

Big Data & Competition law

Alec Burnside

Marjolein De Backer

19-20 October 2021



Dechert

LLP

Big Data & Competition law

Day 1 – 12:30 -16:45 CEST

**Regulation of Platforms
around the Globe**

Day 2 – 8:30 -13:40 CEST

**Big Data & Competition Law
in Practical Contexts**

19-20 October 2021, Virtual Conference
Delivered Live (CEST Time) & On Demand Afterwards

BIG DATA & COMPETITION LAW

Examine how competition authorities around the globe are regulating digital markets and explore strategies to address the challenges of big data in practical contexts

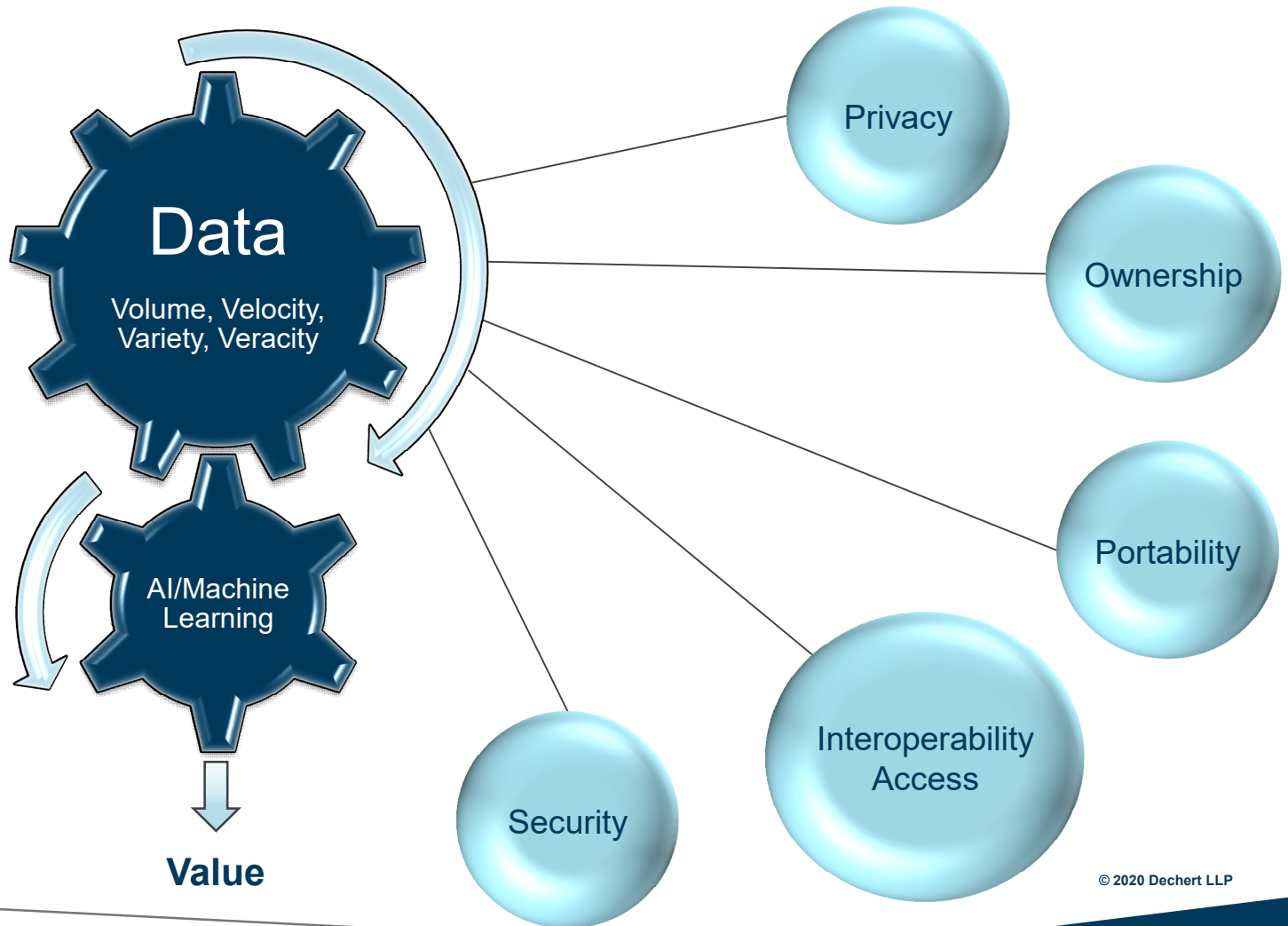
Day 1

Regulation of Platforms around the Globe

Alec Burnside and Marjolein De Backer

Introduction – What is Big Data?

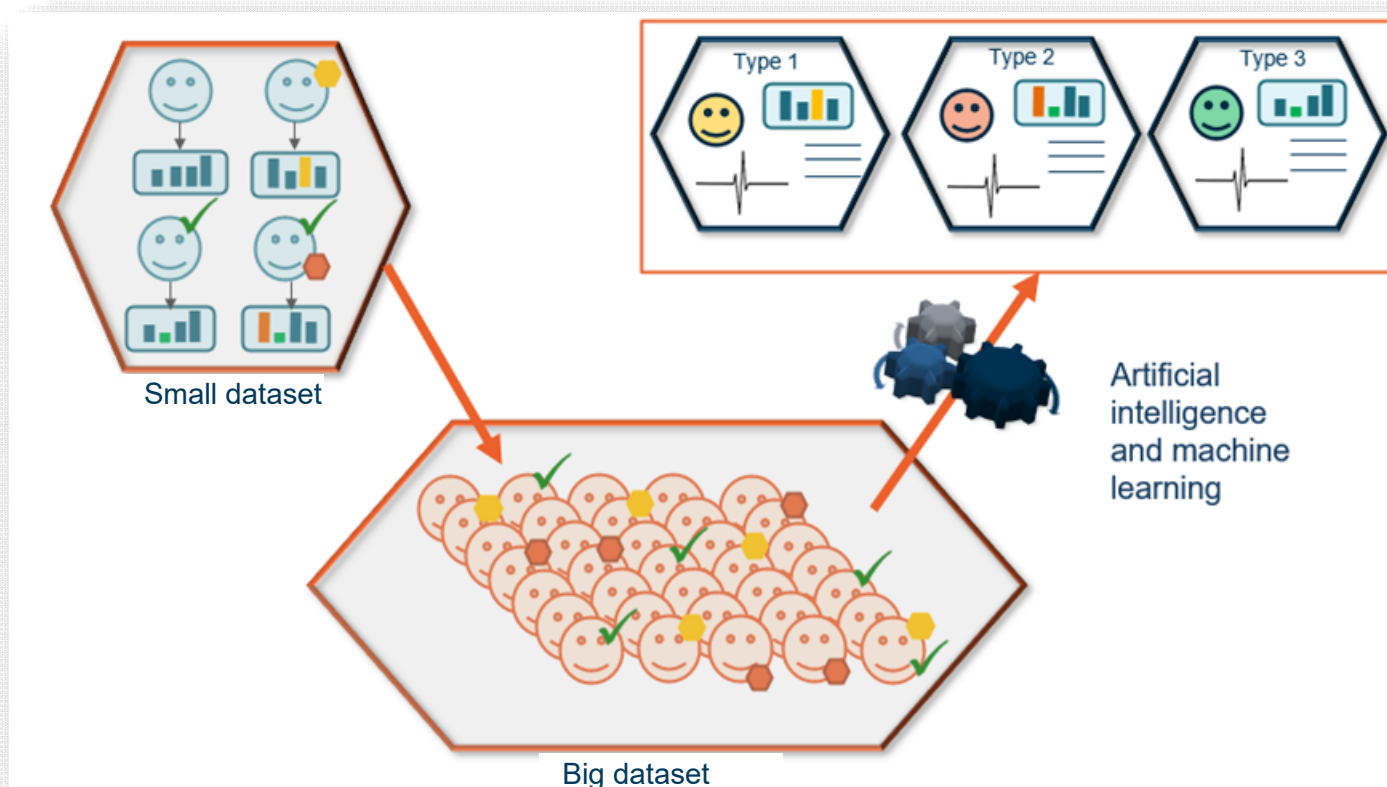
Big Data



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Increasing importance of data... and AI

- Requires an understanding of the **interplay between data and artificial intelligence**



Big... and growing

Projected figures 2025



530%

increase of global
data volume

From 33 zettabytes
in 2018 to 175
zettabytes



**€829
billion**

value of data
economy in the
EU27

From €301 billion
(2.4% of EU GDP)
in 2018



**10.9
million**

data
professionals in
the EU27

From 5.7 million in
2018



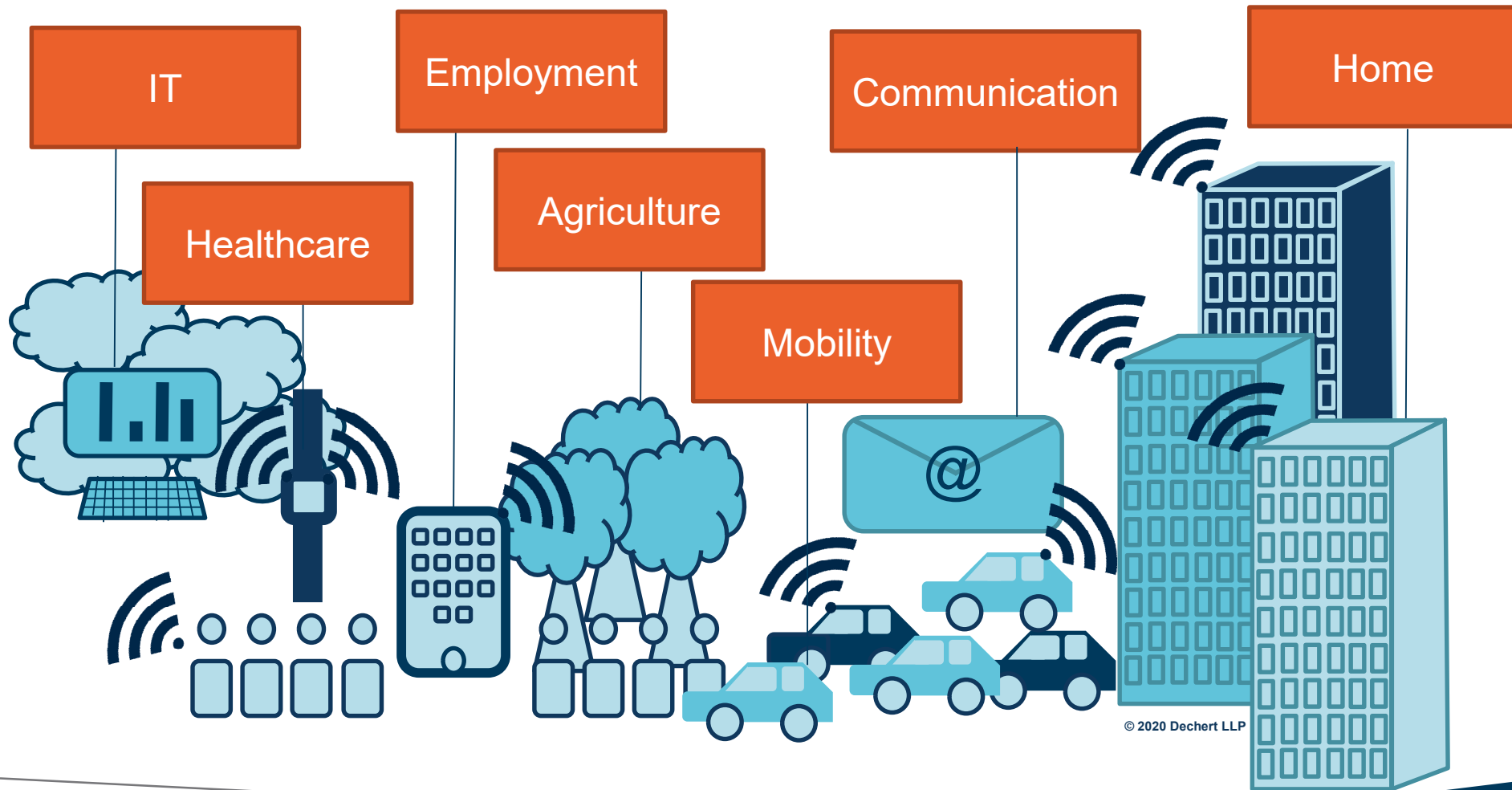
65%

Percentage of EU
population with
basic digital skills

From 57% in 2018

Source: European Commission

Big Data – a driver of innovation



Regulation of platforms Where have we reached?

Regulation of platforms

- 2019-2020 – the years of the **reports**



- 2020-2021 – the years of the **proposals**



Ex-post vs ex-ante?

Progress of ex-post EU cases (2019 – 2021)

Press release | 17 July 2019 | Brussels

Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon

Press release | 10 November 2020 | Brussels

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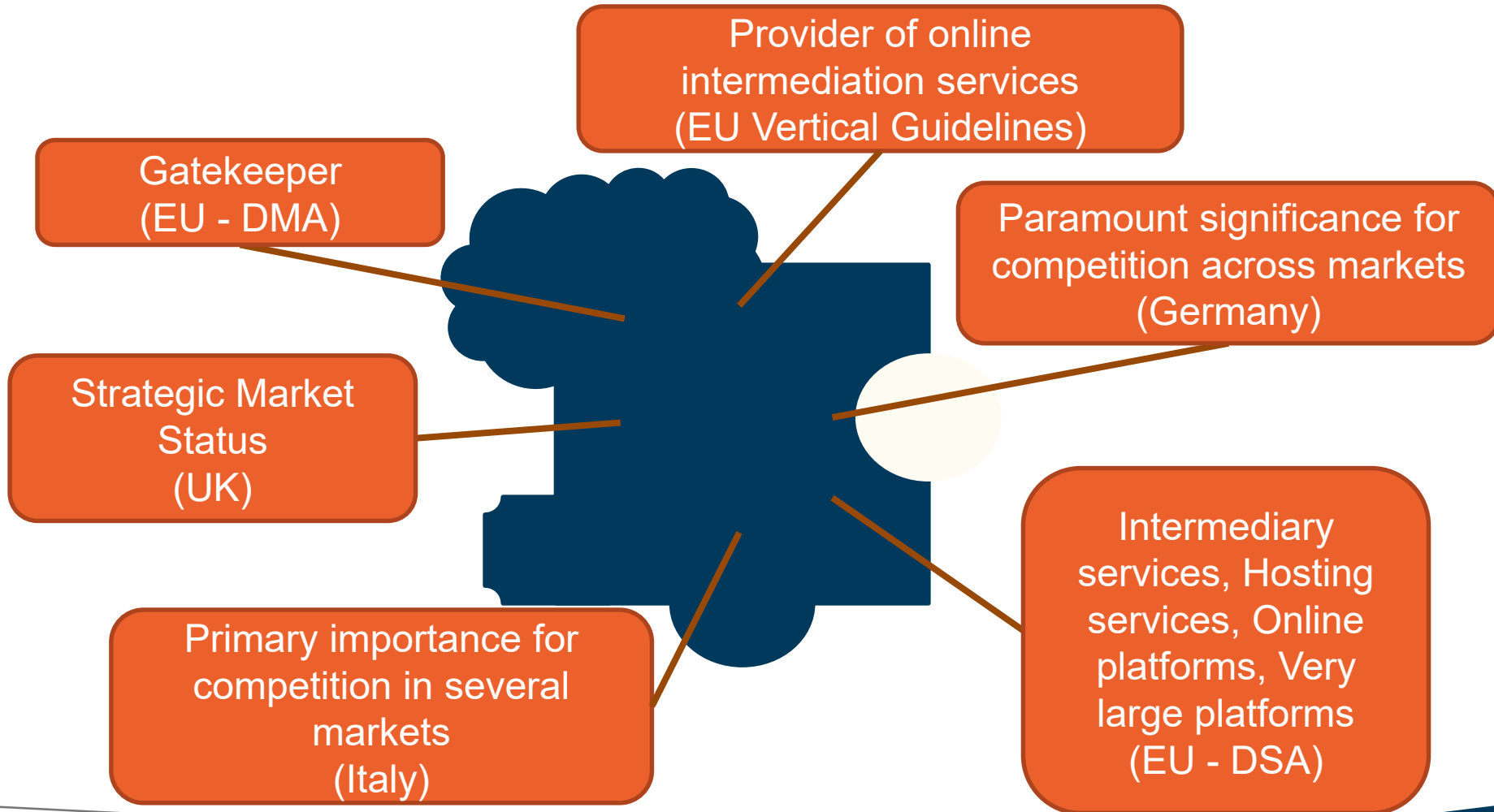
Press release | 4 June 2021 | Brussels

Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook

Press release | 22 June 2021 | Brussels

Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector

Scope of regulations - What is a “platform”?



Regulation of platforms The European perspective

EU level

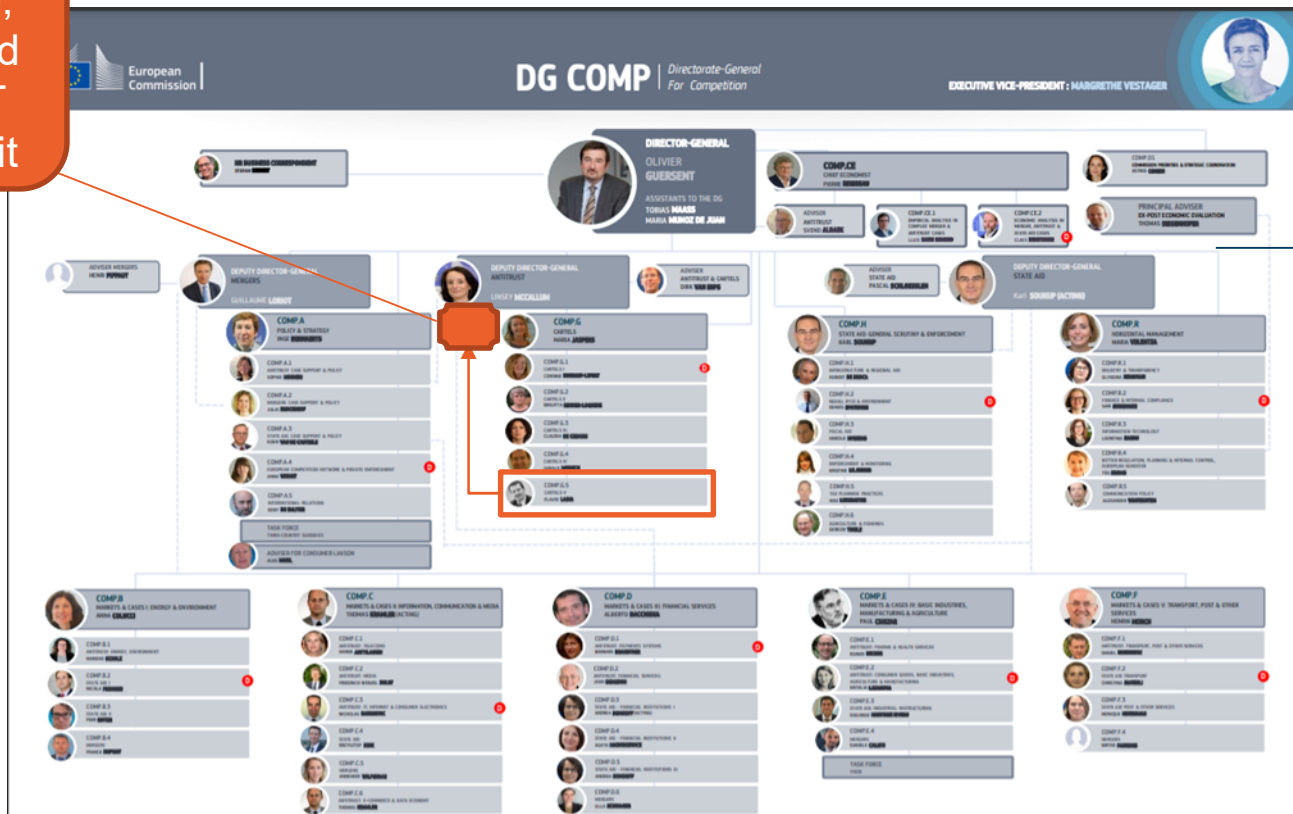
Direct platform regulation – DMA

- DMA proposal published on **15 December 2020**; final text is expected by **Spring 2022**
- DMA would apply to so-called **gatekeepers**, once designated by the EC and subject them to **ex-ante obligations**
- Text is currently under review by the EP and Council. Debate focus on:
 - Scope
 - Role of national competition authorities
 - Possibility of tailor-made remediation
 - Further rules on merger control



EU level DMA – Preparatory steps

New
Intelligence,
Analysis and
Forensic IT
Support Unit

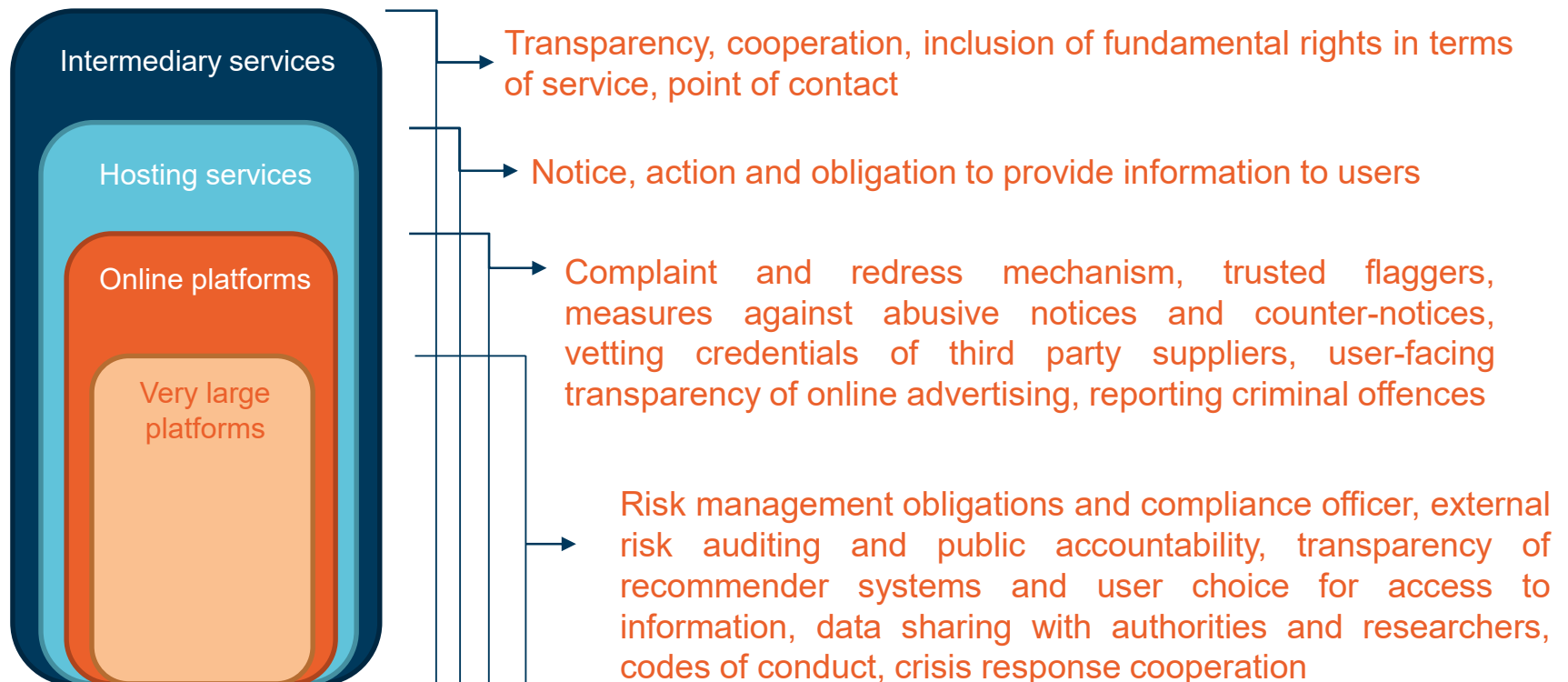


New task
force to
“prepare for
an effective
and efficient
implementa
tion” of the
DMA

EU level

Direct platform regulation – DSA

- DSA proposal published on 15 December 2020
- Includes a wide set of additional obligations for targeted entities



EU level

Indirect platform regulation – Sector specific rules

- Pending proposals
 - **Data Governance Act** – aims to
 - facilitate the reuse of public sector data that cannot be made available as open data.
 - ensure that data intermediaries will function as trustworthy organisers of data sharing or pooling within the common European data spaces.
 - allow citizens and businesses to make their data available for the benefit of society.
 - facilitate data sharing, in particular to make it possible for data to be used across sectors and borders, and to enable the right data to be found for the right purpose.
 - **Artificial Intelligence Act** – building trust in AI and boosting innovation and excellence
- Upcoming proposals
 - Regulatory **Connected Cars** initiative: a new regulation that will set conditions for “accessing and using” data that is generated by vehicles, such as traffic and road conditions, engine performance, driver behaviour and the speed and location of the vehicle

National level

United Kingdom

- Government proposal published in July 2021
- The new regime will grant formal powers to the CMA's **digital market unit** (DMU) created in April 2021
- The DMU will have the power to designate digital platforms that hold substantial and entrenched market power with '**Strategic Market Status**' (SMS)
- SMS firms would be subject to:
 - a **tailored code of conduct**, aiming to manage the effects of an SMS firm's market power;
 - **pro-competitive interventions**, to address the root causes of a firm's substantial and entrenched market power;
 - stricter **merger control**.

A new pro-competition regime
for digital markets

July 2021

CP 489

National level

Germany

- New Section 19a GWB entered into force on 19 January 2021
- Under this new section, the BKartA can designate companies as being of **“paramount significance for competition across markets”**
- Once designated, these companies can be subject to further obligation, including prohibition of **self-preferencing**, **interoperability** and **portability** requirements, measures against **weaponization of privacy**, etc.
- The BKartA started proceedings to assess whether **Amazon, Apple, Facebook and Google** are of “paramount significance”, and more may be coming

“There are even other cases where we’re thinking about extending or even flipping one or the other (prior cases) under 19a”

A. Mundt, 5 October 2021

National level

Italy

- On 23 March 2021, the Italian Competition Authority issued **wide-ranging proposal** to amend the Italian competition law
- These include in particular
 - The possibility to designate digital players as “**companies of primary importance for competition in several markets**”; this would also allow the ICA to prohibit certain behaviours of these actors
 - A rebuttable presumption of **economic dependency** for businesses using digital intermediation services
 - The possibility to **review non-notifiable transactions** ex-post

Regulation of platforms

The US perspective

New enforcement heads – Kanter, Khan, Wu

- President Biden has appointed established critics of big tech at key positions of the US antitrust administration
 - **Lina Khan** (FTC Chair)
 - **Tim Wu** (Special Assistant to the President for technology and competition policy within the National Economic Council)
- President Biden nominated **Jonathan Kanter** as DOJ Assistant AG for antitrust



Plethora of draft bills

- Many **bi-partisan bills** have been introduced to both Houses. A few key examples are:
- **American Innovation and Choice Online Act** (Klobuchar/Grassley) – The bill would e.g. prohibit discriminatory conduct by dominant platforms, including a ban on self-preferencing and picking winners and losers online and require them to allow their products to interoperate with third-party products
- Five bills passed out of the Judiciary committee in June 2021, but stalled since, including
 - **Access Act** (lower barriers to entry through interoperability and data portability requirements),
 - **Platform Competition and Opportunity Act** (prohibits acquisitions of competitive threats by dominant platforms, as well acquisitions that expand or entrench the market power of online platforms); and
 - **Ending Platform Monopolies Act** (eliminates the ability of dominant platforms to leverage their control over across multiple business lines to self-preference and disadvantage competitors in ways that undermine free and fair competition)

Regulation of platforms And elsewhere?

A few examples

- **Australia:** merger reform recommendation published in August 2021 (calls for changes for acquisitions by large digital platforms of nascent rivals). ACCC chairman: we need laws *“to deal with self-preferencing behaviour, promote competition in monopoly and duopoly markets, allow more choices for business users and consumers, and bring about transparency”*
- **Brazil:** restrictions on content moderation by social media companies and ex-post review of 143 merger deals in the digital sector
- **China:** mandatory self-examination and self-rectification of Chinese tech players against 100 compliance items (e.g. exclusivity agreements, restriction of businesses’ free choice of auxiliary-services providers, and a requirement to ensure fair trade and free choice, etc.)
- **Japan:** Japan enacted the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms in February 2021. Designated digital platforms are required, e.g. to disclose terms as they apply to suppliers and factors used to rank offers
- **South Africa:** Pending “Online Intermediation Platforms Market Inquiry” and possible new transaction value threshold for digital mergers
- **South Korea:** Pending online platform and app-marketplace bill, two new units dedicated to digital-ad market players and app-marketplaces.
- **Thailand:** draft decree would allow authorities to regulate the platforms’ dispute settlement, access to and use of data, notice and takedown measures, and remedial measures

Day 2

Big Data & Competition Law in Practical Contexts

Alec Burnside and Marjolein De Backer

Market definition

Defining digital markets – navigating the uncertainty

- Current review of the **Market Definition Notice**
- Commission's staff working document published on **12 July 2021**
- Competition in the market versus competition for the market

“the results indicate that there are other market realities, currently not explicitly referred to in the Notice, where ‘the application of the principles [of market definition] has to be undertaken with care’. These include: (i) digital markets, namely in relation to multi-sided platforms and services offered at a zero-monetary price, ‘ecosystems’, data and online channels; and (ii) non-price competition, including innovation.”

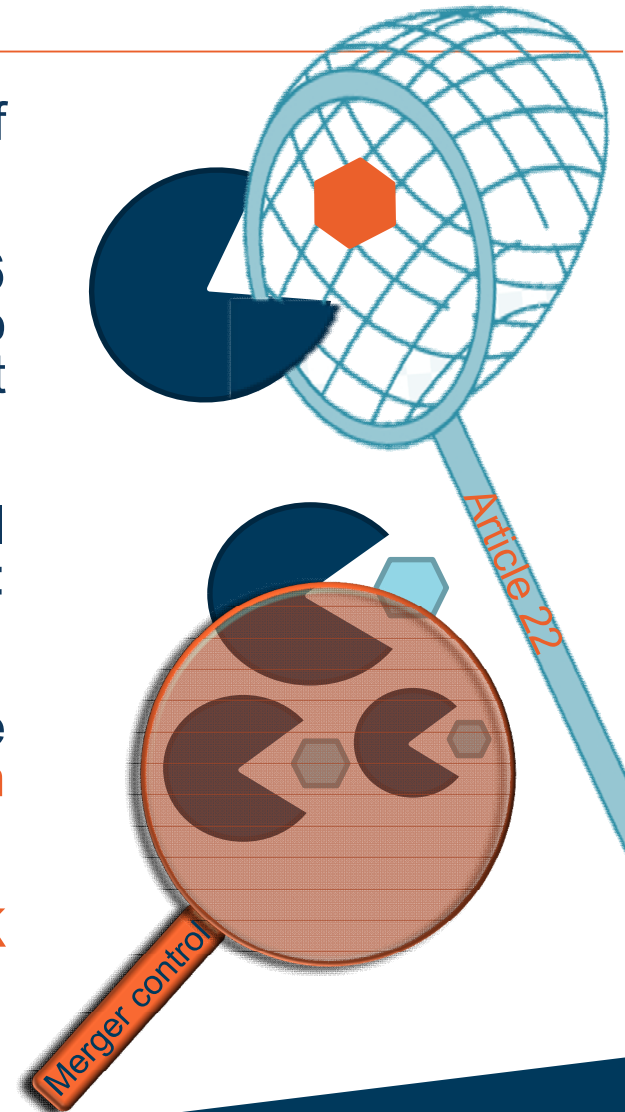
EC staff working document, July 2021

Merger control in the digital sector



Jurisdictional challenges – Killer acquisitions

- Perceived **enforcement gap** for certain types of mergers, especially in the digital sector
- **New guidelines on Article 22** published on 26 March 2021 - member states are encouraged to refer to the EC transactions that do not meet national thresholds for merger control
- Already one phase II investigation in the digital sector following an Article 22 referral: **Facebook/Kustomer**
- DMA requirement for gatekeepers to inform the Commission of all deals may **strengthen Article 22**
- But is it enough? **Different approach in the UK** for instance...



Substantive challenges

- **Fast-moving technology markets:** need to shift from narrow focus on short-term (price/quantity) effects to longer term effects
- The need to assess **future evolution** of complex and **fast moving sectors** creates new challenges
- *Google/Fitbit* example
 - Cleared with remedies by the EC on **17 December 2020**; cleared in Japan and South Africa
 - Investigations **still ongoing** in Australia and in the USA – the ACCC's investigation focusses on whether the transaction would give Google substantial market power in the digital healthcare market

Diverging approaches across the globe

The need to assess **future evolution** of complex and **fast moving sectors** creates new challenges



Google/Fitbit, EU
press release

VS



Google/Fitbit,
Australian
Statement of issues

Some market participants who consider that Google has already a significant presence in the digital healthcare sector, raised a concern that Google may obtain a competitive advantage in this sector by combining Google's and Fitbit's databases to such a degree that competitors would no longer be able to compete. The Commission's in-depth investigation **did not confirm such concerns** because the **digital healthcare sector is still nascent in Europe with many players active in this space.** Moreover, Fitbit has a limited user community in the fast-growing smartwatch segment.

The proposed acquisition also further consolidates Google's leading position in relation to the collection of user data, which supports its significant market power in online advertising and **is likely to have applications in health markets.**

"Wearable devices such as smart-watches are becoming more important in Australians' online lives, and the user data these devices collect is likely to become increasingly valuable. The competition impacts of **Google acquiring Fitbit to expand into these important markets needs to be very carefully considered.**"

Increasing importance of data

- Requires comprehensive analysis of competitive impact of datasets as an asset and as an input for data analytics, in the near and longer term

“It is important to closely review potentially problematic acquisitions by companies that are already dominant in certain markets. This applies in particular to the digital sector, where Facebook enjoys a leading position in both online display advertising and in over-the-top messaging channels, such as WhatsApp, Messenger or Instagram. Our investigation aims to ensure that the transaction will not harm businesses or consumers, and that any data that Facebook gets access to does not distort competition”

M. Vestager, Facebook/Kustomer press release, 2 August 2021

A need for “new” types of remedies

- Divestments may not be adequate in digital mergers – possible move to “**quasi-structural remedies**”

“We need to go clearly beyond classic cease-and-desist orders in order to go one step further. [...] We are moving to what I call quasi-structural remedies as behavioural are ineffective and structural remedies are not really working”

O. Guersent, 15 October 2021

- Remedies must address concerns and ensure that the merged entity’s data advantage will not cause **markets to tip**
- “New” remedies: **data access, interoperability, data silo, non-discrimination**, etc.
- But what should competition authorities do when faced with cases with complex issues where there is no “effective remedy at all” as G. Lorient said recently?

Abuse of dominance in the digital sector



Last year we said...

Dominance: is the Big Data case coming?

Press release | 17 July 2019 | Brussels

Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon

Press release | 16 June 2020 | Brussels

Antitrust: Commission opens investigations into Apple's App Store rules

The lack of options available to Facebook users does not only affect their personal autonomy and the exercise of their right to informational self-determination also protected by the GDPR. In light of the considerable barriers existing for network users who would like to switch providers (“lock-in effects”), **this lack of options also exploits users in a manner which is relevant under competition law** since due to Facebook’s dominant position competition is no longer able to effectively exercise its controlling function.

German Federal Court of Justice, June 2020

Maybe next year?

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Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon

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Press release | 30 April 2021 | Brussels

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New potential contenders

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Press release | 22 June 2021 | Brussels

Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector

Press release

CMA to investigate Google's 'Privacy Sandbox' browser changes

Cooperation & collusion in the digital sector



Vertical restraints – Review of VBER

- Draft VBER and Vertical Guidelines published in July 2021
- New text to enter into force on 1 June 2022
- Further guidance for the digital sector:
 - **Prohibition of RPM and parity clauses** imposed by providers of online intermediation services on their business users
 - New rules on restrictions relating to the **use of online marketplaces** and **price comparison tools**

The proposed revised rules aim to keep up with market developments that have transformed the way businesses around the world operate, including the growth of e-commerce and online platforms, during the last decade.

M. Vestager, 9 July 2021

Horizontal cooperation - HBER

- Commission published staff working document on **6 May 2021**
- Main issues outlined by respondents **#1 Sustainability** and **#2 Digitalisation**

“Contributors also mentioned that the current HBERs and Horizontal Guidelines are not adapted to recent developments in the market, such as the dynamics of the digital economy, the entry of disruptive technologies or big-data applications, which impede effective self-assessment”
EC Staff working document, July 2021

Data pooling agreements – Are we drowning?

“the Commission intends to include in the Horizontal Guidelines guidance that would assist stakeholders in the self-assessment of, for instance, data pooling and data sharing arrangements and horizontal cooperation agreements that pursue sustainability goals”

EC Inception Impact assessment, June 2021

“stakeholders considered in this regard that there is a lack of guidance on data pooling/data sharing, the use of algorithms and data exchanges in ecosystems and infrastructure sharing”

EC staff working document, July 2021

Press release | 18 June 2021 | Brussels

Antitrust: Commission sends Statement of Objections to Insurance Ireland for restricting access to a data sharing platform

Algorithmic collusion – are we there yet?

- CMA study published in January 2021
“Algorithms: How they can reduce competition and harm consumers”

“collusion appears an increasingly significant risk if the use of more complex pricing algorithms becomes widespread”

- Are algorithms a **tool** to facilitate infringement or true **cartelists**?
- How to review **black box algorithms**?
- Algorithms and prejudice: any way to avoid **bias**?



Competition, consumer protection and privacy



Weaponisation of privacy making its way into cases

- **Google Privacy Sandbox** announced in August 2019 and in early 2020 that it would remove third party 'cookies' on Chrome
- 8 January 2021 – CMA opens an investigation; Google offered commitments in June 2021, still being reviewed
- 22 June 2021 – EC opens a broad investigation including the Privacy Sandbox
- Test case on the **interplay of privacy and competition**

“The CMA will now consult on the commitments, which, by involving the CMA and ICO in the development of the proposals, will protect competition in digital advertising markets while safeguarding users' privacy, and which include specific limits on how Google can use and combine customer data for digital advertising.”

Increased cooperation between protection agencies

- **Digital Regulation Cooperation Platform** launched by 4 Dutch agencies, including the competition and data protection agencies
- Cooperation between competition and privacy agencies in the UK

“The digital economy has the potential to have a hugely positive impact on people’s lives, from improvements to public services to companies driving innovations that can make us healthier and happier. We think that this can best be achieved where digital markets are competitive, consumer and data protection rights are respected”

CMA/ICO joint statement, 19 May 2021

Sector inquiries

Towards a better understanding of digital markets

- **IoT** – The EC published its preliminary report in June 2021

“We just made a sector inquiry into the Internet of Things, and what we see is exactly the same things that we have investigated, fined, asked for a cease-and-desist and pushed for restorative remedies. Now we see the same thing all over again.”

M. Vestager, 1 October 2021

- Sweden, publication of report on “**competition on digital platform markets in Sweden**” in February 2021
- **Cloud services**
 - Dutch competition authority launched sector inquiry in May 2021
 - French competition authority announced inquiry for 2022
- **Fintech** – Ongoing Greek sector inquiry

And around the world as well (non-exhaustive)

- **Australia:** As part of a 5-year inquiry into markets for the supply of digital-platform services, the ACCC is currently focusing on online retail marketplaces.
- **Japan** launched a market survey on the country's smartphone OS and mobile-app markets in October 2021
- **South Africa** launched an “Online Intermediation Platforms Market Inquiry” focusing on services that enable online transactions between businesses and consumers of goods, services and software
- **Taiwan** is expected to conclude its study of major international digital platforms by the end of 2022
- **Turkey** launched a sector inquiry into the online advertising industry in March 2022

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Alec Burnside practices in the area of EU competition law, with a particular focus on covering merger clearances, state aid, cartel defense, abuse of dominance, and damages litigation.

Over the past three decades, Mr. Burnside has played a key role in cases for leading corporations, global industries and governments on issues arising across a broad spectrum of industries, including consumer products, energy and natural resources, financial services, manufacturing, military, pharmaceuticals, technology, telecoms, and transport and logistics. In particular, Mr. Burnside represents **a number of complainants in the Google investigations by the EU Commission**.

Currently he is particularly invested in the themes around **Big Data and the tech industry**, as well as antitrust and sustainability, focusing also on the new EU FDI regulation.

He co-authors the Dechert Antitrust Merger Investigation Timing Tracker (DAMITT), which is the leading source of analysis for significant U.S. and EU antitrust merger investigation and litigation trends. Further, Mr. Burnside heads the firm's Brexit task force.

Awards/Recognitions

Clients noted Mr. Burnside as "*one of the icons of the competition Bar in Brussels*" because of his "*strong analytical skills and intellectual curiosity*." (*Chambers*)

Mr. Burnside has been recognized and recommended over many years as a leading lawyer for competition law in publications such as *Chambers Global*, *Chambers Europe*, *Legal 500 EMEA*, *Global Competition Review*, *International Financial Law Review*, and *Best Lawyers in Belgium*. He was named a "*thought leader*" in competition by *Who's Who Legal* in 2018, 2019, 2020 and 2021.

Education

University of Cambridge, Downing College, 1982

College of Law, London, 1983

Institut d'Etudes Européennes, Brussels, 1984

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Marjolein De Backer is a senior associate at Dechert LLP in Brussels. Marjolein has significant experience leading advice to clients on merger control, abuse of dominance, cartels, and state aid before the EU, UK, and Belgian authorities and courts. She also advises on antitrust and IP related issues.

Marjolein has worked for multinationals across different sectors, including transport, energy and natural resources, IT and the digital sector. In recent years, she has advised several complainants and third parties in the European Commission's Google investigations and has assisted clients in building antitrust compliant data pools.

Marjolein has also published numerous articles on privacy, data and the digital sector, as well as on the interplay between competition law and sustainability. And she is a core member of the Dechert Foreign Direct Investment team.

Awards/Recognitions

In 2021 Marjolein was named a Future Leader – Competition (non-partner) by Who's Who Legal. She has been recognized as a Rising Star in Competition/Antitrust since 2018 by *Euromoney Legal Media* and has previously been named an Associate to Watch by *Chambers*.

Education

K.U. Leuven, Master of Laws 2005

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