complaint to the Commission.⁵⁸ Some of the key points from the Complaints Notice are summarised below.

Form C

- 127.** The Commission has also produced a form (entitled “Form C”) to be used for submitting complaints.⁵⁹ Form C identifies the details that should be included in the complaint. By way of summary, the complaint should set out, in as much detail as possible, the conduct complained of and the reasons that the complaining party considers this constitutes an infringement of competition law.
- 128.** Generally, any complaint must contain the information required by Form C, although the Commission may dispense with this obligation as regards part of the information, including documents, where it considers this to be appropriate.
- 129.** It is important that the complaint is as comprehensive as possible in order to enable the Commission to properly consider whether to investigate the matter further. The complaint should ideally be supported by relevant evidence and, where possible, provide indications as to where the Commission could obtain other relevant information and documents if they are unavailable to the complainant.

The need for a “legitimate interest”

- 130** As noted in paragraph 125 above, formal complaints can only be made by a natural or legal person who can demonstrate that they have a “legitimate interest”. A complainant could demonstrate this if they operate on the relevant market or where the conduct complained of is liable to directly and adversely affect their interests. This would include, for example:⁶⁰
- a.** Parties to an agreement or practice which is the subject of the complaint;
 - b.** Competitors whose interests have allegedly been damaged as a result of the behaviour complained of; and/or
 - c.** Consumers whose economic interests are directly and adversely affected, such as where they are the buyer of goods or services that are the subject of an infringement.

⁵⁸ See Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, pp.65-77.

⁵⁹ Form C is included as an annex to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty, OJ L 123, 27.04.2004, pp.18-24.

⁶⁰ Further guidance and examples are provided in paragraphs 35 – 40 of the Complaints Notice.

- 131.** Furthermore, certain trade associations, consumer associations or other representative bodies may also be able to demonstrate a legitimate interest in order to make a formal complaint.⁶¹

5.1.1.2 Assessment of complaints

The Community interest

- 132.** A particular point to note about the process of making a complaint to the Commission is that it has discretion as to whether it will pursue a complaint and will set priorities as to which cases is most likely to investigate. One of the ways in which the Commission determines the degree of priority to be applied to various complaints it receives is to assess the “Community interest” in the further investigation of a case. If the Commission forms the view that a case does not display sufficient Community interest to justify further investigation, it may reject the complaint on that ground.
- 133.** The Complaints Notice explains that the assessment of the Community interest raised by a complaint depends on the circumstances of each case, and there are no specific criteria that must be taken into account. Among the criteria that may be relevant are the following:
- a.** The Commission may reject a complaint on the ground that the complainant could bring an action before national courts;
 - b.** The Commission may take account of the seriousness of the infringements and whether their consequences are persistent. This would include considering the duration and extent of the infringements and their effect on competition within the EU;
 - c.** The Commission may balance the significance of the infringement, the probability of establishing its existence and the scope of the investigation required;
 - d.** The Commission may consider that it is not appropriate to investigate a complaint where the practices in question have ceased; and
 - e.** The Commission may also decide that it is not appropriate to investigate a complaint where the undertakings concerned agree to change their conduct in such a way that it can consider there is no longer a sufficient Community interest to intervene.

⁶¹ To take an example, an association of undertakings may have a legitimate interest in lodging a complaint regarding conduct concerning its members, provided that: (i) it is entitled to represent the interests of its members; and (ii) the conduct complained of is liable to adversely affect the interests of its members.

Assessment under Articles 101 and 102 TFEU

- 134.** The main part of the assessment of a complaint under Article 101 TFEU and/or Article 102 TFEU involves two steps:
- a.** Establishing the facts to prove an infringement of Article 101 TFEU and/or Article 102 TFEU; and
 - b.** The legal assessment of the conduct that is the subject of the complaint.
- 135.** Where the complaint does not sufficiently substantiate the allegations put forward, or does not demonstrate an infringement of Article 101 TFEU and/or Article 102 TFEU, it may be rejected on that ground. It is for this reason that both the conduct complained of, and the reasons this is considered to constitute an infringement, must be set out in as much detail as possible.

5.1.2 The Commission's procedures when dealing with complaints

- 136.** The Commission's Complaints Notice explains that while it is not obliged to carry out an investigation on the basis of every complaint submitted in order to establish whether an infringement has been committed, it will "*consider carefully the factual and legal issues brought to its attention by the complainant, in order to assess whether those issues indicate conduct which is liable to infringe [Articles 101 and 102 TFEU].*"
- 137.** There are a number of stages that the Commission follows when dealing with complaints:
- a.** The first stage entails the Commission examining the complaint, and it may collect further information in order to decide what action it may take on the complaint. This may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues raised by the complaint. It is possible that the Commission may also give an initial reaction to the complainant, which would enable them to expand on the allegations in the light of that reaction;
 - b.** The second stage involves the Commission investigating the case further with a view to deciding whether it will pursue the complaint as a formal investigation. If the Commission decides that there are insufficient grounds for acting on the complaint (including because there is no sufficient Community interest in pursuing the case further), it will inform the complainant of the reasons for this and offer the complainant the opportunity to submit any further comments within a specified time limit. If the complainant fails to respond within that time limit, the complaint is deemed to have been withdrawn; and

- c. At the third stage, the Commission reviews all the observations submitted by the complainant and decides whether to: (i) initiate a formal investigation;⁶² or (ii) adopt a decision rejecting the complaint.

- 138. The Commission is required to take a decision on complaints within a reasonable time, which depends on the circumstances of each case and in particular its context, the various procedural steps followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case, and its importance for the parties involved. Generally, the Commission will endeavour to inform complainants of the action it proposes to take on a complaint within four months.
- 139. It should be noted that a decision to reject a complaint does not definitely rule on the question of whether there is an infringement of Article 101 TFEU and/or Article 102 TFEU. As a result, a national court or NCA is not prevented from applying Article 101 TFEU and/or Article 102 TFEU to that same conduct, although it may take into account the assessments made by the Commission when examining that conduct.
- 140. It is possible to appeal a decision to reject a complaint to the General Court of the European Union.

5.1.3 Complaints to NCAs

- 141. It is also worth considering whether the facts of the case would be better dealt with by way of a complaint to one or more NCAs. The Commission provides some guidance on this as follows:

If the situation you have encountered is specific and limited to the country or the area in which you live, or involves no more than three member States you may want to contact a national competition authority. The competition authorities of all EU Member States now apply the same competition rules as the European Commission and very often they are well placed to deal with your problem. If you think that a larger number of Member States are concerned, you may primarily choose to contact the European Commission. If you are not sure about the scope of the problem, do not hesitate to contact either the European Commission or the national competition authority because the authorities cooperate among them and will allocate the case as appropriate.

⁶² In the event that the Commission decides to proceed to a formal investigation, the complainant will have certain procedural rights to participate in some parts of the investigation. Full details can be found in paragraphs 64 – 65 of the Complaints Notice.

- 142.** Further guidance on whether to approach an NCA or the Commission is provided in paragraphs 19–25 of the Complaints Notice.
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5.1.4 Advantages and disadvantages of pursuing a suspected infringement of competition law by way of public enforcement

- 143.** The main advantage of pursuing a complaint to the Commission or an NCA is that is likely to be less costly than pursuing litigation in respect of an infringement of competition law. If the Commission or an NCA agrees to investigate a complaint further, it will bear the burden of the investigation, and the complainant may still be able to participate in certain parts of the procedure. This route might be particularly attractive given that, depending on the relevant principles in a Member State, litigation may involve potential liability for the Defendants' costs in the event a claim was unsuccessful.
- 144.** Some of the disadvantages of public enforcement include the following:
- a.** As noted above, the Commission and NCAs cannot investigate all complaints brought to them, and instead will set priorities for the complaints they will investigate. Generally, the Commission will focus on enforcing the EU competition rules in cases in which it is well-placed to act, in particular by concentrating its resources on the most serious infringements. It will also focus on those cases in which the Commission should act with a view to defining EU competition policy and/or ensuring the coherent application of Articles 101 and 102 TFEU. As a result, there is no certainty that a complaint will be investigated by the Commission or an NCA;
 - b.** The costs incurred in making a complaint and/or participating in the complaint process will not be recoverable; and
 - c.** An investigation by the Commission or an NCA will not result in any remedy for the complainant individually, such as damages for any losses suffered. Such a remedy would need to be pursued by a private enforcement route (i.e. litigation).

5.2 Private enforcement: litigating breaches of competition law

- 145.** The alternative to a public enforcement route in addressing a potential breach of EU competition law is to pursue private enforcement, by way of litigation. All national courts of the EU member states are empowered to apply Article 101 TFEU and Article 102 TFEU in their entirety.
- 146.** Litigation before national courts may take one or more of the following forms, depending on the legal system of a particular Member State:
- a.** An action for damages for losses suffered as a result of an infringement of Article 101 TFEU and/or Article 102 TFEU;
 - b.** An action for an injunction to restrain an ongoing or anticipated breach of Article 101 TFEU and/or Article 102 TFEU; and/or
 - c.** An action for a declaration, for example that a particular contract or contractual clause is void because it infringes of Article 101 TFEU and/or Article 102 TFEU.
- 147.** As explained in paragraph 43 above, there are broadly two types of competition law claims:
- a.** **“Follow on” actions**, which are based on a decision adopted by the Commission or an NCA which finds an infringement of competition law. In essence, a claimant would rely on that decision as proof that an infringement of competition law has occurred, and seek damages for the losses suffered as a result; and
 - b.** **“Standalone” actions**, whereby a claimant alleges, and must prove, both the existence of an infringement of competition law, and the losses suffered as a result.
- 148.** In some Member States, it is possible to bring an action on behalf of a class of claimants (known as a “collective action”) seeking damages for losses suffered as a result of an infringement of Article 101 TFEU and/or Article 102 TFEU.

5.2.1 Advantages and disadvantages of pursuing a suspected infringement of competition law by way of private enforcement

- 149.** A key benefit of pursuing litigation as opposed to a complaint to a competition authority is that the national court will be bound to adjudicate on the case, whereas the Commission or NCAs are not able to investigate all complaints. Furthermore, if the claimant is successful it may receive a personal remedy, which would not be the case with a complaint to a competition authority.
- 150.** There are important drawbacks to litigation:
- a.** It can be a costly and lengthy process. In particular, if a claim were to fail it is possible that the court may order the claimant to bear some or all of the Defendants' costs. On the other hand, if the Claimant were successful it may be able to recover some of its costs; and
 - b.** If the claim is brought on a "standalone" basis, the Claimant will bear the burden of proving an infringement of competition law. This can be particularly difficult if the Claimant does not have a way of accessing the evidence necessary to prove the infringement, and instead may need to seek disclosure from other persons. The extent to which such disclosure may be available will depend on the legal rules in each Member State.

5.3 Broader engagement with competition law issues in the digital and technology sectors

151. It is also important to bear in mind that becoming involved in competition law issues concerning the digital and technology sectors does not solely entail acting in respect of specific infringements. Instead, there are a number of opportunities to become involved in policy advocacy on such issues. There are ongoing debates as to how competition law should apply to the digital and technology sectors, and there have been a great number of recent consultations on issues arising in this area. For example, both the European Commission and the UK's Competition and Markets Authority have recently run consultations on particular pieces of legislation which may have an impact on the technology/digital sectors, and in addition have sought views on more general issues relating to these sectors.
152. There are broadly three types of enquiry that might present opportunities for contributions by persons working in the digital and technology sectors:
- a. **Consultations on specific pieces of legislation that would impact on the digital and technology sectors.** For example, the European Commission has recently conducted a review of its rules relating to vertical agreements, which included detailed consideration of how these should apply in relation to a number of matters relating to e-commerce, such as restrictions on online sales and advertising;⁶³
 - b. A number of competition authorities, including the European Commission and the UK's Competition and Markets Authority, have **published reports, or commissioned studies** into how competition rules should be adapted to take account of the specific features of the digital and technology sectors;⁶⁴ and
 - c. Competition authorities often **conduct market studies or investigations** in order to determine whether competition is functioning effectively. Some of these may touch on issues relating to the digital and technology sectors. For example, the Commission recently conducted an e-commerce sector enquiry which identified a number of types of conduct that may give rise to restrictions of competition.⁶⁵ This resulted in a number of subsequent investigations into restrictions of online sales and advertising. Similarly, the UK's Competition and Markets Authority is carrying out a market study into online platforms and the digital advertising market in the UK.⁶⁶

⁶³ Details of this consultation can be found online at: https://ec.europa.eu/competition/consultations/2018_yber/index_en.html and https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981/public-consultation_en.

⁶⁴ See note 1 above and note 67 below.

⁶⁵ Further details can be found at: https://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

⁶⁶ Further details can be found at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

- 153.** Those involved in digital rights issues would have a valuable role to play in submitting evidence to enquiries and/or being involved in discussions in this area more generally as their expertise will help to inform these policy debates. One of the main ways to identify opportunities to contribute in this way is to check the websites of the main authorities for calls for evidence/consultations. For example, the European Commission publishes its current open consultations on a specific page on its website.⁶⁷

⁶⁷ <https://ec.europa.eu/competition/consultations/open.html>.

6. Further resources

This list is intended to identify some of the main resources concerning this area to assist the reader in finding out more on the subject. It is not intended to be comprehensive.

Books

- *Bellamy and Child's European Union Law of Competition* (8th Edition, OUP, 2018).
- *Richard Whish and David Bailey, Competition Law* (9th Edition, OUP, 2018).
- *Jones & Sufrin's EU Competition Law: Text, Cases and Materials* (7th Edition, OUP, 2019).

Websites

- The Commission's Directorate General for Competition - https://ec.europa.eu/competition/index_en.html.
- The European Competition Network - https://ec.europa.eu/competition/ecn/index_en.html.
- The OECD's website has a section on Digital Economy, Innovation and Competition - <https://www.oecd.org/daf/competition/digital-economy-innovation-and-competition.htm>.

Reports and other documents

- Unlocking digital competition: Report of the Digital Competition Expert Panel - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.
- Competition policy for the digital era: A report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer - <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.
- Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy" - https://www.ftc.gov/system/files/attachments/press-releases/ftc-chairman-supports-common-understanding-g7-competition-authorities-competition-digital-economy/g7_common_understanding_7-5-19.pdf.

- The UK Competition and Markets Authority's Digital Markets Strategy - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf.
- Note by the UNCTAD Secretariat, Competition issues in the digital economy - https://unctad.org/meetings/en/SessionalDocuments/ci-clpd54_en.pdf.
- Stigler Committee on Digital Platforms: Final Report - <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms--committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BC-C560B7FEF7A81E1F95C1DDC5225E>.

About the Digital Freedom Fund

The Digital Freedom Fund supports strategic litigation to advance digital rights in Europe. With a view to enabling people to exercise their human rights in digital and networked spaces, DFF provides financial support for strategic cases, seeks to catalyse collaboration between digital rights activists, and supports capacity building of digital rights litigators. DFF also helps connect litigators with pro bono support for their litigation projects. To read more about DFF's work, visit: www.digitalfreedomfund.org.

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