

# Competition Law in the Digital Era: Adapting to the New Environment

An overview from the co-chairs

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Dechert  
LLP

# THE NEW PARADIGM: A MAZE OF REGULATIONS AND ANTITRUST ENFORCEMENT





*New times call for new measures, and that is why we moved to pass the Digital Markets Act - an ex ante instrument that complements our existing tools in the fight to ensure a level playing field online.*

Executive Vice – President Vestager  
27 September 2022

*In our European single market — which is also one of the largest democracies in the world, if not the largest — the DSA and the DMA will strengthen the rule of law and provide better protection for our citizens and provide new opportunities for our businesses in the digital space.*

Commissioner Breton  
5 July 2022



*[The Digital Markets Act] recognizes the significant impact of the so-called gatekeeper in the digital economy and imposes on them a series of obligations aimed at ensuring the fairness and contestability of digital markets.*

AGCM President Rustichelli  
18 July 2022

*The DMA will represent a significant additional instrument for quickly addressing competition problems in the digital sector in the future.*

FCO President Mundt  
27 April 2022

*As we address platforms that thrive on interconnection, global remedies regimes will intersect more than ever. [...] We look forward to working closely with EVP Vestager and our friends in the European Commission as they implement the DMA.*

DOJ Assistant Attorney-General Kanter  
16 September 2022

*The DMA is now a certainty. It will take time, but it's a certainty. It will change the behavior of platforms, even now.*

FCA President Cœuré  
23 June 2022



# EC - Regulatory Landscape and Antitrust Enforcement

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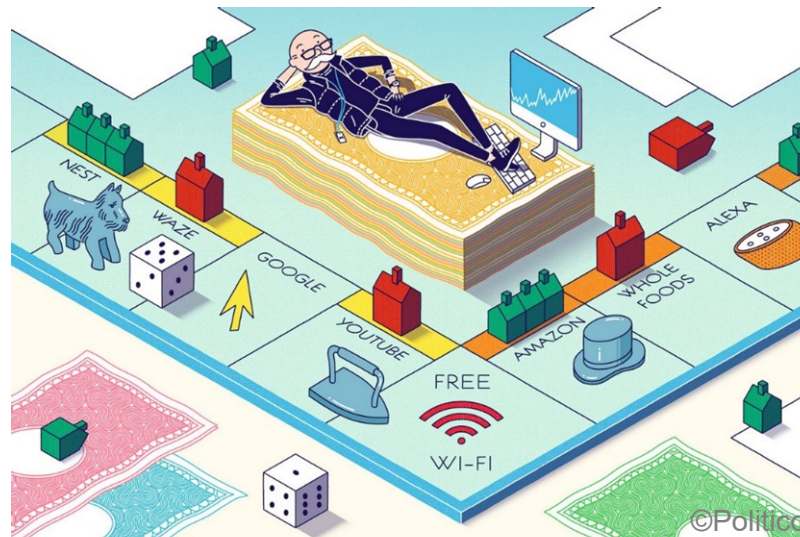
# Digital Markets Act - DMA

- DMA will enter into force on 1 November and apply from 2 May 2023
- DMA applies to **gatekeepers**, once designated by the EC; it subjects them to **ex-ante obligations**, and requires them to share information about M&A activities
- EC will consult on **implementing acts** and hold workshops and bilateral dialogues about the implementation of the ex-ante obligations

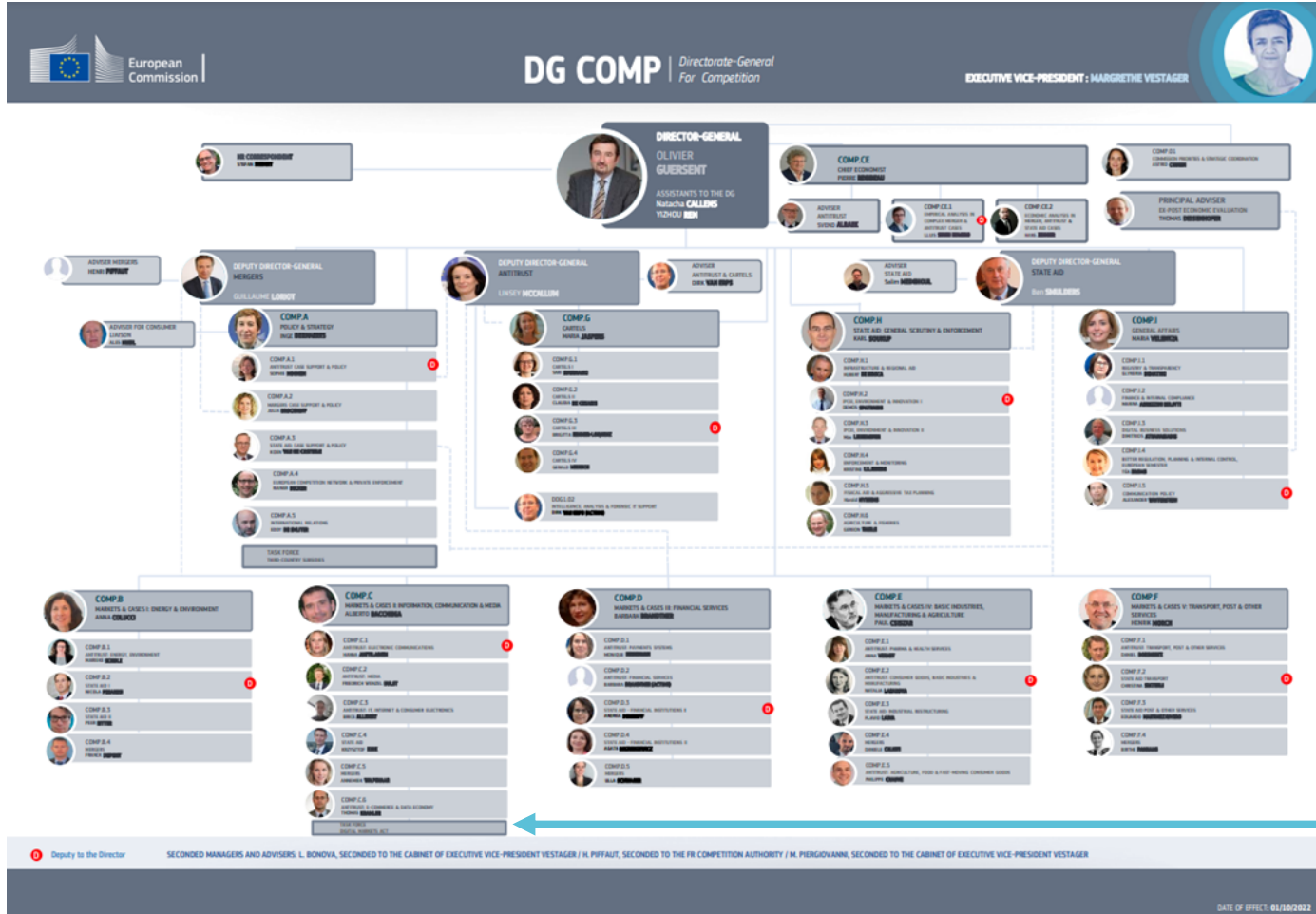


# DMA - Enforcement

- The **EC is the sole authority empowered to enforce the DMA**: joint powers for DG COMP and DG CONNECT
- **Member States have a supporting** role: each Member State will be able to empower their NCAs to conduct investigations into possible non-compliance by gatekeepers with certain obligations under the DMA

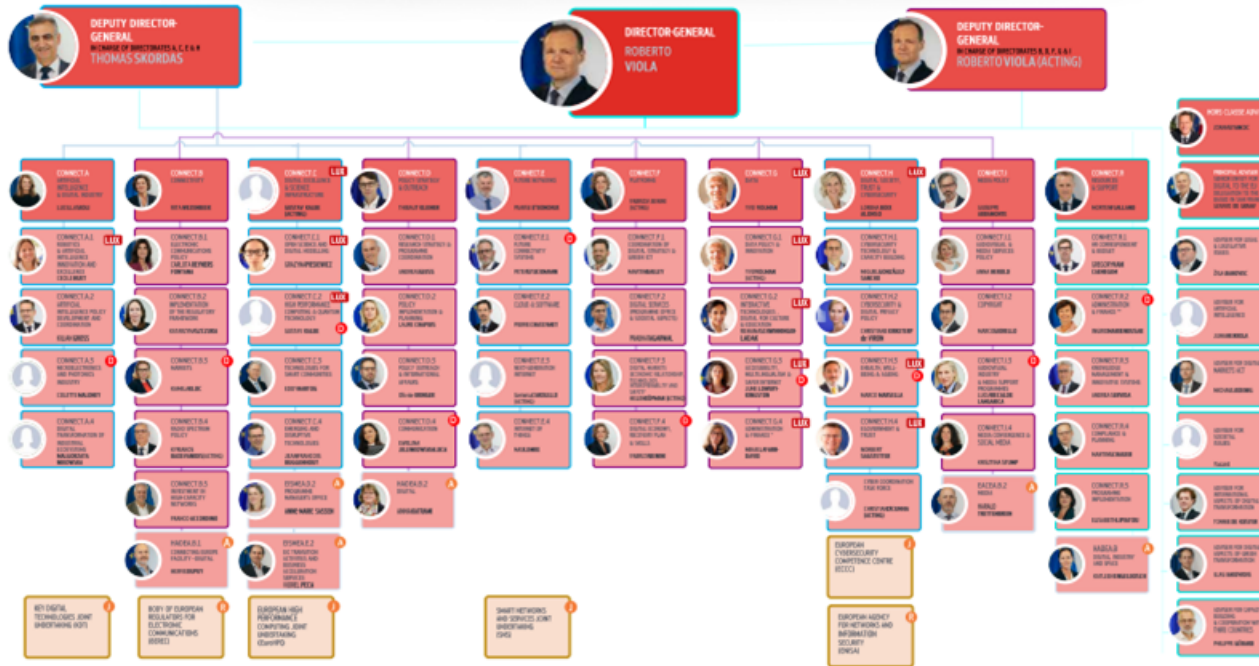


# DMA – Preparatory steps at DG COMP



New task force under COMP.C to “prepare for an effective and efficient implementation” of the DMA led by Lea Zuber

# DMA – DG CONNECT



Dedicated teams within DG CONNECT will be organised around thematic domains – including the societal aspects, the technical aspects, and the economic aspects.



# Digital Services Act – DSA

- DSA expected to be published at the end of October and will likely apply from January 2024
- Includes a wide set of additional obligations for targeted entities



# Data Governance Act - DGA

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- Entered into force on **23 June 2022**, will apply from September 2023
- The DGA 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



# Pending Proposals

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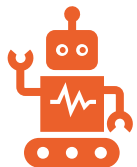
## ▪ Data Act

- Proposal published in **February 2022**, awaiting first reading in EP
- Goal is to remove barriers to access data, for both private and public sector bodies, while preserving incentives to invest in data generation by ensuring a balanced control over the data for its creators
- Also aims to set the right framework to allow interoperability and switching between providers to unlock the EU cloud market
- Designated gatekeepers under the DMA will be excluded from the scope of the access right under the Data Act. They will be required to provide, inter alia, more effective portability of data generated through business and end users' activities



## ▪ Artificial Intelligence Act

- Proposal published in **April 2021**, awaiting first reading in EP
- Goal is to build trust in AI and boosting innovation and excellence



# Antitrust for the digital age

*Traditional antitrust enforcement will continue to have its role to play to address potential abuses of dominance in digital markets. Along the way, we acquire deep knowledge of markets and competition dynamics in those markets.*

*This is where **synergies between antitrust and the Digital Markets Act will be at the centre of our enforcement of both instruments. At the same time, the Digital Markets Act will not replace antitrust enforcement.** It is an important new tool to our toolbox, making sure we have the right instruments to intervene at the most appropriate stage in the cycle – whether that means merger control, DMA enforcement or antitrust action under Article 101 or 102.*

Executive Vice-President Vestager  
16 September 2022



# Antitrust enforcement: recent court cases

- General Court largely confirmed the EC's **Google Android** decision (September 2022) as well as the EC's **Google Shopping** decision (November 2021)
- The General Court annulled the EC's **Qualcomm** decision: General Court found that the EC committed several serious procedural violations, including failure to allow Qualcomm to effectively use its “as efficient competitor” analysis by unilaterally changing the scope of the infringement in the final decision
- The General Court partially annulled the EC's **Intel** decision, considering that the EC's analysis was incomplete and did not make it possible to establish to the requisite legal standard that the rebates at issue were capable of having, or likely to have, anticompetitive effects



©Court of Justice of the EU



# Examples of NCA Antitrust Enforcement in 2022

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# Germany

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- New Section 19a GWB entered into force on 19 January 2021
- Under this new section, the FCO can designate companies as being of **“paramount significance for competition across markets”**
- Once designated, these companies can be subject to further obligations, including prohibition of **self-preferencing**, **interoperability** and **portability** requirements, measures against **weaponization of privacy**, etc.
- The FCO designated Meta, Alphabet/Google, Apple and Amazon as companies of paramount significance
- The FCO has investigations pending against Google for possible anti-competitive restrictions of map services (Google Maps Platform) and against Apple for its tracking rules and the App Tracking Transparency Framework

*Since § 19a GWB provides for further powers of intervention for the digital sector, both in personal and factual terms, the rule can, in addition to the DMA, ensure the fairness and contestability of digital markets.*

FCO President Mundt, 27 April 2022

# AG Rantos' opinion on FCO's approach in Facebook case

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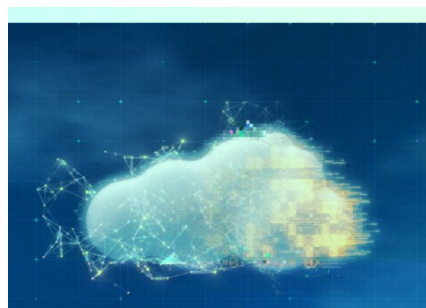
- Higher Regional Court in Düsseldorf referred the case after Meta appealed a 2019 order from the FCO to stop bundling information from its suite of apps, including Facebook, Instagram and WhatsApp, to sell to advertisers
- **AG Rantos** delivered his opinion in September and confirmed that the FCO can invoke the **EU's data protection** rules to find that Facebook **abused** its market power under competition law

*Therefore, I consider that the examination of an abuse of a dominant position on the market may justify the interpretation, by a competition authority, of rules other than those relating to competition law, such as those of the GDPR, while specifying that such an examination is carried out in an incidental manner and is without prejudice to the application of that regulation by the competent supervisory authorities.*

# France

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- The FCA is applying its existing tools to a number of investigations/studies in the digital markets, e.g.:
  - Market study to analyse competition conditions in the **cloud computing sector: final conclusions** will be issued in **early 2023**
  - **Meta** made **commitments** in June to put an end to practices that may raise competition concerns in the French market for **non-search related online advertising**
  - **Google** made **commitments** in June to create a framework for negotiating and sharing the information necessary for a transparent assessment of the remuneration of **related publishing rights**



DIGITAL

The Autorité opens a public consultation as part of its cloud sector inquiry

# United Kingdom

- The government will **bring forward legislation** to implement proposed reforms **when parliamentary time allows**:
  - The new regime will grant formal powers to the CMA's **digital market unit** (DMU) created in April 2021
  - UK Government answer to the public consultation “A new pro-competition regime for digital markets” was published in May 2022
  - New regime is still some time away as it was not included in the 2022/2023 parliamentary session
- CMA is using **existing tools in digital markets** on many fronts:
  - market study into mobile ecosystems – Final report published in **June 2022**
  - market study into the music and streaming market – report expected early 2023
  - investigation into (i) Apple's conduct in relation to the distribution of apps on iOS and iPadOS devices in the UK, (ii) Google's and Meta's Jedi blue agreement, (iii) Google Privacy Sandbox
  - a code of conduct advice for platforms and publishers
- **Ofcom and FCA** also getting involved; New UK's **Digital Regulation Cooperation Forum** set up on 28 April 2022



# Italy

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- **“2021 Annual Competition Law”** entered into force on 27 August 2022 and includes:
  - An updated list of potentially abusive conduct, adding specific examples applicable to digital platforms
  - A rebuttable presumption of **economic dependency** for businesses using digital intermediation services
  - The possibility to **review non-notifiable transactions** that are below the thresholds.
- **Examples of investigations**
  - **Android Auto.** In May of 2021, the AGCM fined Google €123 million for restricting access to an electric car charging app; confirmed by the Lazio Regional Administrative Court on 18 July 2022
  - **Amazon.** In December 2021, the AGCM fined Amazon €1,1 billion and imposed behavioural remedies for abusive practices in the market for e-commerce logistics services

# US Perspective

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# A plethora of draft bills stalled in legislative process

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- Many **bi-partisan bills** have been introduced in 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 the Judiciary committee in June 2021, but have been 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 as acquisitions that expand or entrench the market power of online platforms
  - **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

# FTC rulemaking: data privacy

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- On 8 September the FTC held a Public Forum on **commercial surveillance and lax data security practices**, focusing on the potential harms of these practices. The Forum followed the FTC's Advance Notice on Proposed Rulemaking from 11 August
- **Digital Services Oversight and Safety Act** (February 2022) establishing the Bureau of Digital Services Oversight and Safety within the FTC to provide **oversight for content moderation by online platforms** (e.g., social media companies)

*We know that today's digital tools can deliver huge conveniences—but we also know that these tools and the business models that underlie them can be used to track and surveil individuals in entirely new ways. [...]*

*With this rulemaking proceeding, we are seeking to determine whether certain unfair or deceptive data practices may now be so prevalent that we need to move beyond case-by-case adjudication and instead have market-wide rules.*

FTC Chair Khan, 8 September 2022

# Pending cases (examples)

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- **FTC**

- Facebook: the FTC sued Facebook, alleging that the company was illegally maintaining its personal social networking monopoly through a years-long course of anticompetitive conduct

- **DOJ**

- Action to restrain Google from unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the US through anticompetitive and exclusionary practices, and to remedy the effects of this conduct

- **State Attorney Generals**

- **AG Paxton** filed his third lawsuit against Google in January, again alleging that the company is systematically misleading and deceiving Texas consumers in violation of Texas' Deceptive Trade Practices Act
- **AG Ferguson** filed lawsuit in January against Google for secretly tracking consumers' location
- **AG Bonta** sued Amazon in September, alleging the e-commerce giant has stifled competition in a way that has increased prices for California consumers



# EU-US Trade & Technology Council

- Established in June 2021; meetings took place in September 2021 and May 2022
- 10 working groups to tackle a diverse set of challenges: **cooperation on technology standards**, global trade challenges and supply chain security, climate and green technology, ICT security and competitiveness, **data governance and technology platforms**, the misuse of technology threatening security and human rights, export controls, investment screening, and **access to, and use of, digital technologies by small and medium enterprises**.



# Global Focus on Digital Markets – market studies

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# Towards a better understanding of digital markets

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- **IoT** – The EC published its final report in January 2022

*“We are confident that the sector inquiry's findings will provide guidance on the Commission's future enforcement and regulatory activity. We are also hopeful that it will stimulate companies to pro-actively address those concerns.”*

Executive Vice-President Vestager, 22 January 2022

- Sweden, publication of report on “**competition on digital platform markets in Sweden**” in February 2021
- **Cloud services**
  - **Dutch** competition authority published sector inquiry in August 2022
  - **French** competition authority closed public consultation in September 2022
- **Fintech** – ongoing Greek sector inquiry. Final report will be published before the end of the year

# And around the world as well: a few examples

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- **UK:** the CMA completed its market study into mobile ecosystems in June 2022 and Ofcom is starting a study into the UK cloud market
- **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
- **Japan** published a report on cloud services in June 2022
- **South Korea:** the KFTC started in August 2022 a survey of online-platform sectors
- **Denmark:** the DCCA published in August of 2021 a report on the nature of competition in markets with digital platforms

# EU Merger Control

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# Defining digital markets – navigating the uncertainty

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- 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 EC called for feedback at the beginning of 2022 and it is expecting to **adopt** the revised notice **early 2023**

*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

# Defining digital markets – ecosystems

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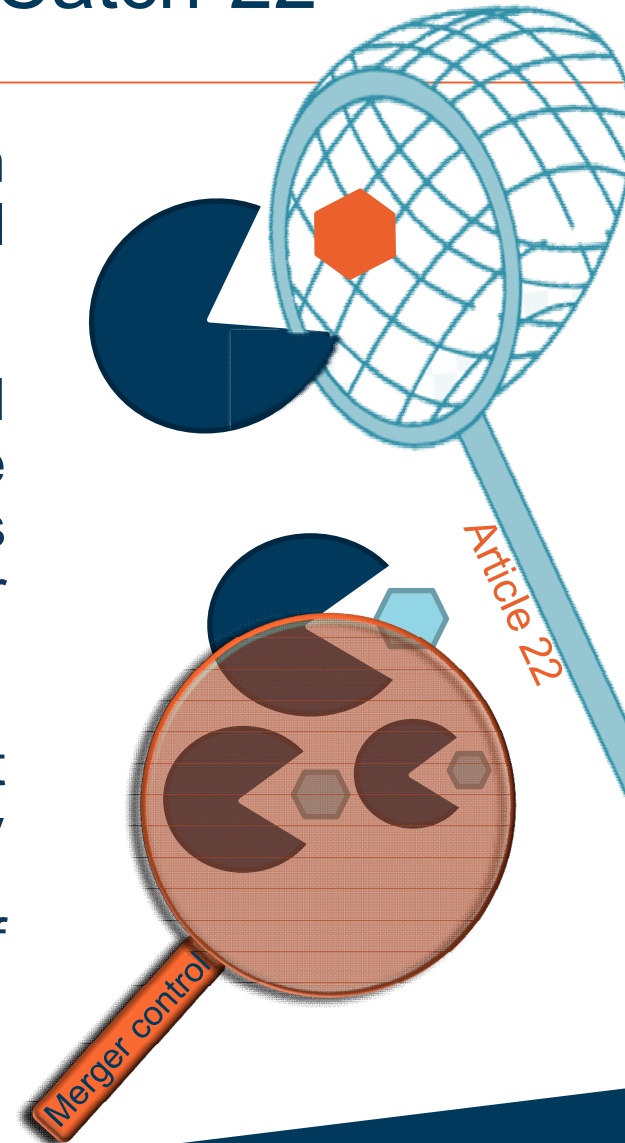
*Thus, in a digital ‘ecosystem’, which brings together several categories of supplier, customer and consumer and causes them to interact within a platform, the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity. Taken together, the relevant markets may also have a global dimension in the light of the system that brings its components together and of any competitive constraints within that system or from other systems*

*... it must be pointed out that while the relevant markets are presented separately in the contested decision, they cannot be artificially separated in so far as they all had complementary aspects that were duly mentioned by the Commission.*

Case T-604/18, Google v Commission (Android), paragraphs 116 and 126

# The Illumina/Grail judgement – a Catch-22

- 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
- The **Illumina/Grail** transaction was the first case under the new Article 22 referral policy
- The **General Court** upheld the decision of the EC accepting the referral request





# Recent completed merger in the digital space

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- **Facebook/KUSTOMER** approved in January
  - Article 22 referral request in May 2021 by Austria, Belgium, Bulgaria, France, Iceland, Italy, Ireland, the Netherlands, Portugal and Romania
  - Despite Kustomer having a small share of the EEA customer service and support customer relationship management (CRM) software market, the EC said it is an “innovative and fast-growing player”
  - The EC found that Facebook would have the ability and incentive to foreclose Kustomer’s rivals and new entrants by denying or degrading access to APIs for Facebook’s messaging channels.

*We must carefully review transactions that could further strengthen large players that increasingly dominate the digital economy, irrespective of the target company's size. Our decision today will ensure that innovative rivals and new entrants in the customer relationship management software market can effectively compete.*

Executive Vice-President Vestager, 27 January 2022

# Recent completed merger in the digital space

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- Microsoft/Nuance – Cleared by the EC in December 2021
- Amazon/MGM – Cleared by the EC in March 2022
- Oracle/Cerner – Cleared by the EC in June 2022
- Google/Mandiant – Cleared by the Austrian competition authority in July 2022
- And more coming: Microsoft/Activision Blizzard (notified to the EC in September 2022)

# Alec Burnside

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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.

## 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, 2021 and 2022.

## Education

University of Cambridge, Downing College, 1982

College of Law, London, 1983

Institut d'Etudes Européennes, Brussels, 1984

## Bar Admissions/Qualifications

Brussels

England and Wales

## Languages

English

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# Marjolein De Backer

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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, pharmaceutical, 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 2022 Marjolein was named one of seven “Most Highly Regarded Future Leaders Non-Partners in EMEA” by *Who's Who Legal*; she was recognized as a Future Leader in 2021. She has been recognized as a “Rising Star” by *Legal 500* in 2022 and as an “Associate to Watch” by *Chambers*.

## Education

K.U. Leuven, Master of Laws 2005

L.L.M NYU Law, 2006

## Bar Admissions/Qualifications

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