Big Tech remedies—recent antitrust case law and legislative developments

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1. Introduction

Recent developments in antitrust law enforcement and legislation regarding dominant digital platforms—commonly referred to as Big Tech—reflect a more interventionist stance by policymakers. The legislative initiatives introduced to date, notably the recently adopted Digital Markets Act (DMA) in the European Union (EU), signal a shift towards ex ante regulation, bringing with it not only specific rules and obligations with which designated gatekeepers must comply, but also the prospect of increased monitoring of compliance by antitrust enforcers, appointed external experts and monitoring trustees. More generally, the more active enforcement of existing antitrust and merger policy instruments in this sector shows that antitrust agencies are willing to challenge dominant digital platforms and anti-competitive behaviour by platform operators—imposing remedies relating to access, data sharing and data usage restrictions, prohibiting self-preferencing and foreclosure strategies—and where appropriate, to impose fines. These specific and general developments have put a focus on the design and implementation of antitrust and merger remedies for Big Tech, which is the subject matter of this article.

Although the basic principles underpinning the range of available remedies are not particularly novel, the design and implementation of antitrust and merger remedies which focus on the behaviour of dominant digital platforms have become much more challenging in the light of issues that are increasingly gaining traction in the digital sphere, such as changes in market dynamics, control of access to data, privacy, and the critical importance of maintaining incentives for innovation.

This raises a number of questions, two of which are central to the research that underpins this article:

- do we see a trend and expect to see further changes in the choice of remedies based on the more interventionist stance and new set of rules governing Big Tech and the digital economy; and
- what other implications do we expect from a more interventionist and ex ante approach in terms of institutional changes and resource implications?

To answer these questions this article will:

- review and identify trends in recent case law relating to Big Tech;
- review and identify trends in legislative and policy developments (with a focus on the EU and the United Kingdom (UK));
- assess to what extent these legislative and policy developments have been informed by case law; and
- review the wider implications for enforcement agencies applying this more interventionist approach.

We show that, at least for the EU and the UK, the relationship between recent case law and legislative developments is a very close one. We believe that the legislative developments reflect a trend towards the adoption of a clearly-defined range of specific behavioural remedies which is bound to be sustained even though the two jurisdictions have taken different approaches: in particular, the EU relies more heavily than the UK on rules with broad (indeed, one might say indiscriminate) application and self-enforcing obligations. What is debatable at this stage is whether the calls for more structural remedies, which have been rare in antitrust case law as opposed to merger control, will be heeded. The groundwork for this shift has been laid, but structural remedies which extend as far as ownership separation are in our view likely to remain an exception. However, operational separation of businesses and certain competitive activities of dominant platform providers as well as data separation and ring-fencing measures that are of a more structural nature will become a more important feature of the regulation of Big Tech and the enforcement of antitrust law in the digital economy. What is clear though is that the resource implications are likely to be significant due to the increased complexity of the subject matter and the dynamic nature of digital technology markets. Governments and authorities need to think through the institutional and resource implications

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of new legislative instruments and the increased compliance and monitoring costs of ex ante regulation and enforcement of antitrust law and regulations.

2. Review of key cases relating to digital markets

The last 20 years have seen dozens of antitrust and merger investigations dealing with digital technology companies (defined as the Information and Communications Technology (ICT) sector in the EU and as the Information, Telecommunications and Electronics (ITE) sector in the UK). In the EU, our analysis shows that there have been 51 investigations into the ICT sector since 2001. Whereas most of the pre-2016 decisions related to telecommunications, all seven ongoing cases relate to the digital economy and Big Tech. Similarly, in the UK, there have been 40 investigations into the ITE sector since 2001. Of those cases opened prior to 2015, nine related to telecommunications, six related to media and only four focused on the digital economy. In contrast, 13 of the 17 investigations opened since 2016 have focused on the digital economy, with the remaining three focusing on telecoms price control and one relating to media. It is also worth noting that there have been eight cases falling into these categories opened by the EU since 2019, and 11 cases opened by the Competition Markets Authority (CMA) since 2021, demonstrating an increased focus on Big Tech and the digital economy in both the UK and the EU, and pointing to a more interventionist stance by both the European Commission (the Commission) and the CMA in relation to competition issues in the digital markets.

Arguably the leading United States (US) and EU antitrust decisions against Microsoft in 2004 marked the beginning of an era of competition law focused on Big Tech. Although the break-up of Microsoft was initially proposed by the US Department of Justice (DOJ) in its complaint against Microsoft and mandated by the District Court of Columbia in 2000, after appeal the structural remedies were converted into a number of behavioural remedies which were imposed on Microsoft.[1] The Commission considered similar issues and similarly imposed a number of behavioural remedies on Microsoft in 2004 which in substance were upheld by the courts.[2]

This case provoked an ongoing debate about the relative effectiveness of behavioural and structural remedies in Big Tech cases. As the review of cases (the vast majority of them antitrust rather than merger control cases) that follows indicates, remedies in recent cases involving Big Tech have been overwhelmingly behavioural, often mandating specific interoperability and other access obligations, but also involving cease and desist and other softer, self-regulating remedies which leave the manner of their implementation largely at the discretion of the relevant undertaking. This reflects the Commission's wider remedies practice in antitrust cases, where the Commission mainly relies on behavioural remedies, and structural remedies are rare: by contrast, the Commission displays a strong preference for structural remedies in merger investigations.[3]

Serious doubts have been expressed, however, regarding whether behavioural remedies are sufficient to create legal certainty,[4] and to curb the market power of the largest digital companies and its negative impact on competition and the interests of consumers. Commentators have recently argued in ex post reviews that competition authorities' reticence to impose structural remedies may be misplaced. For example, John Kwoka and Tommaso Valletti argue that serious thought should be given to breaking up entrenched dominant firms and unscrambling anti-competitive consummated mergers as an alternative to efforts to regulate the conduct of such firms; the latter require clear and enforceable rules as well as extensive monitoring of compliance to make them effective.[5]

A range of recent cases are reviewed below: 13 have already resulted in remedies, while three have not yet reached that stage. These have been selected on the basis that they demonstrate how competition authorities have responded to particular platform issues that have been identified as anti-competitive conduct by the world's largest and most powerful tech companies and platform operators. Although this case review focuses on investigations by the Commission and the CMA, investigations by other authorities have also been included where considered of value to the discussion.

As Table 1 below illustrates, of the 13 cases reviewed where remedies already exist, more than half resulted in remedies which are very specific and tailored to the digital economy (relating to data access and usage and to platform access and interoperability). Four remedies took the form of a requirement to "cease and desist", meaning that the firm was ordered to stop a particular form of conduct identified as harmful to competition.

We note that categorisation of remedies is rarely straightforward, but consider that it is nonetheless possible to derive insights from exercises such as those reflected in Table 1 and in Table 2 (later in this article) where we have sought to categorise the DMA's obligations for gatekeepers into categories of remedy.

[1] Initial Remedy Order: *United States v Microsoft Corp.* 97 F. Supp. 2d 59 (D.D.C. 2000), final remedy judgment, see *United States v Microsoft Corp.* No. 98-1232, 2002 WL 31654530 (D.D.C. Nov. 12, 2002).
[2] Commission Decision of 24 May 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792—*Microsoft*), and Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, in *Microsoft Corp v Commission of the European Communities* (T-201/04) EU:T:2007:289; [2007] 5 C.M.L.R. 11.
[3] B. Lörtscher and F.P. Maier-Rigaud, "On the Consistency of the Commission's Remedies Practice" in D. Gerard and A. Komninos (eds), *Remedies in EU Competition Law—Substance, Process and Policy* (Wolters Kluwer, 2020), pp.53–72; and Allen & Overy, "Global trends in merger control enforcement" (March 2022), available at: *https://www.allenovery.com/en-gb/global/news-and-insights/global-trends-in-merger-control-enforcement*.
[4] See e.g., statements in P. Akman, "A Preliminary Assessment of the Commission's Google Search Decision", Antitrust Chronicle, Competition Policy International 2017 (17 December 2018), which argues in the context of the Google *Shopping*/*Android*/*AdSense* cases that that the principle of legal certainty also applies in the imposition of remedies; any remedy must be clear and precise so that the undertaking may know without ambiguity its rights and obligations and take steps accordingly.
[5] J. Kwoka and T. Valletti, "Unscrambling the eggs: breaking up consummated mergers and dominant firms" (2021) 30 *Industrial and Corporate Change* 1286, available at: *https://doi.org/10.1093/icc/dtab050*.

Table 1—Overview of remedies in selected Big Tech cases (reviewed below)

Type of remedy	Number of times imposed/accepted	Relevant cases*
Full ownership separation	1	*Facebook/Giphy* (CMA)
Operational separation	1	*Facebook* (Bundeskartellamt)
Cease and desist	4	*Google Search (Shopping)* (EC) *Google Search (Android)* (EC) *Google AdSense* (EC) *Amazon Marketplace* (EC)**
Code of conduct	1	*Facebook* (FTC)
Data access and usage	5	*Google/Fitbit* (EC)** *Google Sandbox* (CMA) *Investigation into Meta's use of advertising data* (Autorité de la concurrence) *Google AdTech* (Autorité de la concurrence) *Amazon Marketplace* (EC)**
Platform access/Interoperability	4	*Microsoft/LinkedIn* (EC) *Google AdTech* (Autorité de la concurrence) *Facebook/Kustomer* (EC) *Google/Fitbit* (EC)**
TOTAL	*16***	

Source: Authors' case analysis and calculations.

*Full case citations are provided in the summaries below.

**Two separate remedies were identified in relation to *Google/Fitbit* (EC), *Google AdTech* (Autorité de la concurrence) and *Amazon Marketplace* (EC).

Facebook (Germany)

In its decision dated 6 February 2019, a so-called "internal divestiture" remedy was imposed on Facebook by the Bundeskartellamt.[6] In summary, the Bundeskartellamt found that Facebook's terms of use meant that use of the social network was only possible on the precondition that Facebook could collect user data not only on the Facebook website itself ("on-Facebook"), but also on Facebook-owned services such as WhatsApp or Instagram, as well as on third-party websites ("off-Facebook"). In its Decision, the Bundeskartellamt prohibited Facebook from combining user data from different sources and ordered that voluntary consent of the user would be required to: (i) assign data collected from Facebook-owned services to the individual's user account; and (ii) collect and assign data from third-party websites.

The proposed remedy in the *Facebook* case has been described as not exactly structural, but one which goes in a structural direction with the intention of breaking up market power without physically breaking up the corporation. The President of the Bundeskartellamt, Andreas Mundt, stated:

> "we are carrying out what can be seen as an internal divestiture of Facebook's data. In future, Facebook will no longer be allowed to force its users to agree to the practically unrestricted collection and assigning of non-Facebook data to their Facebook user accounts. The combination of data sources substantially contributed to the fact that Facebook was able to build a unique database for each individual user and thus to gain market power. In future, consumers can prevent Facebook from unrestrictedly collecting and using their data. The previous practice of combining all data in a Facebook user account, practically without any restriction, will now be subject to the voluntary consent given by the users. Voluntary consent means that the use of Facebook's services must not be subject to the users' consent to their data being collected and combined in this way. If users do not consent, Facebook may not exclude them from its services and must refrain from collecting and merging data from different sources."[7]

Although the decision required Facebook to remedy these findings within a period of 12 months, Facebook sought interim relief as well as an interim suspension against the same, which was granted by the Düsseldorf Court of Appeals and will remain in place until the main proceedings have been concluded.[8]

Facebook/Giphy (UK)

A very recent example of the imposition of ownership separation is the CMA's recent decision in *Facebook/Giphy*. In the CMA's Remedies Notice, the CMA noted that it will generally prefer structural remedies over behavioural remedies for three main reasons:[9]

- structural remedies are likely to deal with anti-competitive effects at source by restoring rivalry that would be lost as a result of the merger;

[6] Bundeskartellamt, "Bundeskartellamt prohibits Facebook from combining user data from different sources" (7 February 2019), available at: *https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2019/07_02_2019_Facebook.html*.
[7] Bundeskartellamt, "Bundeskartellamt prohibits Facebook from combining user data from different sources", (7 February 2019), available at: *https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html*.
[8] In this context, the Court of Justice of the European Union is currently considering questions referred to it by the Düsseldorf Higher Regional Court about the relationship between competition and data protection authorities, and how to interpret users' consent for data processing under the GDPR: *Meta Platforms Inc v Bundeskartellamt* (C-252/21) EU:C:2022:704.
[9] CMA Possible Remedies Notice regarding the Completed Acquisition of Giphy, Inc. by Facebook, Inc. of 12 August 2021, para.10.

- behavioural remedies may not have an effective impact and may create significant costly distortions in market outcomes; and
- structural remedies do not normally require ongoing monitoring and enforcement once implemented.

Against this background, the CMA concluded that the sale of Giphy was the only effective remedy, and while:

> "Divestiture of the acquired business is not an uncommon outcome when the CMA finds an SLC, divestiture of the GIPHY business poses particular challenges arising as a consequence of the completion of the Merger, and Facebook's related actions, namely the termination of GIPHY's revenue function and team, the transfer of almost all GIPHY staff on to Facebook employment contracts and the transfer of GIPHY's back-office functions to Facebook".[10]

In order to overcome these challenges, the CMA decided that Facebook should be required to reinstate certain of Giphy's activities and assets and to ensure that Giphy has the necessary management, technical and creative personnel to enable it to compete effectively throughout and following the divestiture, and more generally to restore Giphy's ability to generate revenue. This marked the first time that the CMA had ordered the reversal of a completed acquisition by a large digital platform. The CMA's reasoning was essentially upheld on appeal by the Competition Appeal Tribunal (CAT).[11] The CAT found, with respect to the determination of the appropriate remedy, that ss.35 and 41 of the Enterprise Act 2002 confer a broad and wide discretion on the CMA in crafting remedies in relation to completed mergers and that the remedies ordered by the CMA were not irrational and were well within its remedial powers.[12]

Facebook (US)

In 2019, Facebook was penalised by the US Federal Trade Commission (FTC) with a record-breaking $5 billion penalty and had to submit to new restrictions and a modified corporate structure that will hold the company accountable for the decisions it makes about its users' privacy.[13] The FTC charged the company with a violation of a 2012 FTC order by deceiving users about their ability to control the privacy of their personal information. In 2014, when clearing the acquisition of the mobile messaging service WhatsApp without formal remedies the FTC had warned the merging parties in a letter that they must not backtrack on commitments to user privacy and pointed out that failure to honour these promises could lead to further action by the FTC. The $5 billion fine is one of the largest penalties ever issued by the US government for any violation.

Google Search (Shopping) (EU)

In *Google Search (Shopping)*, the Commission found that Google had abused its dominant position in general internet search by favouring its own comparison shopping service (CSS) on its general results pages while demoting the results from competing CSSs, thus stifling competition in CSS markets and protecting its dominant position in general internet search. The Commission required Google "to bring the infringement established by this Decision effectively to an end and henceforth refrain from any measure that has the same or an equivalent object or effect", adding that "as there is more than one way in conformity with the Treaty of bringing that infringement effectively to an end, it is for Google and Alphabet to choose between those various ways" (i.e. this was a cease and desist remedy). Any such measure should, however, "ensure that Google treats competing shopping services no less favourably than its own comparison shopping service within its general results page".[14] This order was accompanied by a €2.42 billion fine against Google. The Commission's decision was appealed to the European General Court (General Court). On 10 November 2021, the General Court issued its judgment in the appeal, which dismissed almost in its entirety the action brought by Google and Alphabet against the Commission's decision.[15] The judgment recognised that self-preferencing can constitute an abuse of dominance on its own terms. Google is appealing the General Court's judgment to the Court of Justice of the European Union (CJEU).[16] As for the remedy itself, Google had implemented an auction-based mechanism that would give rival comparison shopping services access to shopping tab slots. Although complainants have requested the Commission to fix what they view as an ineffective remedy,[17] no non-compliance investigation has been launched by the Commission.

[10] CMA Final Report regarding the Completed Acquisition of Giphy, Inc. by Facebook, Inc. of 30 November 2021, para.62.
[11] *Meta Platforms, Inc v Competition and Markets Authority* 1429/4/12/21 [2022] CAT 26, Judgment published 14 June 2022.
[12] *Meta Platforms, Inc v Competition and Markets Authority* Judgment 1429/4/12/21 [2022] CAT 26 (14 June 2022), available at: *https://www.catribunal.org.uk/judgments/142941221-meta-platforms-inc-v-competition-and-markets-authority-judgment-14-jun-2022*. Although the CAT rejected Facebook's arguments on the substantive elements of the CMA's decision, it did uphold one procedural element of the appeal, resulting in the remittal of the case back to the CMA for reconsideration. The CMA published its final report on 18 October 2022; this repeated its findings and required full divestment of Giphy to an approved purchaser.
[13] In the Matter of Facebook, Inc., FTC Matter/File Number 092 3184 182 3109 C-4365, *https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook*.
[14] Commission Decision of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740—*Google Search (Shopping)*) C(2017) 4444 final at [697]–[699].
[15] *Google and Alphabet v Commission* (T-612/17) EU:T:2021:763; [2022] 4 C.M.L.R. 6.
[16] *Google and Alphabet v Commission (Google Shopping)* (C-48/22) (ongoing).
[17] See the joint letter from 41 CSSs to Commissioner Vestager dated 28 November 2019, available at: *https://www.shopalike.nl/downloads/Joint_Letter_of_41_CSSs_to_Ms_Vestager_on_Google_Shopping-Non-Compliance_28.11.2019.pdf* (shopalike.nl); "Open letter to Vestager: Google remedies fail to comply with decision", FairSearch (28 February 2018), available at: *https://fairsearch.org/open-letter-to-vestager-google-remedies-fail-to-comply-with-decision/*; and Kelkoo Group Policy, 10 November 2021, available at: *https://twitter.com/KelkooPolicy/status/1458376233713086464*.

Google Search (Android) (EU)

In *Google Search (Android)*, the Commission found that Google had abused its dominant position by tying its Google Search app and its Chrome browser to the Play Store.[18] The Commission Decision imposed a €4.34 billion fine[19] and required Google to bring its illegal conduct "effectively to an end, if they have not already done so, and to refrain from adopting any practice or measure having an equivalent object or effect".[20] It was therefore open to Google to implement a mechanism to comply with the remedy. Google introduced a so-called "Choice Screen" requiring Android users to choose a default search provider. After nearly three years of discussions with the Commission relating to claims that Google had failed to comply with the Commission's decision, Google announced in June 2021 major changes for September 2021 to its Choice Screen to prevent potential non-compliance proceedings, which involved: (i) making participation free for eligible search providers; and (ii) increasing the number of search providers shown on the screen.[21] Google's attempt to overturn the Commission's decision largely failed, as the General Court dismissed most of the appeal. The General Court annulled part of the decision relating to revenue share agreements and marginally reduced the fine to €4.125 billion.[22]

Google AdSense (EU)

In *Google AdSense*, the Commission found that Google had abused its dominant position in online search advertising intermediation by shielding itself from competitive pressure and imposing anti-competitive contractual restrictions on third-party websites.[23] In this case, Google had already ceased the alleged infringements a few months before the Commission decision was issued. The Commission still, however, ordered that "to, [sic] the extent that the Infringement is ongoing, Google and Alphabet should be required to bring it immediately to an end and refrain from any measure having an equivalent object or effect".[24] The order was also accompanied by a fine of €1.49 billion, which Google is now appealing at the General Court.[25]

Microsoft/LinkedIn (EU)

In *Microsoft/LinkedIn*,[26] in order to address competition concerns relating to professional social network services brought about by Microsoft's acquisition of LinkedIn, the Commission accepted commitments: (i) ensuring that Personal Computer (PC) manufacturers/distributors were free not to install LinkedIn on Windows and allowing users to remove LinkedIn should manufacturers/distributors decide to preinstall it; (ii) allowing competing professional network service providers to maintain interoperability with Microsoft Office; and (iii) granting competing professional network service providers access to Microsoft Graph.[27]

Google/Fitbit (EU)

In *Google/Fitbit*,[28] clearance of the transaction was conditional on the following commitments for a period of 10 years: (i) a commitment not to use Fitbit's health and fitness data for advertising purposes—the first data silo accepted by the Commission; to enable third-party access to Fitbit's Web API.[29] This is a forward-looking access commitment and is not just designed to preserve existing supply relationships; and (ii) a commitment to make available to wrist-worn wearable Original Equipment Manufacturers (OEMs) a set of Application Programming Interfaces (APIs) that relate to "current core functionalities that wrist-worn devices need to interoperate with an Android smartphone" and all Android APIs that Google will make available to other Android smartphone app developers.

Google AdTech (France)

In the Autorité de la concurrence's decision regarding practices implemented in the online advertising sector,[30] the French competition authority found that Google's proprietary technologies under the Google Ad Manager brand granted preferential treatment to each other (the Doubleclick for Publishers ad server and the AdX Supply-Side Platform (SSP), respectively), therefore amounting to an abuse of a dominant position in each market. In addition to a fine, Google committed to the following: (i) interoperability: making technical changes

[18] Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099—*Google Android*) C(2018) 4761 final at [697]–[699].
[19] Commission Decision of 18 July 2018 in Case AT.40099 *Google (Android)* at [1480].
[20] Commission Decision of 18 July 2018 in Case AT.40099 *Google (Android)* at [1393].
[21] O. Bethel, "Changes to the Android Choice Screen in Europe", *The Keyword, Google* (8 June 2021), available at: *https://blog.google/around-the-globe/google-europe/changes-android-choice-screen-europe/*.
[22] Court of Justice of the European Union, Press Release No.147/22, "Judgment of the General Court in Case T-604/18 *Google and Alphabet v Commission (Google Android)*", 14 September 2022.
[23] Commission Decision of 20 March 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40411—*Google Search (AdSense)*) C(2019) 2173 final.
[24] Commission Decision of 20 March 2019 in Case AT.40411 *Google AdSense* at [658].
[25] Alphabet Inc. (25 October 2022), Form 10-Q, available at: *https://www.sec.gov/Archives/edgar/data/1652044/000165204422000090/goog-20220930.htm*, p.27.
[26] Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/20041 and Article 57 of the Agreement on the European Economic Area (M.8124—*Microsoft/LinkedIn*) C(2016) 8404 final.
[27] Commission Decision of 6 December 2016 in Case M.8124 *Microsoft/LinkedIn* at [434]–[437]. Mazars was appointed as Monitoring Trustee in this case to oversee compliance with the commitments for a period of five years.
[28] Commission Decision of 17 December 2020 declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.9660—*Google/Fitbit*) C(2020) 9105 final.
[29] Commission Decision of 17 December 2020 in Case M.9660 *Google/Fitbit* at [944]–[957].
[30] Autorité de la concurrrence Decision of 7 June 2021 in Case 21-D-11 regarding practices implemented in the online advertising sector.

so that in the future, SSPs integrated in header bidding will have access to information on the outcome of the auction (e.g., the minimum bid to win); (ii) allowing publishers to set different price floors for ads deemed to belong to sensitive categories; (iii) committing not to use information on rivals' bids to adjust its own behaviour, subject to certain exceptions; (iv) providing a three-month notice to publishers prior to rolling out important product changes, subject to certain exceptions; and (v) public statements that the remedies offered will be rolled out globally. The commitments will remain in force for period of three years and require the appointment of a Monitoring Trustee.

Facebook/Kustomer (EU)

Although the CMA and the Australian Competition and Consumer Commission (ACCC) cleared the transaction unconditionally,[31] the Commission moved to Phase II in this investigation on 2 August 2021 due to concerns: (i) that Facebook may foreclose access to its business to consumer (B2C) messaging channels in the market for Customer Relationship Management (CRM) software; and (ii) about Facebook's increased data advantage in the market for online display advertising. On 27 January 2022, the Commission cleared the acquisition[32] conditioned upon binding commitments to guarantee non-discriminatory, free-of-charge access to APIs for its messaging channels and to also make available equivalent improvements to Kustomer's rivals and new entrants to those that are made to Messenger, Instagram messaging or WhatsApp.

Google/Sandbox (UK)

On 8 January 2021, the CMA launched an investigation under Chapter II of the Competition Act 1998 (CA98) into Google's proposals to remove third-party cookies and other functionalities from its Chrome browser on the basis of concerns that these proposals would potentially create unequal access to the functionality associated with user tracking, Google self-preferencing its own ad tech providers and owner and operated ad inventory, and the imposition of unfair terms of Chrome's web users. On 11 February 2022, the CMA closed its investigation after accepting commitments from Google which provide for transparency and consultation with third parties, provide for involvement of the CMA in the proposals themselves, provides for a standstill before the removal of third party cookies, places certain conditions on Google's use of data (e.g. a requirement not to use personal data or to track users to target or measure digital advertising) and provides for non-discrimination in the development and implementation of these proposals.[33] In terms of reporting and compliance, Google has committed to provide the CMA with quarterly reports and to appoint a monitoring trustee to monitor compliance with the commitments.

Investigation into Facebook's use of Data (France)

On 15 December 2021, the Autorité de la concurrence published commitments for consultation in relation to a complaint from Criteo, a French online advertising agency, which criticised the lack of clarity and objectivity in accessing Meta's advertising services.[34] As part of this complaint, Meta was alleged to favour its own advertising services on its platforms to the disadvantage of its competitors. Following an investigation by the French regulator focusing on the conditions of access to advertising inventories and to data concerning advertising on Facebook, Facebook's proposed commitments centre around providing transparent and objective access conditions to all advertising inventories and related ad data for its AdTech Facebook Marketing Partners (FMPs) and applying them in a non-discriminatory manner. In addition, Facebook proposed to provide compliance training to its sales teams and develop and make available a recommendation functionality to qualifying FMPs. In its decision on 16 June 2022, the French competition authority accepted final commitments. No fine was issued in conjunction with the commitments.[35]

Amazon Marketplace and Amazon Buy Box (EU)

On 17 July 2019, the Commission initiated antitrust proceedings investigating Amazon's use of competitively sensitive information concerning third-party sellers (as well as their products and transactions) on the marketplace. The Commission's preliminary findings showed that very large quantities of non-public seller data are available to employees of Amazon's retail business and flow directly into the automated systems of that business, which aggregate the data and use them to calibrate Amazon's retail offers and strategic business decisions to the detriment of other marketplace sellers.[36]

On 10 November 2020, the Commission initiated further antitrust proceedings in the *Amazon Buy Box* case, following concerns that Amazon's business practices might artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services. In particular, the Commission investigated the criteria that Amazon set to select the

[31] CMA Phase I Clearance Decision regarding the anticipated acquisition of Kustomer, Inc. by Facebook, Inc. on 27 September 2021. Australian Competition & Consumer Commission Decision regarding the anticipated acquisition of Kustomer, Inc. by Facebook, Inc. on 18 November 2021.
[32] Commission Decision of 27 January 2022 declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.10262—*Meta (Formerly Facebook)/Kustomer*) C(2022) 409 final.
[33] CMA Decision to accept commitments regarding the investigation into Google's "Privacy Sandbox" browser changes on 11 February 2022.
[34] Autorité de la concurrence, "Google proposes commitments as part of the investigation into the merits of the related rights case. The Autorité submits them for public consultation" (15 December 2021), available at: *https://www.autoritedelaconcurrence.fr/en/article/related-rights-google-proposes-commitments*.
[35] Autorité de la concurrence Decision of 16 June 2022 in Case 22-D-12 *regarding practices implemented in the online advertising sector*.
[36] Preliminary findings of the Commission in Case AT.40462 *Amazon Marketplace*.

winner of the "Buy Box" and to enable sellers to offer products to Prime users under Amazon's Prime loyalty programme. Based on these preliminary findings, the Commission issued a Statement of Objections on 10 November 2021. On 20 December 2022, the Commission made commitments offered by Amazon legally binding. The Commission concluded that the commitments will ensure that Amazon does not use marketplace seller data for its own retail operations and will grant non-discriminatory access to Buy Box and Prime.[37]

Finally, we also review three key *ongoing cases* where remedies have not yet been imposed/accepted but which are sufficiently developed at the time of writing to identify theories of harm and, in some cases, the remedy most likely to be adopted.

Apple App Store Practices (EU)—ongoing

On 16 June 2020, the Commission initiated antitrust proceedings in relation to Apple App Store Practices (music streaming),[38] in response to a complaint from Spotify about two rules in Apple's licence agreements with developers and the associated App Store Review Guidelines, as well as their impact on competition for music streaming services. The first rule relates to the mandatory use of Apple's own proprietary in-app purchase system for the distribution of paid digital content, for which Apple charges app developers a 30% commission known as "Apple tax". The second rule relates to restrictions on the ability of developers to inform users of alternative purchasing possibilities outside of apps, which are usually cheaper. On 30 April 2021, the Commission issued Apple with a Statement of Objections explaining the Commission's preliminary findings that Apple has a dominant position in the market for the distribution of music streaming apps through its App Store, which is the sole gateway to consumers using Apple's smart mobile devices running on the Apple operating system iOS, and that Apple's rules distort competition in the market by raising the costs of competing music streaming app developers, which leads to higher prices for consumers.[39]

Also on 16 June 2020, the Commission initiated a separate, although very similar, investigation under art.102 Treaty on the Functioning of the European Union (TFEU), into Apple's App Store Practices regarding e-books and audiobooks.[40] The complaint raised in this case relates to similar concerns to those under investigation in the music streaming case, but with regard to the distribution of e-books and audiobooks.

The Commission initiated a further, third investigation on 16 June 2020 under art.102 TFEU into Apple App Store Practices, which in principle concerns all other apps that are directly competing with apps or services offered by Apple (although it is understood the Commission is particularly looking at the markets for cloud services and video games).[41]

Investigation into Facebook's use of data (UK)—ongoing

On 3 June 2021, the CMA announced it had initiated an investigation into Facebook's use of data.[42] The investigation concerns Facebook's conduct in relation to the collection and/or use of data in the context of providing online advertising services and its single sign-on function, and whether this results in a competitive advantage over downstream competitors. Following its initial investigation, in July 2022 the CMA decided to investigate further. The CMA is currently still gathering information for analysis and review.

Google AdTech and Data-related practices (EU)—ongoing

On 22 June 2021, the Commission initiated formal antitrust proceedings against Google. The Commission is assessing in particular whether Google is self-preferencing its own technology, and distorting competition by restricting access by third parties to user data for advertising purposes.[43]

3. Policy and legislative developments

We have explored above the ramping up of competition law cases in digital markets. This has been accompanied by a building consensus amongst policymakers around the world that ex post general competition rules are insufficient to tackle structural competition problems associated with the largest online platforms and the market failures that result from the behaviour of so-called "digital gatekeepers".

A paradigm shift to ex ante regulation of the largest digital platforms is widely contemplated, with some jurisdictions much further along that journey than others. Below we focus, in particular, on developments in the

[37] Commission press release of 20 December 2022 concerning Cases AT.40462 *Amazon Marketplace* and AT.40703 *Amazon - Buy Box*.
[38] Case AT.40437 *Apple App Store Practices (music streaming)*.
[39] Preliminary findings of the Commission in Case AT.40437 *Apple App Store Practices (music streaming)*.
[40] Case AT.40652 *Apple App Store Practices (e-books and audiobooks)*.
[41] Case AT.40716 *Apple App Store Practices*.
[42] CMA's decision to investigate the transaction in its *Investigation into Meta (formerly Facebook)'s use of data*, opened on 2 June 2021.
[43] Case AT.40670 *Google: Adtech and Data-related practices*.

EU and the UK—the former having already enacted legislation, while the latter has yet to publish draft legislation.[44]

EU: the Digital Markets Act

The EU's DMA[45] is arguably the most significant of a wave of new regulatory regimes at various stages of development. It heralds a new era in the regulation of digital markets in the EU. Having been adopted by the European Parliament and the Council on 14 September 2022, the DMA was published in the EU's Official Journal on 12 October 2022 and entered into force on 1 November 2022. Its journey from European Commission proposal to a final instrument was impressively speedy, at less than 18 months. The DMA will become applicable on 2 May 2023, and the companies caught by its scope will likely need to comply with its rules by early 2024.

The DMA seeks to regulate only a small number of the largest digital platforms which are considered to possess "considerable economic power" because they have "an ability to connect many business users with many end users through their services".[46] The DMA places obligations only on firms which provide at least one core platform service (CPS) and which meet the criteria to be designated as a "gatekeeper".

The DMA provides an exhaustive list of 10 CPSs, which includes online intermediation services, search engines, advertising services, social networking services, video-sharing platform services and cloud computing services. A firm operating a CPS will be a "gatekeeper" if three cumulative criteria are satisfied: (i) the firm has the ability to have a significant impact on the EU internal market; (ii) the CPS acts as an important gateway for business users to reach end users and (iii) the CPS has an entrenched and durable market position. These criteria are presumed to be met if quantitative thresholds, which focus on the company's turnover and number of EU end and business users of the CPS, are exceeded. If these quantitative thresholds are met, the company will be designated as a gatekeeper by the Commission and will be required to comply with the DMA.[47]

The DMA sets out positive and negative obligations, in arts 5, 6 and 7, that apply generally to gatekeepers operating a CPS. These rules are directly applicable and self-executing: gatekeepers must ensure and demonstrate compliance with the obligations. The rules cover a broad range of practices and issues, only some of which will be relevant for any particular CPS; these include self-preferencing, use of data, steering practices, most favoured nation provisions, interoperability, access on non-discriminatory terms, transparency and app distribution. The rules in arts 6 and 7 (which cover inter alia self-preferencing, interoperability, and certain data-related practices) are "susceptible to specification" under art.8, meaning that the Commission may, either on its own initiative or at the request of a gatekeeper, specify the measures which the gatekeeper must implement in order to effectively comply with the obligations, i.e. providing for them to be further tailored to the specific activities of the gatekeeper in question.

In Table 2 below, we have summarised the conduct obligations for gatekeepers in arts 5, 6 and 7 of the DMA, and for each have categorised the "remedy" to which these might be said to equate into one of several broad types, many of which were identified when analysing key Big Tech cases above.[48] From this it can be seen that, in the remedies listed, "cease and desist" remedies figure prominently, as do access and interoperability remedies, with data-related remedies and obligations to provide information to advertisers and publishers making up the other categories.

Table 2: Conduct obligations in the DMA, categorised by remedy type

Article	Conduct obligations	Remedy type
5(2)(a), (b) and(c)	No commingling or cross-use of personal data without consent	Cease and desist
5(2)(d)	No tying (for data commingling)	Cease and desist
5(3)	No wide MFN clauses	Cease and desist
5(4)	Allow commercial activities of business users on CPS	Platform access
5(5)	Undistorted platform access for end-users using third party services	Platform access
5(6)	No litigation restrictions	Cease and desist
5(7)	No tying of payment services	Cease and desist
5(8)	No tying of other CPS	Cease and desist
5(9)	Information provision to advertisers	Provision of information

[44] It should be noted that many other jurisdictions are at various stages of tackling the thorny issue of how digital markets are most effectively regulated (e.g: Germany, US, Australia, China).
[45] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (DMA) [2022] OJ L265/1, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG*.
[46] DMA Recital 3.
[47] A company meeting the quantitative thresholds must notify the Commission, which will then designate. The Commission is also empowered to designate on becoming aware of relevant information if a firm fails to notify that the quantitative thresholds are met.
[48] See Table 1 above.

Article	Conduct obligations	Remedy type
5(10)	Information provision to publishers	Provision of information
6(2)	No business data commingling	Cease and desist
6(3)	Support uninstallation of gatekeeper software applications	Choice
6(4)	Support installation and interoperability of third-party apps	Interoperability
6(5)	No self-preferencing; non-discriminatory treatment	Cease and desist, Platform access
6(6)	No switching restrictions	Cease and desist
6(7)	Interoperability of operating systems	Interoperability
6(8)	Provision of KPI tools and data to advertisers and publishers	Provision of information
6(9)	Free data portability	Data portability
6(10)	Real time access to data	Data access, Interoperability
6(11)	Non-discriminatory access to search data	Data access
6(12)	Non-discriminatory access to online services (business users)	Platform access
6(13)	No disproportionate termination	Cease and desist
7	Interoperability of number-independent interpersonal communications services	Interoperability

Source: Authors' analysis of Regulation (EU) 2022/1925.

It is important to appreciate that the DMA departs fundamentally from a classical competition policy approach. It extends the set of objectives (to include fairness and contestability) and reverses the burden of intervention. The novel approach involves the definition up front of required and prohibited behaviours, rather than the ex post analysis of a firm's behaviour and its anti-competitive effect. In particular, the DMA bans certain behaviours without the need for the Commission to prove that such conduct in respect of a particular gatekeeper's CPS would harm competition. A further novelty is that the onus will be on the gatekeepers to report to the Commission regarding their compliance and to propose the equivalent of remedies where appropriate (under art.8).

Notwithstanding this fundamental difference in approach, many of the DMA's rules and the behaviours on which it focuses can be mapped back to issues and remedies found in Commission antitrust cases involving digital markets over a considerable period, many of which are to be found in the case review above. Interestingly, these include some cases which are ongoing and where the relevant issues have therefore not yet been resolved; further, many of the theories of harm in even the decided cases have yet to be approved by the courts. For example:

- the prohibition on gatekeepers' use of business users' data that is not publicly available in order to compete with them, at art.6(2), echoes the Commission's *Amazon Marketplace* case;
- the prohibition on a gatekeeper ranking its own services and products more favourably than similar services or products of a third party, at art.6(5), appears to be inspired by *Google Search (Shopping)*;
- the obligation to provide interoperability with operating systems or virtual assistants, at art.6(7), recalls the ongoing case on Apple's refusal to give competitors access to its technology for contactless mobile payments;
- the obligation on gatekeepers to allow business users to communicate offers available through other channels, at art.5(4), links to the *Apple App Store Practices* case, as does the obligation to allow end users to access content purchased without using the CPS, at art.5(5);
- the obligation to allow end users to uninstall any software apps on the gatekeeper's operating system and to set third party apps as their default, at art.6(3), echoes *Google Android*; and
- several data usage-related obligations recall requirements in the commitments accepted from Google in *Google/Fitbit*.

The DMA could therefore be said to codify aspects of EU competition law practice and policy. But, as highlighted above, it goes much further by applying all obligations to all gatekeepers, regardless of their business model or market position, and regardless of the specific facts of the competition cases in relation to which equivalent obligations have been imposed or contemplated. In line with the overall concept of the DMA, the scope for firms to be exempted from designation as a gatekeeper or from specific obligations appears to be extremely limited (notably, in respect of designation, they do not include economic arguments concerning market definition or efficiencies).

The penalties for non-compliance with the DMA's rules are severe: the Commission can impose fines of up to 10% of a gatekeeper's annual global turnover. In the case of multiple infringements, the Commission has the

power to impose behavioural and structural remedies, which may include a prohibition on the gatekeeper entering into any concentration regarding the relevant CPSs for a specified period.

Intended to complement the enforcement of competition law, the DMA applies without prejudice to the application of arts 101 and 102 TFEU, the corresponding national competition laws rules of Member States and EU and national merger control regimes.[49] As a result, conduct that infringes both the DMA and competition law will be subject to parallel actions and national competition authorities, and courts remain competent to address conduct that infringes the DMA under national or under EU competition law.[50]

UK—a proposed "pro-competition regime" for digital markets

Despite having been an early front-runner in the development of a new approach to regulation of the digital economy,[51] by 2022 the UK lagged significantly behind the EU. Earlier in 2022 there was speculation that the UK Government might have mothballed its plans for a new "pro-competition" regime for digital markets: the Government's response to the latest iteration of proposals for this new regime, its July 2021 consultation,[52] was not published until 6 May 2022.[53] This included a statement that government would bring forward legislation to implement the relevant reforms "when parliamentary time allows".[54] In the event, the Queen's speech on 10 May 2022, setting out the government's legislative agenda for the coming year, made reference to a "Draft Digital Markets, Competition and Consumer Bill" which is expected to implement the plans set out by the government in its consultation response (discussed below). The timing for the adoption of the new rules remained unclear, however—in November 2022 the government announced in its Autumn Statement that the government will bring in the new legislation early in 2023.

Like the DMA, the proposed new regime for the UK is intended to impose ex ante obligations on the most powerful digital firms to tackle the harmful effects and sources of substantial and entrenched market power. There are material differences in their approach, however, as we highlight below.

The new pro-competition regime will be implemented and enforced by the CMA's Digital Markets Unit (DMU), which was launched in in April 2021 and is currently working in shadow form.

Despite significant discussion in earlier documents,[55] much in the government's proposals for the new regime is still expressed in broad terms. Details will apparently be fleshed out in draft legislation (and the government has noted that it is still considering how best to implement a number of the proposals) but we set out here the current "knowns".

The scope of the UK regime will be limited to "digital activities". These have not yet been defined: the consultation response states that the government is considering how to do this in a way which is clear and easy to apply.

The regime will apply to a small number of firms designated with strategic market status (SMS) by the DMU. The criteria that will be used to assess whether a firm should be designated will be exhaustive and set out in legislation. The government has stated that SMS designation will be evidence-driven, and that the regime will designate only firms found to have substantial and entrenched market power in at least one digital activity, providing them with a strategic position. No further details are provided by the government in its response. A UK nexus will ensure a focus on competition in the UK. In addition, the government intends to adopt a minimum revenue threshold in legislation to make it clear which firms are out of scope of designation, but has not yet determined what an appropriate minimum threshold would be. The government envisages that the criteria will be updated periodically in response to fast-moving digital markets. The need for economic assessment by the DMU contrasts with the designation approach based purely on quantitative criteria found in the DMA, which facilitates firms' self-assessment.

The DMU will have discretion to decide how to prioritise which cases to take forward in line with its statutory objectives and duties, although it will be required to publish guidance on the way it will prioritise its assessments to provide clarity to stakeholders. The

[49] DMA Recitals 10 and 11.
[50] The DMA states (at art.11) that the DMA: "pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual potential or presumed effects of the conduct of a given gatekeeper… on competition on a given market".
[51] In the context of global calls for regulation of the digital economy, the UK government commissioned a report from an expert panel led by former White House economic adviser, Jason Furman, on reforms to competition rules and regulation in the digital sector. This influential report (the "Furman Report"), published in March 2019 (J. Furman et al., *Unlocking Digital Competition, Report of the Digital Competition Expert Panel*, HM Treasury (2019)), made recommendations for a radical overhaul of the UK competition rules in the digital sector. In July 2019, the CMA published its first Digital Markets Strategy and launched a market study into online platforms and digital advertising; the latter culminated in a report, published in July 2020 ("Online platforms and digital advertising: Market study final report", 1 July 2020), which made significant recommendations on the future regulation of platforms funded by digital advertising, with the CMA calling for new UK legislation to provide for additional regulatory controls of online platforms. The UK government responded to the study in November 2020 and announced that it would set up the DMU to govern the conduct of the most powerful digital firms (Department for Business, Energy & Industrial Strategy (BEIS)/Department for Digital, Culture, Media & Sport (DCMS), "Response to the CMA's market study into online platforms and digital advertising").
[52] DCMS/BEIS, "A new pro-competition regime for digital markets" (July 2021), available at: *https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets*.
[53] DCMS/BEIS, "Government response to the consultation on a new pro-competition regime for digital markets" (May 2022), available at: *https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation*.
[54] DCMS/BEIS, "Government response to the consultation on a new pro-competition regime for digital markets" (May 2022), para.16.
[55] For a brief history of the UK proposals, see fn.55.

timeline for an SMS designation assessment will be nine months, extendable by three months in exceptional circumstances.

Firms designated with SMS will be subject to binding conduct requirements (codes of conduct) in relation to the digital activities for which they are designated, setting how they are expected to behave so as to proactively shape their behaviour. The legislation will set out high-level objectives relating to "fair trading", "open choices" and "trust and transparency"; these will clarify the types of behaviours that conduct requirements will seek to address.[56] Categories of potential conduct requirements will also be set out in legislation. The following examples of such categories were provided by the government in its response to the consultation:

- requiring SMS firms not to apply discriminatory terms, conditions or policies to certain users or categories of users, compared to equivalent transactions;
- preventing bundling or tying the provision of its other products or services by making access to them conditional on the use of the relevant designated activity;
- providing clear, relevant, accurate and accessible information to users;
- preventing a firm using its position in its designated activity to further entrench that position or leverage its market power to the long-term detriment of its users; and
- a cross-cutting category of conduct requirements which prevents anti-competitive leveraging into a designated activity.

There will be an exemption to ensure that conduct which provides net benefits to consumers will not breach conduct requirements. SMS firms will be able to put forward evidence that particular conduct is indispensable to achieving such benefits and that the benefits outweigh the potential harm. The scope for exemptions from conduct requirements therefore appears likely to be significantly broader under the UK regime than under the DMA.

It will fall to the DMU to develop specific requirements within these categories for each firm with SMS where appropriate, such that codes of conduct will be tailored to the exact circumstances of that particular firm. It is expected that the DMU will issue the codes of conduct alongside its SMS designation decision. Thus the UK regime will not be self-executing in the same way as the DMA, and can be expected to be less prescriptive and potentially more flexible than the EU regime. While, as discussed above, there is scope for further "specification" (or some tailoring) of a sub-set of the DMA's obligations with a view to effectiveness and proportionality, the UK regime's codes of conduct can be expected to be significantly more bespoke and targeted.

In addition to the codes of conduct, which the government has characterised as aimed at managing the effects of market power by setting out the rules of the game in advance, it is intended that the DMU will have the power to implement pro-competitive interventions (PCIs) which can tackle the root causes of substantial and entrenched market power. PCIs will be imposed only where an adverse effect on competition (AEC) can be demonstrated, echoing the UK's existing market investigations regime. The remedies available to the DMU via the PCI process will not be limited to a constrained list of specific remedies set out in legislation. Instead, the DMU will have broad discretion over which remedies to implement, such as the ability to enforce interoperability between platforms or services. Safeguards will prevent the imposition of PCIs which would harm consumers (for example, the DMU will need to take into account any countervailing benefits when considering whether an AEC exists, and to consider the impact of any proposed remedies on benefits enjoyed by consumers). Significantly, the DMU will be able to implement ownership separation remedies, although only in circumstances where it is appropriate and other remedies are insufficient (it will be recalled that a pre-condition to structural remedies of this nature was dropped from the DMA proposals).

The DMU will be able to implement a PCI anywhere within a SMS firm, provided that it relates to a competition concern in a designated activity. The government believes this is needed to ensure the DMU is able to address any anti-competitive leveraging of a firm's market power across its ecosystem. The DMU will, however, need to demonstrate the direct relationship between any intervention and the relevant competition concern.

Whereas the DMA's self-enforcing provisions include measures requiring gatekeepers to enable interoperability with their CPS, it appears that UK codes of conduct could not be used by the DMU to require significant new interoperability—that would require the DMU to go through the process to implement a PCI.[57]

The DMU's powers to impose penalties on SMS firms failing to comply with conduct requirements or PCIs will be in line with the CMA's existing powers under the Competition Act 1998: firms could face not only enforcement orders but also significant financial penalties.

The consultation document included proposals to introduce a bespoke merger control regime for SMS firms. These have been diluted considerably, however. Instead, there will be a narrower reporting mechanism, requiring SMS firms to inform the CMA prior to completion of the

[56] The government provided further detail on these objectives in the July 2021 consultation, at para.83.

[57] See the government's May 2022 response, which states: "For example, as currently envisaged the code would allow corrective action against an SMS firm which suddenly restricts a third party's access to key data, but could not be used to proactively require significant new interoperability to be introduced. Equally, the code could require that an SMS firm does not unduly self-preference its own services, but a PCI would be required if a functional separation remedy was considered necessary to remove the underlying incentive for such preferencing".

most significant transactions. The CMA will then undertake an initial review of the merger to consider whether it would warrant further investigation before it can be completed. In addition, the government proposes to introduce a jurisdictional threshold under the general UK merger control regime, focused on the acquirer, which is in large part aimed capturing so-called "killer acquisitions" which often involve digital markets.

Like the DMA, when introduced, the UK's new regime will exist alongside existing competition rules and merger control regime.

Observations on trends in legislative and policy developments relating to Big Tech

As shown in the summaries above, the adopted EU legislation and the UK's plans for a pro-competition regime have in common that they lay out in advance specific behavioural rules that will apply to the largest digital firms, albeit that the two regimes differ in approach: the EU has adopted a blanket approach to the obligations that will apply to firms automatically within scope of the rules, including them up front in legislation such that they are self-executing; under the UK regime, on the other hand, it is expected that there will be additional steps before rules become binding on firms, delivering more tailored codes of conduct.

These regimes are illustrative of a wider trend towards the adoption of a more prescriptive, interventionist approach, involving ex ante, granular rules governing the conduct of the most powerful players in digital markets which seems bound to continue.[58]

It would be overly simplistic, however, to expect that different jurisdictions will in the future always take similar approaches to equivalent issues affecting (or with the potential to affect) competition in digital markets, whether applying ex ante regimes or through ex post enforcement of general competition law. We have already seen indications of a divergence in the approaches of the EU and the UK to such issues; for example, in a speech delivered in February 2021, the CMA's then CEO made clear that the CMA would likely have rejected the behavioural remedies that were accepted by the Commission in *Google/Fitbit* and would instead have prohibited the transaction,[59] as the ACCC did.[60] On the other hand, the scope for divergence from approaches already taken under other digital regulatory regimes (particularly those with considerable reach) will be limited by the implications of such divergence for the firms involved: for example, while the UK is now outside the EU and sets its own rules, as reported by Kate Beioley of the *Financial Times*, the CMA's CEO observed in June 2022 that the UK risked in practice becoming a rule taker because of the cost of divergence.[61]

With the DMA widely viewed as a blueprint for regulation in other jurisdictions, the way in which the Commission addresses key digital issues can be expected to influence to a significant degree the approach adopted beyond the EU's territory.

The new regimes will, by definition, increase regulatory intervention in digital markets. What remains to be seen, however, is whether, with these new regulatory tools, we will see a change in the nature of remedies that regulators impose on Big Tech in the form of greater use of structural remedies, which have been rare to date, particularly in connection with the enforcement of competition law.

Should we expect increased use of structural remedies?

As touched upon above, the regulator's arsenal under both the DMA and the UK's proposed pro-competition regime includes structural remedies. It is not clear, however, whether we will witness a sea-change in the use of structural remedies—and, most significantly, the use of ownership separation remedies resulting in break-ups of Big Tech giants which many have argued for some time are the only effective means of addressing certain competition problems that stem from gatekeeper status.

Considering first the DMA: we have already noted that the Commission has the power, in the case of a gatekeeper's "systematic non-compliance" with the DMA rules of conduct, to go beyond a "cease and desist" remedy and to impose behavioural or structural remedies (art.18). Such remedies could include divestments. On further examination, it might be argued that this power is significantly constrained: first, in order to be deemed a recidivist of the type that brings this power into play, a market investigation must establish that the gatekeeper must have failed to comply with the obligations in arts 5, 6 and 7 at least three times in the previous eight years; second, the Commission's market investigation must show that the gatekeeper has maintained, strengthened or extended its gatekeeper position; third, any structural remedy must be proportionate and necessary to ensure effective compliance with the rules. On the other hand, the hurdle of "systematic non-compliance" is not as high as it might at first appear, given that breaches can take place in parallel and can involve a single product. Thus, a break-up order could be issued within a matter of months from a first failure to comply. It is noteworthy,

[58] See, for example, OECD, "Ex Ante Regulation of Digital Markets", OECD Competition Committee Discussion Paper (2021), available at: *https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf*. A number of jurisdictions have enacted or proposed ex ante regulations specifically aimed at digital platforms or some aspects of digital markets, including Australia, the EU, France, Germany, Italy, Japan, the UK and the US. Several other jurisdictions have also enacted new rules for digital markets, for instance Korea and Mexico.

[59] MLex, "Google-Fitbit's EU behavioral remedies would likely have failed in UK, CMA chief says" (9 February 2021).

[60] *Google/Fitbit* did not fall within the CMA's jurisdiction because the case was notified before 1 January 2021, in the period when mergers which fell within the EU's jurisdiction were not also examined under the UK regime. This is no longer the case due to the UK's exit from the EU.

[61] K. Beioley, "UK risks being a 'rule taker' on tech regulation, warns CMA chief", *Financial Times* (20 June 2022), available at: *https://www.ft.com/content/bfc7a3bf-9b16-40c7-9f56-ae16af4a13b8*.

too, that the threshold for a decision to impose a structural remedy is significantly lower than was the case at one stage of the DMA's evolution: a provision that the Commission could impose structural remedies only where either there was no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper did not survive. It might be argued, therefore, that the journey to break-up orders could be a short one. In addition, we need to be mindful of the fact that certain behavioural remedies have structural features such as data separation and ring-fencing measures.

The DMU's powers under the UK's proposed pro-competition regime are, as we have noted, also to include the power to implement ownership, as well as operational, separation through PCIs. As the then-CEO of the CMA characterised the situation, "break-ups … are in play if ex ante regulation does not deliver".[62] The DMU will have the same remedy design powers as are already available to the CMA following a market investigation under the Enterprise Act 2002. It will be able to implement separation remedies, but only where the DMU has established an "adverse effect on competition" (in line with the legal test in the existing market investigation regime) and, as already noted above, only in circumstances where it is appropriate and other remedies are insufficient. The government's proposal goes further than was recommended by the CMA's Digital Markets Taskforce, which recommended that the power to impose full ownership separation (including any divestment or transfer of assets or technology) should be reserved for the CMA following a market investigation reference, while submitting that operational separation remedies would be an important tool for the DMU. However, the government's decision to give the DMU powers to impose the full range of structural remedies does not represent a radical departure from current regulatory tools, and it appears that the DMU's use of these powers is likely to be more constrained than the Commission's use of its powers to impose structural remedies.

On balance, our view is that, while these two regimes both prepare the ground for more extreme and decisive interventions, we believe that we will not see significant moves to break up tech giants for some time to come. However, operational separation of businesses and certain competitive activities of dominant platform providers as well as data separation and ring-fencing measures that are of a more structural nature are likely to become a more important feature of remedies in the digital economy. The regulators can be expected to give their regimes' ex ante rules a good run at working (since they are, after all, meant to curb gatekeepers' problematic behaviour)—refining them where they are found wanting—before moving to what might still be seen as measures of last resort (and are explicitly expressed to be so, in the case of the planned UK regime).

4. Resource implications and institutional challenges

Regardless of the answers to the questions posed above, it is clear that these new regulatory regimes will demand significant resources. This is due not only to the complexity of the issues raised and the dynamic nature of digital markets, but also to the increased compliance and monitoring costs of ex ante regulation. If these new regimes are to be implemented successfully, governments and authorities must take care not to underestimate the scale of the challenges involved.

Although legislation for the UK's proposed "pro-competition" regime for digital markets has yet to appear even in draft, as noted above the DMU has already been launched in shadow form and is operational. The UK Government noted, in May 2021, that the CMA had received funding for approximately 55–60 staff members for the DMU for the full financial year, even before receiving the statutory powers that it expected to receive in the next one to two years.[63] By May 2022—still a considerable time before the regime can be expected to be operational—the DMU was roughly 70-strong.[64]

In his 2021 Beesley lecture, the then CEO of the CMA, Dr Andrea Coscelli, reflected on building in-house skills to address information asymmetries with the Big Tech firms and the need to promote competition in digital markets which requires a set of capabilities and technical knowledge that has not been historically common in competition authorities. He referred to ongoing cases such as the CMA's market studies into Apple and Google's mobile ecosystems, where the CMA deployed the full range of its data unit's capabilities working alongside lawyers, economists and markets experts to improve the speed and effectiveness of the investigations:

> "Our technology insight advisers have mapped the markets for mobile operating systems, browsers and app stores. Our behavioural scientists have identified the specific defaults and choice architecture features in the app stores and operating systems. Our engineers have used the data platform they built to ingest very large datasets from market participants, and our data scientists—working with our economists—are applying a range of analytical methods to interrogate these data. Understanding this market is a key part of our preparations for the digital regime."[65]

[62] A. Coscelli, "Beesley Lecture: A new route forward for regulating digital markets", *CMA* (28 October 2021), available at: *https://www.gov.uk/government/speeches/beesley-lecture-a-new-route-forward-for-regulating-digital-markets*.
[63] As noted above, legislation will now be introduced in 2023.
[64] CMA, "Digital markets and the new pro-competition regime" (10 May 2022), available at: *https://competitionandmarkets.blog.gov.uk/2022/05/10/digital-markets-and-the-new-pro-competition-regime/*.
[65] Coscelli, "Beesley Lecture: A new route forward for regulating digital markets", CMA (28 October 2021).

It is evident that the DMU resource required when the "pro-competition" regime for digital markets finally comes into effect will be significantly greater than now.

With respect to the DMA, the Commission's original proposal for the legislation envisaged that the size of the Commission team monitoring and enforcing the rules would increase to 80 officials over the next few years. However, in a letter dated February 2022, Andreas Schwab, Member of the European Parliament and the Parliament's rapporteur on the DMA, called for at least 220 staff members for the DMA task force,[66] although that has since been revised down, in budget discussions, to a headcount of 150. Reflecting the concerns of industry, Brad Smith, Microsoft's President, similarly argued in a speech in Brussels on 18 May 2022 that DG Comp would need more resources: "I think it's unusual in an industry that's regulated to suggest that an agency needs more staff, but I think an agency that has more staff will be able to serve better and in a more effective way".[67]

In a recent article discussing the resource implications of the DMA,[68] the authors estimate that the Commission already has 70 specialists to draw upon, the majority with a background in law, and a minority in areas such as data science, mathematics and informatics (less than 10%). When projecting expected staff requirements for the period 2021–2027 they ran four scenarios. Scenarios 1 to 3 are based on estimates of the Commission, the Internal Market Commissioner and the DMA rapporteur of the EU Parliament and range between 80 and 220 staff with a budget of €81 million to €223 million. In scenario 4 they base their projections on a budget equivalent of 0.04%, or two employees per gatekeeper (assuming 14 gatekeepers in total) amounting to a total of 605 staff and a budget of €613 million.

The DMA states that the Commission should be able to take the necessary actions to monitor the effective implementation of and compliance with the gatekeeper obligations, including the ability to appoint independent external experts, auditors, and competent independent authorities such as data or consumer protection authorities.[69] It seems likely that the Commission will indeed need to call on significant external resource in addition to support it in setting up and enforcing the new regime, and it can be expected that such third parties will have an important role to play in the new regime.

5. Conclusions

In this article we have reviewed recent case law and legislative developments regarding the choice of competition and merger remedies for Big Tech companies with a focus on the EU and the UK. We further discussed institutional changes and resource implications of the increase in ex ante regulation and antitrust law enforcement in the digital economy. Our review showed a close relationship between recent case law and legislative developments with a trend towards the adoption of a clearly-defined range of specific behavioural ex ante remedies even though the two jurisdictions have taken different approaches. We also discussed the scope for an increased use of structural remedies. While the groundwork for this shift has been laid, we believe that consideration of the break-up of Big Tech companies is likely to remain an exception. However, other more structural remedies short of full ownership separation will become more prominent. This would involve the operational separation of businesses and commercial activities of dominant platform in competition with platform-dependent third parties as well as data separation and ring-fencing measures. We also argue that the increased complexity of the subject matter and the dynamic nature of digital technology markets will require significant resources and compliance and monitoring costs. The pendulum has definitely swung, and the next few years will be very interesting, with remedies and compliance monitoring taking centre stage.

[66] See *https://twitter.com/SamuelStolton/status/1504128038270902280*.
[67] T. Gil and A. Boyce, "EU's gatekeeper law needs bigger enforcement team to be effective, Microsoft chief says", MLex (18 May 2022), available at: *https://content.mlex.com/#/content/1378866?referrer=search_linkclick*.
[68] C. Martins and C. Carugati, "Insights for successful enforcement of Europe's Digital Markets Act", *Bruegel* (11 May 2022), available at: *https://www.bruegel.org/blog-post/insights-successful-enforcement-europes-digital-markets-act*.
[69] Recital 85 and art.26(2).