Organisers

AAIL ASIAN ACADEMY OF INTERNATIONAL LAW

AAIL FOUNDATION

Competition / Antitrust

Mr Brent Snyder
Mr Jindrich Kloub
Partners
Wilson Sonsini

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Trends in Cartel Enforcement

Cartel/Criminal Enforcement in the US

- ***Labor Market Focus:*** DOJ is criminally prosecuting no-poach and wage-fixing agreements
- ***Procurement Collusion:*** in 2019 the DOJ created the Procurement Collusion Strike Force to fight collusion in government purchasing or grant programs
- ***Revival of Section 2 Criminal Enforcement:***
  - As part of its efforts to use ‘all the tools at its disposal’ the DOJ has announced its intention to pursue Section 2 violations (monopolization) criminally.
  - In November 2022, the DOJ secured a guilty plea for attempted monopolization in the market for highway crack sealing services in Wyoming and Montana
- ***International Cartels Back in the Spotlight:*** Following a period of attention on domestic conduct, there are signs that the DOJ is again **focusing its efforts on international cartels**

Cartel Enforcement in the EU

- ***Increased Focus on Detection:***
  - Greater ex-officio efforts, including dedicated market monitoring team and reliance on anonymous whistleblowers
  - Efforts to increase attractiveness of the EC's leniency program
  - Reported uptick in leniency applications

- ***Resumed Dawn Raid Activity:*** Post-Covid resumption of dawn raid activity, focus on private premises. Three dawn raids since start of 2023 (Fragrances, Energy Drinks, Fashion)

- ***Pursuit of Atypical Forms of Conduct:***
  - Non-poach, Restriction of innovation
  - Conduct affecting non-price parameters
  - Information sharing
  - Conduct hampering sustainability efforts / shift to low carbon economy

- ***Continued Rise of Private Damage Actions:*** Actions being launched in a greater number of Member States with widely diverging outcomes.

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Conduct in Labor Markets

Increased U.S. enforcement since October 2016, but uncertainty in DOJ's criminal antitrust agenda due to recent trial losses

- **The DOJ/FTC HR Guidelines focus on two types of potentially anti-competitive conduct:**
  1. **Agreements** between companies not to hire or solicit employees from each other ('no poach' agreements)
  2. **Agreements** between companies regarding wages and other compensation/benefits for employees ('wage-fixing')
- DOJ believes any **'naked' no-poach agreement** (i.e. not ancillary) and wage-fixing should be assessed under the ***per se* rule**, making them appropriate for criminal prosecution
- **DOJ has brought several criminal cases so far** *(*e.g. *Surgical Care Affiliates, VDA OC, DaVita Inc and Kent Thiry*)
- **However it recently lost four trials** (*United States v. Neeraj Jindal and John Rodgers*, *United States v. DaVita Inc. and Kent Thiry, United States v. Patel, United States v. Manahe*)
  - DOJ has remaining criminal no-poach cases (e.g. *United States v. Surgical Care Affiliates*)
  - DOJ Assistant Attorney General Jonathan Kanter recently indicated the Division will continue to bring no-poach cases when the facts and case law support them
  - DOJ may need to be more selective in future cases to avoid future acquittals
- Non-compete clauses are potentially a subject of future criminal prosecution

Enforcement in the EU

Principle

No-poach/ wage fixing agreements are prohibited by EU (and national) law: they may constitute an agreement on input (buyer cartel)

Enforcement at the EU Level

- No enforcement to date, more due to local nature of most employment markets than to lack of priority
- EC signalled that it may qualify no-poach agreements involving engineers as restriction of innovation

Risk Assessment

Risk depends on specific agreement:

Agreement not to actively approach competitors' employees

Agreement that applications by competitors' employees be refused

Agreements seeking to constrain employees' remuneration

A few national cases have applied competition law to labor/hiring practices …

Fined eight freight forwarding companies EUR 14M for coordinating their strategies, incl. hiring conditions

Fined 8 modelling agencies EUR 4.5M for wage fixing agreements

An agreement between 15 hospitals preventing re-hiring for a 12-month period employees who had terminated their contracts with one of the hospitals breached competition law by object and effect

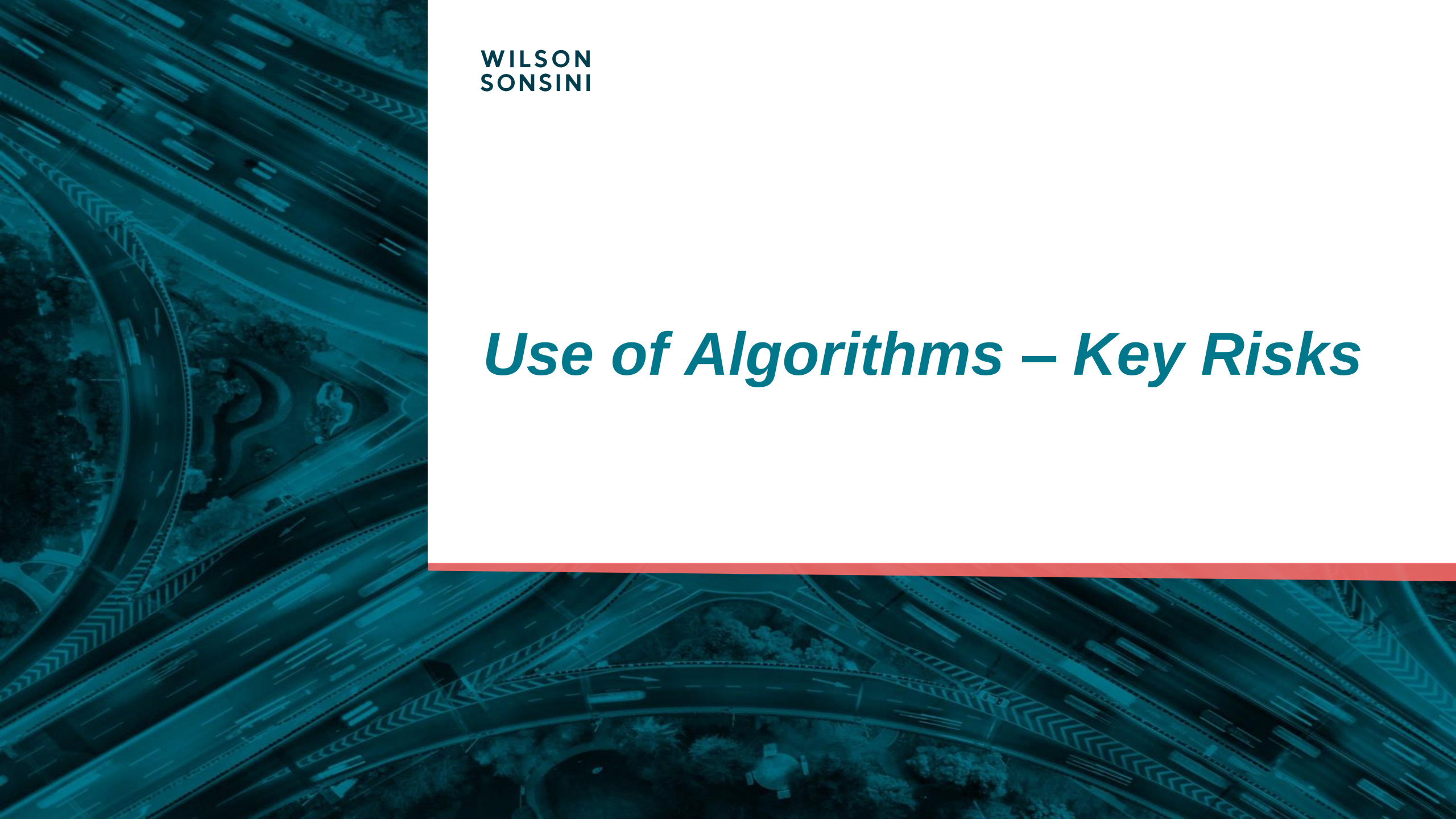
UK Enforcement

The UK CMA recently signalled increased antitrust scrutiny of labor markets after opening its first investigation into alleged wage-fixing practices

- In July 2022, **the CMA opened its first investigation into alleged wage-fixing** of freelance technical staff, such as camera operators and sound engineers who work for several broadcasters of sports content
- In January 2023, the CMA published its draft revised Horizontal Guidelines, in which it **identified wage-fixing as a hardcore restriction** (i.e. a 'by object' restriction)
- In March 2023, the CMA **signalled its interest in bringing enforcement actions in the labor market** by issuing guidance to employers on competition law compliance
    - The guidance highlights three main types of anti-competitive behavior in labor markets and qualifies them as '*examples of business cartels'*
        - ***No-poach*.** Agreements between two or more businesses not to approach or hire each other's employees, or not to do so without the consent of the other employer(s)
        - ***Wage-fixing agreements*.** Agreements between two or more businesses to fix employees' wages (including wage rates or maximum caps on pay) or other employee benefits
        - ***Information sharing.*** Exchange of sensitive information about the terms and conditions that a business offers to its employees

Hong Kong Enforcement

- To date, the HKCC has not adopted any prohibition decision against no-poach/ wage-fixing agreements
- However, it was the **second antitrust agency to express concerns about no-poach/wage-fixing agreements (after the EU)**, based on concrete information about practices in HK market
- In April 2018, it issued an **advisory bulletin**, warning against potentially anti-competitive conduct in companies' hiring practices and employment conditions
  - Businesses are subject to competition law when competing to hire staff (regardless of whether they compete downstream)
  - Wage-fixing and no-poaching seen as 'object' restrictions
- In 2022, the HKCC issued **guidance on joint negotiations in the labor market** effectively exempting practices necessary for the conduct of collective bargaining (joint negotiations), provided that:
  - the joint negotiation is justified by the industry characteristics,
  - the purpose is to improve or maintain relevant employment conditions, and
  - an employee body (labor union) is a genuine participant in the negotiations.



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Use of Algorithms – Key Risks

Algorithms and Competition: Key Takeaways

- ***Algorithms and Competition*.**
  - Companies are increasingly using algos in the course of their business
  - Largely accepted by competition agencies that algos can facilitate collusion, lead to abuse of a dominant position, and reduce competitive pressure
  - Several antitrust agencies have expressed their intention to closely monitor practices involving automated systems

- ***Enforcement Actions*. In recent years, competition authorities have been actively looking into scenarios in which algorithms are used to engage in anti-competitive practices**
  - Examples: *United States v. Topkins* (2015), EU *Eturas* Judgment (2016), UK *Posters* Decision (2016)

- ***Challenges*.**
  - Monitoring potential anti-competitive practices using algos require resources, upskilling, and specialised staff
  - CMA is leading the charge by dedicating significant resources and hiring data scientists. EC appointing a chief technologist.

US and Hong Kong

- **US**
  - The FTC has been active, e.g. by requiring the deletion of algorithms trained on data that was improperly collected in addition to deleting the underlying data itself (*Everalbum* settlement)
  - In February 2023, the FTC warned market participants that using AI tools that have a discriminatory impact and making unsubstantiated claims about AI may violate US antitrust and/or consumer protection law
  - In April 2023, US federal agencies (including the DOJ and the FTC) jointly announced that each of them is now, and will be, looking at possible discrimination involving AI systems and other automated processes
    - FTC Chair Lina Khan stated: '*[w]e already see how AI tools can turbocharge fraud and automate discrimination, and we won't hesitate to use the full scope of our legal authorities to protect Americans from these threats.*'
- **Hong Kong**
  - The HKCC has not yet brought antitrust actions in the algo space
  - However the emergence of AI and machine learning is starting to impact antitrust enforcement globally and we can see the potential for this to inform HKCC's enforcement priorities
    - Hong Kong Competition law typically applies to practices such as algorithmic collusion and the use of AI in the provision of goods and services in digital markets (which are an enforcement priority for the HKCC)

EU and UK

- **EU**
  - In February 2018, EC VP Margrethe Vestager stated: '*What businesses can and must do is to ensure antitrust compliance by design [...] That means pricing algorithms need to be built in a way that doesn't allow them to collude.'*
  - In April 2021, the EC unveiled its proposal to regulate AI tools, by:
    - Banning some AI applications like social scoring, manipulation, and some instances of facial recognition
    - Designating specific uses of AI as 'high-risk', binding developers to stricter requirements of transparency, safety, and human oversight
  - In September 2022, the EC adopted a proposed AI Liability Directive to adjust non-contractual civil liability rules to artificial intelligence

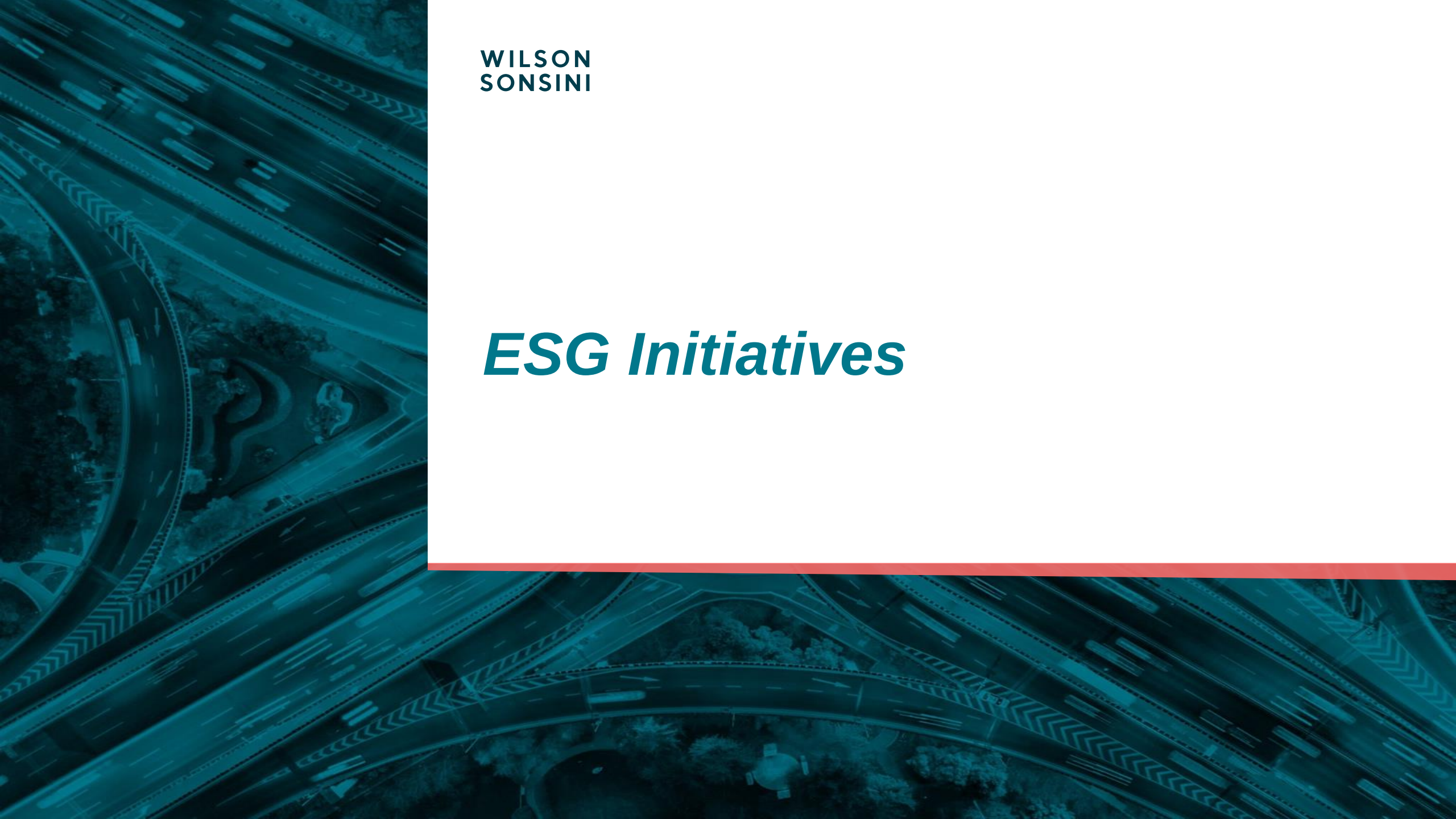
- **UK**
  - In October 2018, the CMA launched a new Data unit (including data scientists) and published the results of a study into how firms use pricing algorithms. It raised potential anti-competitive concerns on both the enforcement of collusion within cartels, and on personalized pricing
  - In January 2021, the CMA published a research paper on price algorithms, raising concerns with respect to practices such as the use of personalisation measures to discriminate between consumers
  - In May 2023, the CMA launched an initial review of competition and consumer protection in the AI 'foundation models' market, i.e. large language models and generative AI, like chatbots and image generators

Enforcement Actions

- ***US 2015 United States v. Topkins Case:*** Defendant David Topkins sold posters through Amazon Marketplace, Amazon.com, Inc.'s website for third-party sellers, and **agreed with rivals to use an algorithm to coordinate their activity by identifying the lowest price in the market**
  - This was DOJ's first criminal prosecution involving the use of AI

- ***UK 2016 Posters Case:*** Two companies, Trod and GBE **used third-party providers' software to implement an agreement consisting of not undercutting each other on prices** for certain licensed sport and entertainment posters and frames sold only by the two of them on the Amazon UK Marketplace

- ***EU***
  - ***2016 Eturas Judgment:*** An operator of an online booking platform for travel agents sent (*via* the platform's mailbox) a message to travel agents, informing them that the discounts for products sold *via* the platform were capped. The platform operator implemented the change in the system.
    - The Court held that travel agents which did not publicly distance themselves from the message could be presumed to have participated in illegal coordination
  - ***2018 EC Consumer Electronics Decision:*** The EC imposed fines on electronics manufacturers for RPM
    - The electronics manufacturers used price algorithms to monitor sales prices and put pressure on retailers to align their prices with those of competitors



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ESG Initiatives

ESG and Antitrust: Key Takeaways

- ***Political Environment*.**
  - There is greater acceptance by several competition agencies (e.g. EU, UK, Netherlands, Austria) that industry collaboration required to achieve genuine sustainability goals could be permitted by antitrust rules
  - However **there remains a significant antitrust risk for ESG collaborations** and uncertainty and divergences across jurisdictions as to how to divide line between heavily punished 'greenwash' cartels and initiatives which are on balance compatible with competition law

- ***Antitrust Concerns.*** Types of ESG conduct particularly likely to be scrutinized include:
  - Conduct Involving Parameters of Competition, e.g. price, product characteristics
  - Group Boycotts and Concerted Refusals to Deal, i.e. collective decisions/agreements between competitors not to conduct business with companies that fail to adhere to ESG principles
  - Mandatory Standards/Certifications
  - Joint Purchase Agreements, i.e. competitors' agreements to purchase goods only from certain ESG-compliant suppliers. The purchasing can have the ability to force suppliers to lower their prices below competitive levels (monopsony power)
  - Exchange of Commercially Sensitive Information (e.g. on pricing, product launch, costs, terms of supply, product/technical information)

- ***Lower Antitrust Risk.*** In more permissive jurisdictions (e.g. EU, UK), initiatives taking the form of, e.g. standard setting agreements, might benefit from a safe harbor, to the extent that they meet specific conditions (e.g. being voluntary, transparent, and open for participation)

Political Environment

- ***EU*** There is a slow shift towards a more flexible approach to sustainability collaborations
  - The EC's draft horizontal guidelines contain a section dedicated to sustainability agreements
  - Several European authorities are signalling an open and positive view to sustainability-related agreements between competitors (e.g. The Netherlands, Austria)

- ***UK*** The CMA is positioning itself as an ESG cooperation-friendly regulator
  - In January 2023, the CMA signaled that it will give firms more latitude to pursue green collaborations
  - In March 2023, it **issued for consultation draft guidance** to show how businesses can pursue green cooperation without fear of infringing UK competition law

- ***US***
  - **There is no one type of enforcement in the US** Members of Congress and state Attorney Generals (AGs) have advocated for greater antitrust scrutiny of industry-wide sustainability initiatives, while other state AGs have argued that such initiatives are procompetitive
  - **There is a significant antitrust risk for ESG collaborations.** While President Biden has identified ESG as an administration priority, firms considering ESG collaborations should anticipate antitrust scrutiny from lawmakers and antitrust agencies

- ***Hong Kong***
  - To date, there has not been a clear focus on the intersection of sustainability and competition law in Hong Kong
  - However HKCC officials indicated their **openness to updating existing guidelines on horizontal cooperation to provide greater certainty in relation to ESG-related cooperation**

Enforcement Landscape – EU

The EC has shifted towards a more flexible approach to sustainability agreements

- ***Horizontal Guidelines.*** Newly adopted (June 1, 2023), include a chapter on agreements pursuing sustainability objectives
  - Sustainability agreements that do not affect competition parameters won't be prohibited under Article 101 TFEU (e.g. internal operations, databases of sustainable suppliers, industry wide information campaigns)
  - 'Soft' safe harbor for standardisation agreements meeting certain conditions (voluntary participation, transparent adoption process, freedom to adopt stricter standard, non-discriminatory access, no significant increase in price/reduction in choice or market coverage below 20%)
  - Genuine sustainability objectives may justify a reasonable doubt as to the anti-competitive object of the agreement – shift to effects assessment
  - Detailed guidance on weighing of benefits under Article 101(3) TFEU (individual use/non-use benefits, collective benefits)

- ***Informal Guidance Notice.*** Revised in October 2022
  - Companies can obtain a guidance letter from the EC for novel/unresolved issues
  - EC officials made clear that this mechanism can be used for sustainability initiatives

Enforcement Landscape – UK

- ***Draft Sustainability Guidance*** issued in February 2023

  - **Examples of agreements that are likely/unlikely to violate antitrust laws**
    - High enforcement risk: Agreement on the price at which competitors will sell products meeting an agreed environmental sustainability standard, agreement to limit their or others' ability innovate to meet or exceed a sustainability goal or to achieve that goal more quickly
    - Low enforcement risk: Agreements to create sustainability-related industry standards, to share information about the environmental sustainability credentials of suppliers or customers, or to withdraw or phase out non-sustainable products or processes

  - **It recognizes an exemption for agreements that would otherwise violate antitrust laws but where the benefits outweigh the competitive effects**
    - The cumulative conditions are similar as the ones under EU Competition Law
    - However the CMA will allow parties to a 'climate change' agreements to justify such cooperation based on a wider range of benefits
      - Climate change agreements include, for example, agreements between manufacturers to phase out carbon dioxide-emitting production processes and agreements not to provide financing or insurance support to fossil fuel producers)
      - The totality of the benefits to all UK consumers are taken into consideration (e.g. delivery companies agreeing to switch to electric vehicles could take into account the totality of the carbon dioxide emissions reduction to compensate for any harm to their direct customers)

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Trends in Merger Review, Heightened Scrutiny of Mergers in the Tech Sector

DOJ and FTC Investigation and Enforcement Activity

- ***Increasingly long reviews and uptick in merger challenges***
  - Pushing for 90-120-day extensions to review Second Requests
  - In 2022, DOJ challenged 4 deals, FTC challenged 5
    - The agencies are opposed to settlements but have lost a number of these in court

- ***Chair Khan and AAG Kanter leading charge to invigorate US antitrust enforcement***
  - Chair Khan and AAG Kanter are fierce critics of 'Big Tech' and advocates for increased antitrust enforcement
  - They believe antitrust enforcement should prioritize goals beyond lower price and higher output

- ***Rethinking merger enforcement priorities***
  - DOJ and FTC leadership are reviewing the current Horizontal Merger Guidelines, signaling potential changes in how mergers are evaluated
  - DOJ and FTC reviews are increasingly covering non-traditional factors, such as non-price harms (quality, innovation), potential competition theories, potential harm to workers and labor-related efficiency claims

DOJ and FTC Investigation and Enforcement Activity (2)

- ***Increased enforcement against vertical mergers***
  - FTC and DOJ have increasingly signaled skepticism of vertical mergers, even with remedies, and have brought lawsuits in several cases during the past year
    - FTC: *Illumina/Grail* (FTC lost at ALJ level and is appealing), *Nvidia/Arm* (abandoned), *Lockheed Martin/Aerojet Rocketdyne* (abandoned)
    - DOJ: *UnitedHealth Group/Change Healthcare* (DOJ filed an appeal in November 2022, but ultimately dropped it in March 2023)
- ***Focus on harms beyond consumer welfare***
  - Merger enforcement has traditionally focused on harms to consumer welfare – higher prices or reduced output for consumers
  - But agencies are increasingly focused on harms to sellers and workers (i.e. monopsony issues, e.g. *Penguin Random House/Simon & Schuster*)
- ***Agency focus on divestitures and settlements***
  - Increased focus on whether divestiture buyers and settlements adequately restore competition
  - Increased agency skepticism of 'behavioral' remedies such as firewalls or merchant supply agreements
  - Biden Administration DOJ announced divestitures would be the exception, not the rule

European Investigation and Enforcement Activity

- ***Increasingly long and unpredictable reviews***
  - 33% of all significant investigations were blocked by the EC or abandoned in 2022
  - In the UK, 2 deals were abandoned at Phase I, with 33% (14) referred to Phase II (CMA reporting year of Apr 2022 – Mar 2023)
  - At Phase II, the trend is grim – 46% of deals were blocked or abandoned

- ***Similar enforcement trends on both sides of the Atlantic***
  - Nascent and potential competition issues are firmly in the spotlight (and so-called 'killer acquisitions'); vertical issues increasingly under scrutiny (*Illumina/Grail*, *Nvidia/Arm*)

- ***Jurisdictional uncertainty***
  - **Art. 22 EUMR:** Referrals to the EC encouraged where one of the parties' turnover '*does not reflect its actual or future competitive potential'*, regardless of whether national (or EC) thresholds are met (*Illumina/Grail*)
  - **UK Share of Supply test**: CMA uses 25% SoS test creatively to 'call in' any deal it deems interesting – new proposal for a 33% share test
  - **EC DMA/UK SMS:** EU and UK regimes would require gatekeepers/SMS firms to inform agencies of certain deals, regardless of whether thresholds are met

The Brexit Effect: Diverging Reviews

- The UK's exit from the EU means that parallel EU/UK reviews are a reality, with a very real risk of diverging outcomes
- Art. 22 policy shift upheld by the EU's lower court (*Illumina/Grail*), but under challenge – parallel EC and Member State review now also possible
- ***Parallel reviews ≠ parallel outcomes***
  - *Microsoft/Activision* blocked by the CMA, approved w/ remedies by the EC, under challenge by FTC
  - *Illumina/Grail* blocked by the EC, FTC's administrative court dismissed FTC's challenge
  - *Konecranes/Cargotec* approved w/ remedies by the EC, blocked by the UK CMA + threatened by DOJ
  - *Facebook/Kustomer* approved w/ remedies by the EC, cleared by the UK CMA + Germany
- ***EC more willing to engage on behavioral remedies; US and UK agencies prefer to block outright***
  - In *Microsoft/Activision*, the CMA compared behavioral remedies to sector regulation

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EU Digital Markets Act – Impact and Opportunities for Businesses

EU Digital Agenda

- ***Regulatory and industrial policy measures aimed at creating a single digital market and promoting EU digital industries***

    - **Digital Markets Act:** Regulates conduct of large platforms that offer 'core platform services'
    - **Digital Services Act:** In parallel, EU regulators are tackling a perceived antitrust 'enforcement gap' in digital ecosystems by (1) investigating conduct even below the typical threshold of dominance and; (2) intensely scrutinizing all M&A deals by digital platforms
    - **Data Act:** Data sharing obligations, safeguards for data transfer and regulation of access by public bodies
    - **Draft AI Act:** Introduces obligations on AI systems that pose a high risk re health, safety and fundamental rights
    - **Draft Chips Act:** Set of initiatives aimed at bolstering EU semiconductor industry, including subsidies and certification schemes for chip manufacturers

- ***In parallel, EU regulators are tackling a perceived antitrust 'enforcement gap' in digital ecosystems by (1) investigating conduct even below the typical threshold of dominance and; (2) intensely scrutinizing all M&A deals by digital platforms***

Digital Markets Act (DMA)

- ***The DMA imposes far-reaching obligations and prohibitions on***
  - **Gatekeeper** Platforms that provide
  - **Core Platform Services**: online intermediation services (e.g. marketplaces, app stores), online search engines, social networking services, web browsers, virtual assistants, and advertising services

- ***Violations may result in***
  - **Fines** (up to **20% global turnover**), and/or
  - **Structural or conduct remedies** in case of systemic non-compliance

- ***It will apply in parallel with EU and national antitrust laws***

- ***Timeline:***
  - Entry into force – November 1, 2022
  - Applies from – May 2, 2023
  - Deadline of Gatekeeper Designation Decision – September 6, 2023
  - Gatekeepers must comply with obligations – within 6 months of designation decision (March 2024)

DMA – Who/What is Caught?

Core Platform Services

- Online intermediation services
- Online search engines
- Online social networking services
- Video-sharing platform services
- Number-independent interpersonal communication services
- Operating systems
- Web browsers
- Virtual assistants
- Cloud computing services
- Online advertising services

Provided by a Gatekeeper

Significant Impact on Internal Market	+	*Important gateway for business users to reach end users*	+	*Entrenched and durable position*
EU turnover **≥** EUR 7.5 B in the last 3 FY **or** Average market cap **≥** EUR 75 B in last FY **and** the same CPS in at least 3 MS		**≥** 45 million monthly active end users in the EU **and** **≥** 10 000 yearly active business users in the EU		Thresholds for end users and business users met in each of the last 3 FY

- If quantitative criteria triggered: platform must notify and is presumed to qualify as a gatekeeper
- If quantitative test not met, EC can still determine that criteria are met by opening a market investigation

DMA Do’s and Don'ts for Gatekeepers

DMA Provision	Obligation
Anti-steering (Art. 5(4))	Gatekeepers **must** allow businesses to communicate special offers available from alternative third-party sources to end users
App uninstallation, changing defaults, and choice screens (Art. 6(3))	Gatekeepers **must** allow end users to easily change default settings and/or uninstall any software apps on an OS, unless essential for the good functioning of the OS
Sideloading (Art. 6(4))	Gatekeepers **must** allow the installation and use of third-party apps or app stores that do not endanger the integrity of the device or OS
Interoperability (Art. 6(7))	Gatekeepers **must** give third-party service and hardware providers interoperability with its OS or virtual assistant so that they can have access to the same hardware and software features to which first-party services have access
Data access (Art. 6(10))	Gatekeepers **must** provide business users real-time access to their data generated on the platform
Access to certain core platform services (Art. 6(12))	Gatekeepers **must** provide business users with fair, reasonable, and non-discriminatory conditions for access to app stores, online search engines and online social networking services

DMA Provision	Prohibitions
Most-Favored Nations clauses (Art. 5(3))	Gatekeepers **cannot** prevent business users from offering their products and services under different prices and conditions on their own sales sites, as well as on third-party platforms
Use of certain platform services (Art. 5(7))	Gatekeepers **cannot** require businesses to use their proprietary payment services, identification services, web browser engines or technical services when using a core platform service
‘Tying’ of platform services (Art. 5(8))	Gatekeepers **cannot** require users to register/subscribe to other core platform services as a condition to use any of the core platform services
Use of business data to compete (Art. 6(2))	Gatekeepers **cannot** use business users’ non-public data to compete against it
Non-discriminatory ranking (Art. 6(5))	Gatekeepers **cannot** rank their own products or services higher than those of rivals (including related indexing and crawling)
Termination of use (Art. 6(13))	Gatekeepers **cannot** impose contractual or technical restrictions to termination (e.g., unsubscribing, or terminating a service contract more generally) on its business users

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EU Foreign Subsidies Regulation

EU Foreign Subsidies Regulation

- ***The FSR introduces a new mandatory review layer for M&A and Public Procurement***
  - Starting July 12, 2023, the new EU Foreign Subsidies Regulation (FSR) will give the EC powers to review subsidies from non-EU states to companies active in the EU
  - Its aim is to complement the EU's existing state aid regime, which controls subsidies by EU Member States, by preventing distortions in the European market caused by third country subsidies
  - It will apply in parallel with the already complicated web of merger control and foreign direct investment (**FDI**) requirements at both an EU and national level

- ***Broad Scope***
  - It captures subsidies received on a corporate group basis from any non-EU country, therefore affecting both non-EU and EU companies
  - It covers financial contribution received from a non-EU state, including loan guarantees, tax exemptions, capital injections, fiscal incentives, debt forgiveness, contributions in kind, but also any provision or purchase of goods or services by government entities (or a private entity whose actions can be attributed to a government)

- ***Potential for Significant Fines***
  - Failing to file and disregarding the suspension obligation prior to EC clearance can each lead to fines of up to 10 percent of global turnover

More Complexity for M&A Deals with EU Dimension

- ***Requirement to obtain EC clearance for large M&A deals.*** Pre-closing mandatory notification will be required if:
  - The acquisition target, one of the merging parties, or the joint venture (**JV**) is established in the EU and has **revenues of at least €500 million ($539 million) in the EU** in the previous financial year; **and**
  - The parties to the transaction received c**ombined financial contributions from non-EU countries of more than €50 million ($54 million)** over the three years preceding the conclusion of the agreement, announcement of the public bid, or acquisition of a controlling interest.

- ***Possibility of EC scrutiny of M&A deals below notification thresholds***
  - The EC may require a **notification of below-threshold deals** where it suspects that foreign subsidies may have been granted to the companies concerned in three years prior to the deal
  - It may also **conduct investigations** (including compulsory information requests and inspections) if it suspects the existence of foreign subsidies distorting the EU market and impose remedies
    - This may impact implemented deals that were not reviewed by the EC under merger control rules and expose them to the potential risk of remedial measures, including divestiture

- ***Review of subsidies in the context of public procurement***
  - Companies participating in public tenders in the EU will need to notify foreign financial contributions of €4 million ($4.3 million) in tenders worth at least €250 million ($269 million) and obtain clearance from the EC, which may require remedies or prohibit the award of the contract
  - Parties that do not meet the thresholds are still required to declare the contributions and confirm they are not notifiable