

Convergence in approaches taken by both East & West to tackle Digital Platforms Anti-Competitive Practices

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ABSTRACT

This Article focuses on how East and West are taking steps to combat the dominance of major online platforms. The piece considers several major judicial and regulatory decisions from China, USA, and Europe in an effort to assess the level of success or failure enjoyed by antitrust regulators in recent investigations where they seek to attempt to maintain competition in digital marketplaces, by subjecting global digital platforms' terms of business and business practices to antitrust scrutiny. The outcomes are sometimes not as expected, and some antitrust decisions by regulatory bodies have been reversed by the courts from time to time.

KEY WORDS: Big Tech; Antitrust / Competition Law; Abuse of Dominance; Comparative Competition; Public & Private Antitrust Enforcement; Innovation & Digital Platforms.

1. Introduction

The United Nations recognises that the anti-competitive practises of digital platforms pose a growing threat to consumers and competition around the world.[1] The OECD has drawn attention to concern about how big technology companies[2]—when they act simultaneously as both platform operators and as services or goods providers—raise antitrust concerns against the background of the concentrated (or less-competitive[3]) structure of the digital economy and potential economic harms thereby arising.[4] Globally, the OECD has observed how major antitrust regulators are grappling with the imposition of excessive competition restrictions by digital platforms on traders offering their products or services on the major platforms. 2020, 2021 and 2022 are proving to be the most interesting years to date in this arena, seeing a significant increase in enforcement activity by antitrust regulators, challenging the platforms market practices across the USA, Europe and China.

This Article will focus on efforts taken by antitrust regulators in both East and West to combat the dominance of the major online platforms. It will seek to assess whether they are combatting similar or different antitrust threats; assess whether the enforcement responses vary between East and West; and will demonstrate how antitrust regulators struggle to keep up with the anti-competitive activities of the online behemoths, such as Apple, Amazon, Google, Alibaba, Tencent, etc., while also recognising that recently there have been some successes as antitrust authorities in both East and West adopt a more combative enforcement approach and new regulatory tactics. The authors will examine leading examples of enforcement activities in the USA, Europe and China to consider whether antitrust regulators need new tools in the fight to control Big Tech's market dominance, and conclude by considering whether East/West have opened a common front against regulating Big Tech.

Before commencing the analysis of the leading investigations, first it may be useful to give the reader a brief flavour of some of the major investigations to allow the scale of the problem to be appreciated.

Starting with the USA: 2020 saw the US Department of Justice (“DoJ”) (sometimes on its own, sometimes in conjunction with other US States) challenge various practices by Apple, in particular Apple’s hefty commission fees imposed on app developers offering their apps for sale on the Apple App Store. Also in the same year, the US DoJ took proceedings against Google inter alia alleging exclusionary practices in online search advertising markets[5], which is awaiting trial in the latter half of 2023.[6] In 2021 the FTC in *Federal Trade Commission (FTC) v Facebook* challenged Facebook’s acquisition strategy as expanding its dominance (such as being allowed to acquire Instagram and Whatsapp, as well as impose anti-competitive conditions on software developers in order to maintain its dominance). The FTC alleged these practices enhance Facebook’s monopoly power in key markets. In early 2022 the court (US District of Columbia) rejected Facebook’s claims that the action should not proceed, holding that “Facebook’s market share comfortably exceeds the levels that courts ordinarily find sufficient to establish monopoly power”. [7]—It is expected to be several more years before the case reaches judgment stage. In 2023, keeping up with technology changes, the US DoJ filed another case against Google for monopolising digital advertising technology products in violation of *the Sherman Act*, challenging Google’s practice of increasing its dominance by acquiring competitors; forcing adoption of Google’s tools; etc.[8]

Meanwhile in Europe, there has been enforcement action on many fronts: the EU Commission launched multiple investigations against Apple App Store & Meta/Facebook’s “gatekeeper” roles in 2020; and against Apple Pay’s “gatekeeper” role in 2022. The outcome of both investigations is awaited. The Commission also challenged Amazon’s “dual purpose role” (2020) as both platform operator and competitor on the Amazon platform itself). This

investigation concluded with an antitrust settlement in 2022, though with a less than satisfactory outcome. A €4.125 billion (USD \$4.12bn) fine imposed on Google by the EU Commission was upheld by the European Union’s General Court in respect of anti-competitive practices and its online shopping dominance (2022)[9]; while on the legislative side, the EU regulation known as the *Digital Markets Act* (“DMA”) was adopted (2022), with its crucial implementation phase to start on 2 May 2023 which aims to put an end to anti-competitive conduct by online gatekeepers’ in digital markets.[10]

There has also been action at the National level in Europe, for example in Holland Authority for Consumers and Markets (“ACM”) fined Apple due to its abusive practices to forbid alternative in-app payment methods to be used in dating apps [11] and successfully made Apple agree to reduce its commission fee from 30% to 27%. [12] In the UK, the Competition & Markets Authority (“CMA”) announced it was investigating Amazon’s business practices in 2021 and 2022; while in October 2022 an “opt-out” action[13] was instigated by consumer rights champion Julie Hunter, who claims that Amazon’s Buy Box is anti-competitive.[14] Whether existing EU and UK enforcement tools are effective, and the impact of enforcement efforts on digital players online commerce strategies will be discussed.

China has also seen very interesting developments in recent times: China’s antitrust regulator—the State Administration for Market Regulation (“SAMR”)—published Digital Antitrust Guidelines in 2021[15] and the 2022 *Anti-Monopoly Law* (“AML”) inter alia seeks to deal with regulating digital markets effectively.[16] The digital antitrust guidelines and the new AML will be discussed later below to see if they reflect a new approach to asserting antitrust jurisdiction over digital platforms. SAMR has also become increasingly active in imposing major fines

for breach of antitrust prohibitions by Major platforms, and to highlight this SAMR's decisions condemning Alibaba's Tmall.com digital platform (2021) for imposing exclusionary practices as well as other major antitrust investigations currently underway in China will also be considered.[17]

Clearly, all of this antitrust activity arising from digital platforms' anti-competitive practices has attracted increasing interest from antitrust enforcement authorities around the world. Increased enforcement action presents a major challenge to the continuance by the digital behemoths of key elements of their business models.

This Article shall now consider some key recent developments, starting with Apple's Apple Store practices, chosen because the Apple Store is a globally known platform which employs several types of anti-competitive practices prevalent on digital platforms which are now coming under increasing scrutiny on other platforms as well, around the world.[18]

2. CONTENT

2.1 FROM MINNOW TO MONSTER? THE APPLE APP STORE

Apple is one of the most prestigious brands in the world. As of 2022, there are 1.8 billion active Apple devices worldwide[19] and Apple's App Store has approximately 2 million apps, with 99.99% of the apps being third-party apps, i.e., apps developed by independent app developers.[20]

In order for an app developer to offer their apps to Apple device users, the app developer must first agree that Apple receives a commission of 30% from the sale of the app (known in the trade as a commission), and second that in general the only way purchasers can pay for the app is via Apple Pay. This means that (a) that app developers cannot access Apple users to sell apps to them unless they agree to Apple's App Store terms and commission arrangements; (b) that Apple-using consumers and

businesses can only buy and pay for apps they want to use on their Apple devices via the Apple App Store, and use only one permitted payment method to pay for apps, Apple Pay; and (c) that Apple collects its 30% commission at point of customer payment for the app. All of this means that: a. other payment systems cannot offer their payment services to Apple app purchasers; b. app developers wishing to sell to Apple users cannot access such users unless they agree to Apple's high commission fee; and c. such high commission fee is undoubtedly passed on to purchasers either in whole or in part by app developers when they price their app products.

Is this business model simply "good business"? Or alternatively, could it be said to be a prime example of one company creating an entire ecosystem where it can lock out all competition at several different levels of commercial exploitation of its products and others' products, while also protecting itself from price or payment method competition?

Apple CEO Steve Jobs once explained why, in his view, Apple's 30% commission fee is a "win-win" model for both app (application) developers and Apple. He said *"When we sell the app through the App Store, the developer gets 70% of the revenues, right off the top. We keep 30% to pay for running the App Store [...]* This is the best deal going to distribute applications to mobile platforms."^[21] However, after years of such practice, it is clear that there are many who now disagree with that view. David Cicilline, Chair of the US House Antitrust Committee made it clear in an interview in 2020 that: *"Because of the market power that Apple has, it is charging exorbitant rents – highway robbery, basically – bullying people to pay 30 percent or denying access to their market."*^[22] Although recent events (discussed below) has seen Apple reduce its 30% app developers commission to either 27%^[23] or 15%^[24] in certain situations, the charging of such a significant level of commission fee remains a live

question about its adverse impact on competition and consumers; in particular whether it constitutes price-fixing and whether it constitutes excessive pricing.[25] In response to US Justice Department pressure and litigation brought by Epic Games on this and other competition issues covered elsewhere below, Apple—in an attempt to forestall against potential enforcement action against it by antitrust authorities arising from adverse publicity associated with Epic’s complaint about 30% being an excessive level of commission—dropped its headline 30% commission fee to 15% in the case of app developers earning less than 1 million dollars in annual net sales via sales of their apps on Apple’s App Store.

2.1.1 The Sour Apple: Litigation against Apple in the USA

Apple’s contentious digital platform commercial practices started to attract the attention of antitrust regulators globally in the West as far back as 2013. App purchasers (i.e., Apple-device using businesses or consumers) have no alternative source from where to purchase apps for use on Apple devices, other than Apple’s own App Store.[26] Furthermore, there is no choice as to payment method: every time a consumer purchases an app for use on their Apple device, anywhere in the world, Apple’s App Store charges the app developer a 30% commission on every app sold. This commission represents a significant overhead, which app developers will inevitably pass on to the app purchaser either in whole or in part.

In 2013, 4 consumers in California decided to take a class action challenging Apple’s 30% app developers’ commission fee in the US District Court (Northern District of California).[27] Apple argued that it bore no responsibility if app developers chose to recover some of Apple’s commission from consumers. The District Court took a different view of the case, holding that the fixed 30% ‘take it or leave it’ commission fee constituted *a form of price fixing*,

between Apple and app developers contrary to *the Sherman Act 1890*. [28] The Court further held that app developers not willing to pay the high commission fees could not otherwise reach Apple device users. So while the Court rightly recognised the anti-competitive nature of Apple’s modus operandi, the Court did not however go so far as to recognise that the complainants could sue Apple for damages (because they were not ‘direct purchasers’ from Apple: Apple argued it was little more than a shop window, with the transaction being between the app developer and the consumer via the medium of the App Store. However on appeal in May 2019 the US Supreme Court (*Apple v Pepper*) took a different view, upholding the Ninth Circuit’s [29] decision that the complainants *were direct purchasers*, thereby giving the complainants the green light to seek damages from Apple for “monopolizing or attempting to monopolize the aftermarket for iPhone software applications”. [30] Although the case was ultimately settled, following this ruling by the Supreme Court the door is now open to digital platforms who employ similar practices to Apple to be exposed to litigation in the courts.

Following the Supreme Court Judgement in *Apple v Pepper*, the US Justice Department and a coalition of State Attorney Generals launched an antitrust probe into Apple in June 2020, focusing on app developers’ unhappiness with other elements of the Apple Store. For example, app developers claimed that App Store rules were not applied consistently, particularly because: (1) Apple abandoned charging commission to certain powerful app developers, e.g., Apple exempted Amazon Prime Video app from the 30% commission when consumers made in-app purchases; (2) Apple was also accused of exclusionary behaviour by either rejecting or postponing the introduction of third party apps into the App Store because they might compete with Apple’s own apps, such as the

Apple Screen Time app. In essence, it was alleged that a combination of high commission fees and exercise of preferential bias by Apple in favour of its own Apps led to consumers paying higher prices and having less choice on the App Store than would otherwise be the case.[31] In anticipation of a tough battle with the US Justice Department, Apple took preemptory action in January 2021 by reducing commission fees for small[32] developers to 15%. However, Apple continues to maintain a 30% commission for app developers whose App Store annual net sales exceed USD\$1m, and so has continued to attract the concern of antitrust enforcement agencies.

Apple has also been subjected to further litigation by Epic Games, which sued Apple in 2020[33] alleging abuse of dominance in both the app purchasing market (i.e., because the Apple's App Store forced app developers to create apps that were Apple platform-compliant, hence Apple device users wishing to play Epic Games apps on their Apple devices could only do so via Apple App Store-compliant apps[34]). Furthermore, Epic alleged abuse of dominance by Apple when it only allowed payment for apps purchased on the App Store to be made solely via the App Store's in-app payment system known as Apple Pay. On this latter point, Epic was arguing that Apple, by forcing app users to process their app payments exclusively through Apple's in-app payment processing system, Apple Pay, ensured that Apple obtained its 30% commission fee automatically for every transaction, which it also argued was abusive.[35] The court at first instance[36] did not find favour with Epic Games because "the court concluded that Apple 'is near the precipice of monopoly power,' but is 'saved by the fact that its [market] share [of 52-57%] is not higher' [...]"[37] However, despite such conclusion, the court still ordered Apple to allow other alternative payment

methods to be added into the Epic Games app to allow users pay for in-app purchases by methods other than Apple Pay. Apple appealed the decision to the US Ninth Circuit Court of Appeals in San Francisco. Epic cross-appealed because it believes the judge erred in law in finding that Apple has not breached US antitrust laws when it did not permit app developers to sell their apps (for use on Apple devices) other than through Apple's App Store. Epic's case was supported by the US DoJ[38], Microsoft[39] and 35 State attorneys.[40] In addition, Counsel for the United States concluded in an Amicus Curiae submission, stating that "[t]he Court should ensure that the Sherman Act is not unduly narrowed through legal error." [41] The decision of the Ninth Circuit is not expected until mid to late 2023.

3.1.2 The Poison Spreads: Investigations against Apple in China and the new Digital Guidelines on the Platform Economy

Although similar complaints about Apple's 30% App Store developers' commission had already been investigated in China as far back in 2017[42] by the Chinese competition enforcement regulator (then known as the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, the predecessor of today's SAMR) Apple was not sanctioned at the time because Apple's App Store held only 20% market share in China's app market at that time. This was well below the 50% minimum market share required to presume that a dominant position existed under the then *Anti-Monopoly Act 2007*. However, since that time *the Anti-Monopoly Act (AML) 2022* has been enacted. [43] It has (in contrast to the original 2007 AML) made clear that antitrust law enforcement bodies should consider broad factors when they deal with digital platforms. For example, Art 22 AML 2022 provides that dominant digital platforms shall not use data, algorithms, technology, or platform rules, etc., to engage in practices that constitute an abuse of their

dominant market position. This change in approach was foreseen a year earlier with the publication of SAMR's *Guidelines on the Platform Economy* in 2021 (which are even more declaratory on the matter than the AML 2022 itself): SAMR's Guidelines provide that antitrust enforcement action can be taken against digital platform operators even where they do not possess the usual minimum 50% market share (normally required to make finding of presumed market dominance), by instead taking the approach that where online platforms market practices otherwise violate AML provisions, then the absence of a 50% minimum market share is not a prerequisite to asserting abuse of dominance enforcement jurisdiction. For example, where a digital operator has the ability to control upstream and/or downstream markets and impede other business operators from entering into the relevant market, then its activities and practices can be scrutinised on antitrust grounds *irrespective of its market share* in order to combat the rise of closed ecosystem monopolies.[44] This marks a different approach to assessing market power than has been traditionally used in more traditional services or manufacturing markets in either China or indeed further afield. A somewhat similar, though more conservative approach, has earlier been seen in EU Competition Law generally where, in pre-digital market era jurisprudence market shares below 50% could be argued to confer dominance where the presence of other advantages on conferred superior market power on the largest player in the market, such as having vertical distribution advantages over competitors[45]; or holding leading brands and possessing superior technology[46]; etc., though in no case has a market participant been held dominant with a market share of less than 40%.

Turning now back to present day China in the digital era. Apple's market share has not grown beyond 20%

in China due to stiff domestic mobile devices competition. SAMR has not yet carried out an official investigation against Apple's App Store developers' 30% commission fee, which clearly it could pursuant to the Guidelines notwithstanding its sub-50% market share. It could be that SAMR is presently patiently waiting on the sidelines to await the outcome of two recent events which have a bearing on the situation: first, it may be waiting on the outcome of the recent EU Commission decision (2020) to investigate the App Store and Apple Pay, opening a formal antitrust investigation into Apple's 30% app developers commission in 2020[47] as well as a separate investigation into the anticompetitive effects on the mobile wallets[48] markets arising from Apple's insistence on use of Apple Pay.[49] If the Commission finds against Apple in either case[50], Apple potentially could face severe penalties up to 10% of its annual worldwide turnover.[51]

The second event SAMR is awaiting on is the outcome of a case in China itself, whereby in 2021 a Chinese iPhone user, Xin Jin, sued Apple in Shanghai's Intellectual Property Court[52] alleging abuse of dominance against Apple. The claimant has argued that the Apple App Store constituted a breach of the AML on several competition grounds, because Apple users were obliged to process app payments exclusively through Apple's in-app payment processing system.[53] This ongoing litigation may be the first shot to enforce the AML against Apple in China. Furthermore, now that the 2021 Guidelines and the AML 2022 no longer require 50% market share as a prerequisite to assertion of abuse of dominance jurisdiction, it will be interesting to see if SAMR decides to revisit the 2017 complaint against Apple's 30% commission arrangements by opening a fresh investigation into the conduct of Apple's App Store in China.

3.1.3 A Strong Crop or a Poor Harvest? Ongoing Investigations against Apple in Europe & Dutch 'Success'

Further challenges for digital platforms operating in Europe arose in several EU Member States at national EU Member State level. For example in March 2021 the UK CMA launched an investigation[54] into whether Apple's 30% commission practices violate *the UK's Competition Act 1998*. [55] Separately, a few months later in May 2021, a group of UK consumers instituted collective action against Apple alleging that Apple's 30% commission fee restricted competition and harmed consumer interests, by inflating the price of apps contrary to the UK's *Competition Act 1998*. [56] In 2022, the CMA commenced an official investigation into Apple's market power in the mobile browser market and restrictions on cloud gaming. [57]

While in the same year the Netherlands ACM successfully forced Apple pursuant to the *Dutch Competition Act 1997* to drop its requirement that the sole method for app purchasing payment must be confined to Apple Pay, and Apple agreed to allow app purchasers pay using different payment methods other than solely Apple Pay, in order to avoid further fines. [58] Furthermore, Apple agreed to reduce its usual 30% commission fee to 27%. [59]

This barrage of action at both national and European level confirms that antitrust regulators were deeply concerned with Apple's business practices. The dam has now been firmly breached because at the time of writing there are reputable media reports that Apple is preparing to allow competing app stores to sell developers' apps to Apple device users in an effort to avoid prospective enforcement action under the incoming EU's *Digital Markets Act*. [60] Of course only time will tell if the commission charged to app developers by those other platforms will be competitive and put downward pressure on Apple's 30% model.

Meantime, the outcome of the EU and UK formal investigations into the 30% commission regime is awaited. It may be that no further action is warranted once other competing app stores start selling Apple-device compliant apps at lower commission rates. Separately, only time will tell whether the Commission and national investigations are suspended or instead proceed to make a finding of "excessive pricing", a finding which is not commonly made because in market based economies it is difficult to argue what is an excessive price and the traditional jurisprudence of the European Court of Justice on this matter has not usually favoured excessive pricing arguments. [61]

3.2 COMPETITION KILLER: DOMINANT DIGITAL PLATFORMS

Antitrust watchdogs are now not only focusing on antitrust exclusionary practices such as those practised by Apple: they have also been observing and investigating other giant online platforms, such as Google, Amazon, Alibaba, etc. amid concern about digital platforms imposition of *excessive restrictions on competition* against traders seeking to sell their wares on the all-pervasive platforms, as well concern arising from the threat to competition posed by *dual purpose* platforms.

3.2.1 MFN Clauses & Choosing One from Two Practices: Digital Platforms Excessive Restrictions on Competition

Europe has seen antitrust regulators taking action at both country level and at EU level to tackle excessive restrictions on competition on digital platforms. First, looking at the national level, the UK's *ComparetheMarket.com* saga presents an excellent example. In the UK, most consumers use this dominant platform to price-compare home insurance products. [62] In November 2020, the UK's CMA condemned price-fixing and other anti-competitive practices engaged in by the platform, imposing a

£17.9 million fine (USD\$ 24.8m) on platform owner BGL, for breaching *the UK Competition Act 1998*.^[63] The CMA found that the dominant platform imposed unduly “*wide most-favoured nation*” (“wMFN”) clauses on home insurance companies, preventing them from placing their insurance products on competitors’ price-comparison websites at *more competitive prices*.^[64] This is different to platforms which apply “*narrow most-favoured nation*” clauses to third parties, which only prevent traders from offering their products at more competitive prices on *their own websites*.^[65] The CMA’s decision on MFN clauses was appealed by BGL to the UK Competition Appeal Tribunal (“CAT”)^[66], and unexpectedly the appeal was successful as the CAT concluded that “[t]here is no reliable evidence to conclude that the existence of the MFNs in the MFN Agreements had any adverse effect on either Premiums or Commissions.” The CMA Decision, therefore, was set aside.

Sharing the same concern in the USA about dominant players restricting price competition and causing harm to consumers (e.g., MFN), Washington DC’s Attorney General sued Amazon in 2021 in respect of its anti-competitive practice which required third-party sellers to offer no better deals on their products on other competing platforms (a form of wMFN).^[67] This antitrust lawsuit was dismissed by the District of Columbia Court, because the court held “[a]n allegation that the agreements violate the Antitrust Act would be a legal conclusion not entitled to the presumption of truth.”^[68] Disagreeing with the Judgment, Washington DC’s Attorney General filed an appeal in 2022 which is pending at the time of writing.^[69] A similar concern is shared by the California Attorney General who sued Amazon in September 2022 alleging that Amazon engaged in anti-competitive practices to harm consumers by causing increased prices throughout California (result pending).^[70] In addition, Washington DC’s Attorney

General succeeded in having the Federal Trade Commission (“FTC”) look into Amazon’s gatekeeper role in consumer protection context (result pending), namely into allegations that Amazon was misusing customer tips for delivery drivers by using the tips instead to pay drivers’ wages in order to lower labour costs and increase profits.^[71]

There have been similar developments in China by antitrust authorities to tackle excessive restrictions on competition on digital platforms which so far appear much more successful compared to what counterparts in the UK and US have experienced. For example, in April 2021 SAMR fined Alibaba the equivalent of USD\$2.8 billion^[72] following its December 2020 investigation into Alibaba’s Tmall.com online shopping platform (China’s equivalent of Amazon) “choosing one from two” practice. Tmall.com was found dominant under the AML^[73] because it had consistently held a market share of more than 50% in the online shopping market over several consecutive years.^[74] SAMR condemned as abusive Alibaba’s requirement for traders (wishing to sell their goods via Tmall.com platform^[75]) not to sell their goods on competitors’ platforms (such as JD.com, Vipshop, etc.).

Immediately following SAMR’s decision condemning Alibaba, SAMR fined Meituan, China’s largest online food delivery platform (occupying over 60% in the market since 2018) equivalent to USD \$530 million for abusing its dominant position, when it restricted restaurants selling takeaway food to sell only via Meituan’s platform (another “choosing one from two” practice).^[76] SAMR’s decisions in Meituan and Alibaba finding abuse of dominance contrary to the AML is compatible with the approach now taken under *China’s 2021 Anti-Monopoly Guidelines on the Platform Economy* (adopted after the Alibaba investigation had commenced, and now in force), which now explicitly prohibits “choosing one from

two” practices in the digital platform market on the grounds that such practices constitute an abuse of dominance.[77]

3.2.2 Antitrust Investigation Challenges: The Two Faces of Digital Platforms

Giant digital platforms excessive restrictions on competition in the market are not often “obvious”, unlike the above-mentioned examples, such as *ComparetheMarket.com*, *Alibaba Tmall.com* and *Meituan*. In this section we shall explore more hidden anti-competitive practices that can pervade in the online platforms world, which require a great deal of effort to investigate, and which emanate from platforms occupying a dual-purpose role.

In 2019 the EU Commission started an investigation into Amazon’s dual role as both a platform operator for retail distribution, as well as *a retailer itself on its own platform*, competing with other independent retailers using its platform to sell directly to consumers.[78] Although Amazon’s retail platform does provide many options and prices for consumers on the one hand, it could also serve to harm competition and consumer interests on the other by distorting competition.[79] The temptation to do this is all the greater where the platform operator is also a competitor on the platform. According to the EU Commission, it is vital to “[...] ensure that dual role platforms with market power, such as Amazon, do not distort competition.”[80] Expanding its Amazon investigation in 2020, the Commission conducted an in-depth investigation into Amazon’s operation of the Amazon “Buy Box”. In the Buy Box Amazon presents consumers with the most popular sellers of products on Amazon by placing them in the Buy Box. However, what raised the Commission’s concern was the fact that Amazon was using sensitive information, acquired by observing consumers’ purchasing habits on Amazon, to drive consumers to its most popular sellers, which *often were Amazon products* or sellers who

paid to be in the Buy Box. This could distort conditions of competition for less popular sellers on Amazon and also for sellers of non-Amazon owned products not prepared to pay for elevated visibility in the Buy Box.

The US shared similar concerns, as highlighted by the US House Judiciary Committee’s 2020 Antitrust Subcommittee Report. It was concerned because “[i]ndustry experts estimate that about 80% of Amazon sales go through the Buy Box [...]”[81], but also because of the existence of other anti-competitive concerns surrounding Amazon’s “significant and durable market power in the US online retail market”[82] (i.e., probable “dominant position”); and “Amazon’s asymmetric access to and use of third-party seller data”.[83]

However, disappointingly, the EU’s high-profile investigation into Amazon’s Buy Box was settled in 2022, with the Commission allowing Amazon avoid multi-billion-euro fines arising from Amazon use of non-publicly available consumers’ purchasing habits data (which it gathered from third party sellers using its site) to boost Amazon’s retail business. Without making a formal finding against Amazon, the Commission accepted Amazon’s commitment to stop using non-public data gained from the independent sellers’ activities to boost its own retail business; to treat all sellers equally on Buy Box; and to allow Prime sellers to freely choose any carrier for their logistics and delivery services.[84] Such action assuaged EU’s competition concerns in the Commission’s eyes.[85] This settlement has no elements providing for recovery of the existing losses suffered by third-party sellers who may have suffered lost sales arising from Amazon’s Buy Box practice. Furthermore, given Amazon consumers have also been manipulated by Buy Box practices, it seems curious that no stronger remedy was sought by the Commission.

In the UK an investigation into Amazon's data use and collection and "Buy Box" was launched by the UK CMA in 2022 (ongoing).[86] The outcome is awaited. Simultaneously, 2022 saw Amazon face the prospect of a £900 million consumer class action, led by Julie Hunter, a consumer advocate and class representative, against Amazon alleging breach of the UK Competition Act 1998.[87] The 2022 class action, alleging consumer harm created by Amazon Buy Box to raise prices and limit consumers choices, is to be filed at the Competition Appeal Tribunal.[88] This antitrust class litigation action may awaken the (so far) weak antitrust enforcement against Amazon Buy Box and gatekeeper role.

4. CONCLUSION

After years of concern being expressed about the adverse impact digital online platforms could have on competition, anti-competitive practices in the digital space are now under full scrutiny in the United States, Europe and China.

There is recognition in Europe that digital platforms can adversely impact fair competition and also severely restrict consumer choice where they impose excessive restrictions on traders using the platforms. Where the platform operator itself is also trading itself on the platform or acting in a gatekeeper role the potential for abuse and conflict of interest to the detriment of other traders using the platform to show their wares is almost inevitable. The European Commission is becoming increasingly assertive in its enforcement investigations, though one wonders why it has not taken action sooner.

China's approach is interesting because it has adopted Guidelines for establishing market dominance in the digital platforms sector that are not strictly market-share driven, but instead are based on substantive assessment of the state of competition (or lack thereof) as well as barriers inhibiting traders accessing other competing platforms arising from the

digital platforms' terms of use. Increasingly, SAMR is now imposing large fines for antitrust breaches, including against domestic-owned corporations found to be acting anti-competitively in China itself.

In the US there have been several high-profile antitrust actions taken against the major digital players in the US, led by either by State Attorneys General combining forces, the FTC, or the US Dept of Justice. Superior courts have in several instances reversed decisions of lower courts, the higher courts clearly concerned with prohibiting abusive business practices practised by dominant payers.

No doubt 2023 and onwards will reveal even further antitrust action in the digital platforms space, and will challenge the industry to revise and reflect on its current business model around the globe. One thing is clear, both East and West are adopting increasingly assertive and similar approaches towards viewing global antitrust practices by online platforms as a common threat and are increasingly taking action against them.

5. FOOTNOTES

1. UNCTAD, 2019.
2. e.g., Apple, Amazon, Apple, Google, Meta/Facebook.
3. Vassallo, M., 2022.
4. OECD, 2021.
5. US Department of Justice, 2020.
6. Feiner, L., 2020.
7. *FTC v. Facebook, Inc.*, 2022.
8. US Department of Justice, 2023.
9. 'Google and Alphabet v Commission (Google Android)', 2022.
10. EU Commission, 2022.
11. ACM, 2022.
12. Van Dorpe, S., 2022.
13. Opt-out action in the antitrust context concerns the situation whereby class litigation action can be pursued on behalf of a group of unnamed and unidentified claimants who have been harmed by anti-competitive conduct carried out by undertakings. Everyone in the group should be entitled to compensation if the litigation is successful, unless they make clear that they do not participate in the litigation by "opting-out".
14. See details in Section 3.2 below.

15. SAMR, 2021.
16. AML 2022, Arts 9 & 22.
17. See details in Section 3.2 below.
18. "Apple's market power is durable due to high switching costs, ecosystem lock-in, and brand loyalty": see *Investigation of Competition in Digital Markets 2020*. CP 117-8 116th Cong., Comm.
19. Caminade, J. and von Wartburg, M., 2022.
20. *ibid*, at 1.
21. Pierce, D. and Birnbaum, E., 2020.
22. Patel, N., 2020.
23. Van Dorpe, S., 2022.
24. The 15% fee is for App developers with less than \$1 million in annual net sales in the Apple Store: see Leswing, K, 2020.
25. 'Epic Games, Inc. v. Apple Inc.', 2021.
26. Bostoan, F. and Mândrescu, D., 2020.
27. 'In re Apple iPhone Antitrust Litig.', 2013; note that this line of litigation which went all the way to the Supreme Court is also known as *Apple v Pepper*.
28. The Sherman Act of 1890, 15 U.S.C. § 2.
29. 'In re Apple iPhone Antitrust Litig.', 2017: the Ninth Circuit on appeal held that the complainants "[...] are direct purchasers of iPhone apps from Apple under *Illinois Brick* and that they therefore have standing to sue."
30. CALERA (2021), S.26A(e)(7).
31. Nylén, L, 2020.
32. i.e., app developers earning less than 1 million dollars in annual app sales through the App Store.
33. 'Epic Games, Inc. v. Apple Inc.', 2021.
34. "Apple's App Store is the only method to distribute software applications on iOS devices": see *Investigation of Competition in Digital Markets 2020*. CP 117-8 116th Cong., Comm.
35. The Sherman Act of 1890, 15 U.S.C. §§ 1&2; Kovovic, T., 2021.
36. i.e., United States District Court, Northern District of California.
37. Brief for the United States of America as Amicus Curiae in Support of Neither Party on 'Epic Games, Inc. v. Apple, Inc.', 2022.
38. "The District Court committed several legal errors that could imperil effective antitrust enforcement, especially in the digital economy [...] The court read Sections 1 and 2 of the Sherman Act narrowly and wrongly, in ways that would leave many anticompetitive agreements and practices outside their protections": see Goudswaard, A., 2022.
39. "If Apple is allowed to step between any company with online services and users of iPhones, few areas of the vast mobile economy will be safe from Apple's interference and eventual dominance. Consumers and innovation will suffer—indeed, they already have": see McGee, P., 2022.
40. BBC, 2022.
41. Brief for the United States of America as Amicus Curiae in Support of Neither Party on 'Epic Games, Inc. v. Apple, Inc.', 2022.
42. Beijing News Reporter, 2017.
43. AML 2007, Art. 19(1), now renumbered as AML 2022, Art. 24(1).
44. *The Anti-Monopoly Guidelines on the Platform Economy*, Art. 11 Finding of Dominant Market Position: "[...] In light of the characteristics of platform economy, the following factors may be specifically taken into consideration: (1) The market share [...] (2) The undertaker's ability to control the market [...] (3) Undertaker's financial resource and technical condition [...] (4) The extent of reliance of other undertakings on such undertaking [...] (5) The difficulties for other undertakings to enter the relevant market [...]"
45. 'United Brands v. Commission', 1978.
46. 'Hoffmann-La Roche & Co v. Commission', 1979.
47. EU Commission, 2020.
48. A mobile wallet is also known as a digital wallet and e-wallet, which is a way to pay for products or services without using cash or a physical card.
49. EU Commission, 2022.
50. In 2021, the Commission accused Apple of abusing its dominant position contrary to Art. 102 TFEU by restricting competition for music streaming services by raising the costs of competing music streaming app developers. In 2022, the Commission accused Apple of abusing its dominant position contrary to Art. 102 TFEU by restricting competition in the mobile wallets market on Apple devices by insistence on purchases using Apple Pay. Apple must now respond to these allegations before the Commission reaches a formal Decision in the matter. See EU Commission, 2021.
51. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation, Art. 33; Timmins, B., 2022.
52. Wang, J. and Guo, M.T., 2021.
53. i.e., selling commodities at unfairly high prices; tying products; refusing to trade, and restricting trading counterparties to trade only with Apple Store: AML 2007, Art. 17, now renumbered as AML 2022, Art. 22.
54. UK Gov't, 2021.
55. Competition Act 1998, s.18: Abuse of Dominant Position.
56. BBC, 2021.
57. CMA, 2022.
58. ACM, 2022.
59. Van Dorpe, S, 2022.
60. Gurman, M, 2022.
61. Though there are some situations where such finding has been upheld: for example 'Hoffmann-

- La Roche & Co v. Commission', 1979; 'Telefónica and Telefónica de España v. Commission', 2012; 'Tetra Pak Rausing SA v. Commission', 1990; 'Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH', 2015.
62. "Over 20 million UK households have home insurance and more than 60% of new policies are found on price comparison sites": see CMA, 2018.
 63. S.2(1) prohibiting price-fixing.
 64. UK Gov't, 2020.
 65. 'Wikingerhof GmbH & Co. KG v Booking.com BV', 2020. In Germany the Düsseldorf Court of Appeal in *Booking.com BV v Bundeskartellamt (FCO)* held major accommodation booking platform Booking.com's use of nMFN clauses was acceptable because they did not seek to prevent the hotels using Booking.com from offering lower prices to consumers via other price comparison websites, apart from the hotels' own websites.
 66. 'BGL (Holdings) Limited & Others v Competition and Markets Authority', 2021 with the appeal claiming *inter alia* that "the CMA [... failed to properly analyse the counterfactual to the existence of CTM's [ComparetheMarket.com's] WMFNs [wide MFN clauses]".
 67. Office of the Attorney General for the District of Columbia, 2021.
 68. 'District of Columbia v. Amazon.com, Inc.', 2021.
 69. Office of the Attorney General for the District of Columbia, 2022.
 70. [70] State of California Department of Justice, 2022.
 71. Office of the Attorney General for the District of Columbia, 2022.
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 73. AML 2007, Art. 17 (now renumbered as AML 2022, Art. 22): "A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts: [...] (4) without justifiable reasons, requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause [...]"
 74. *2017-2020 China Online Retail Market Data Monitoring Report*, 2021. By comparison, Alibaba's next nearest competitor, JD.com, held around 30% market share in the same period.
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 79. Gilbert, R.J., 2021.
 80. *Case AT.40703 Amazon Buy Box 2020*.
 81. Grasso, C, 2020.
 82. *Investigation of Competition in Digital Markets 2020*. CP 117-8 116th Cong., Comm.
 83. *Ibid*, 274-82.
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