

COMPETITION & REGULATORY NEWSLETTER

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EU, UK and US competition authorities publish shared principles for competition in AI

On 23 July 2024, the European Commission, the UK Competition and Markets Authority (CMA), the US Department of Justice and the US Federal Trade Commission published a [joint statement](#) on competition in generative AI foundation models and AI products. The statement sets out the four authorities' views on common principles to support competition, protect consumers and promote innovation in AI technologies.

Overview

In the statement, the EU, UK and US competition authorities (the Authorities) express their common view that, despite differences amongst jurisdictions and the sovereignty of national competition authorities, the risks to competition arising from AI would likely materialise “*in a way that does not respect international boundaries*”. As such, and while acknowledging the potential benefits that the development of AI technologies may create, the statement is part of the Authorities' work to share an understanding of the competition and consumer protection risks arising from AI.

The Authorities go on to set out their views on what they see as the three main competition risks related to AI:

- 1. Concentrated control of key inputs:** according to the statement, the importance of chips, compute, data and specialist technical expertise for the development of AI means that a small number of companies may be able to “*exploit existing or emerging bottlenecks across the AI stack*” to have a disproportionate influence over the future development of these tools. This could ultimately limit innovation.
- 2. Entrenching or extending market power in AI-related markets:** the Authorities believe that large digital firms may be able to extend or entrench their market power across ecosystems in AI-related markets, to the detriment of future competition. For instance, platforms having substantial market power at multiple levels of the AI stack could, according to the Authorities, have control of the channels of distribution of AI or AI-enabled services, creating a risk that these firms could shape the development of these markets in their own interests.
- 3. Arrangements involving key players could amplify risks:** according to the Authorities, arrangements including partnerships, investments and other connections between firms related to generative AI could, in some cases, be used by firms to “*undermine or coopt competitive threats*”. The Authorities' interest in these issues has materialised in recent merger investigations in this space, including into alleged ‘acqui-hire’ arrangements. The Commission has also signalled its appetite to use antitrust rules to review arrangements or partnerships that fall outside the EU merger control rules.

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To address these potential risks, the Authorities have set out fair dealing, interoperability and choice for businesses and users as key common principles to support competition, protect consumers and help businesses to innovate and thrive. The statement does not elaborate on the specific implementation of these principles in the Authorities' respective jurisdictions.

The Authorities also note that they are mindful of other risks that can arise when AI is deployed across markets. This includes, for example, the risk that algorithms may be used to allow competitors to share competitively sensitive information, engage in price-fixing, or otherwise collude in violation of competition laws.

Finally, the statement ends on the Authorities' views of the consumer protection risks associated with AI. The CMA, the US Department of Justice and the US Federal Trade Commission, which have consumer protection powers, note that they intend to stay vigilant of any consumer protection threats that may derive from the use and application of AI, particularly where deceptive practices are concerned. The statement highlights the risk that some firms may deceptively or unfairly use consumer data to train their models, potentially undermining individuals' privacy, security and autonomy. The Authorities emphasise the importance of consumers being informed, where relevant, of when and how an AI application is employed in the products and services they purchase or use.

Comment

The joint statement features as the latest initiative in the EU, UK and US competition agencies' work in respect of AI. It sets out a number of high-level shared principles that the Authorities see as foundational in their approach to AI risks, but does not elaborate on how firms can expect these principles to be implemented by regulators in practice. What the statement does clearly communicate is the Authorities' intention to work closely together to understand AI and the risks associated to it as the technology develops, as well as their commitment to be proactive in this space, learning from their previous experience in digital markets.

The CMA has been working for some time to understand these complex markets and engage in horizon scanning of potential issues. In September 2023, it published its initial report on AI foundational models following a review of the sector. While that initial report was widely praised by stakeholders and practitioners for its nuanced and open-minded approach, the CMA's tone has become firmer in recent months. In April 2024, the CMA published its strategic update on its approach to AI and an update on its initial report, noting that there has been a "*marked increase*" in its concerns about the directional trend of developments in the sector. The CMA has been clear that it sees the new digital markets regime introduced by the Digital Markets, Competition and Consumers Act 2024 as a key tool in its armoury to approach AI-related risks. For more information on these developments, refer to our previous blog posts [here](#) and [here](#).

Competition agencies and lawmakers alike have made regulating AI a key policy objective. On 1 August 2024, the EU AI Act, which the Commission has heralded as the "*world's first comprehensive AI law*", will come into effect. There were also hints of the possibility of a UK AI bill in the recent King's Speech, which confirmed that the Labour government "*will seek to establish the appropriate legislation to place requirements on those working to develop the most powerful artificial intelligence models*". (See our blog posts on these developments [here](#) and [here](#).) In the meantime, competition and consumer protection authorities are expected to continue to closely monitor developments in this space.

OTHER DEVELOPMENTS

MERGER CONTROL

Australia releases draft legislation introducing mandatory notification framework

On 24 July 2024, the Treasury of the Australian government published its [exposure draft](#) of Treasury Laws Amendment Bill 2024: Acquisitions (Exposure Draft) setting out the legal framework for Australia's new mandatory merger notification rules.

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The Exposure Draft comes after the Government announced reforms to its existing merger regime in April 2024. The current regime is voluntary, and there is no obligation to seek authorisation from the Australian Competition and Consumer Commission (ACCC). The new Bill proposes to replace the existing framework with a single mandatory and suspensory administrative system, giving the ACCC the power to block acquisitions of shares or assets of a certain threshold. According to the ACCC, an estimated 1,000-1,500 mergers occur in Australia each year, but only about 330 are notified to the ACCC under the existing regime.

Key points from the Treasury's Exposure Draft include:

- **Transactions caught:** the regime will apply to any direct or indirect acquisition of shares or assets which confers control or the ability to materially influence the acquired business or the competitive structure of the market. 'Control' will be presumed if, post-transaction, the acquirer will hold at least 20% of the voting rights.
- **Timeline:** the initial Phase 1 review period will be up to 30 business days or a 'fast-track' determination if no concerns are identified after at least 15 business days. For more complex mergers, the review may enter into Phase 2 which is a period of up to 90 business days. Should a Phase 2 review be required, the ACCC will provide the parties with a 'notice of competition concerns', setting out the ACCC's views on the deal.
- **Acquisitions in the national interest:** the Exposure Draft permits acquisitions which, in the ACCC's view, are likely to result in a benefit to the public that would substantially outweigh any detriment to the public resulting from the acquisition.
- **Serial acquisitions:** the ACCC would be able to consider the cumulative effect of all acquisitions within three years of the effective notification date, regardless of whether they are notifiable on their own.

Further consultation on the notification threshold, fees and regulations are expected later this year.

Subject to parliamentary approval, the proposed regime is expected to commence on 1 January 2026, upon which Australia will join the majority of jurisdictions globally with a mandatory and suspensory merger review regime. Voluntary merger regimes are still in place in some jurisdictions such as the UK, Singapore, and New Zealand.

GENERAL COMPETITION

European General Court confirms ByteDance's digital 'gatekeeper' designation under the Digital Markets Act

In November 2023, ByteDance brought an action for annulment of the European Commission's September 2023 decision to designate ByteDance as a digital gatekeeper in respect of its social networking platform TikTok under the Digital Markets Act (DMA). In a [ruling](#) under the expedited procedure, on 17 July 2024, the European General Court (GC) upheld ByteDance's gatekeeper designation - this marks the first substantive judgment on the DMA.

In its appeal, ByteDance had not disputed that it met the quantitative thresholds under the DMA (leading to a presumption of its gatekeeper status), but rather that the Commission was wrong to dismiss its arguments rebutting that presumption. In particular, the appeal centred around the presumption that ByteDance had a significant impact on the internal market, that TikTok was an important gateway for business users to reach their end users, and that ByteDance held an entrenched and durable position.

The GC dismissed ByteDance's appeal - stating inter alia that ByteDance's arguments "*were not sufficiently substantiated so as manifestly to call into question the presumption that ByteDance had a significant impact on the internal market, that TikTok was an important gateway allowing business users to reach their end users and that ByteDance enjoyed an entrenched and durable position*".

The GC rejected ByteDance's argument that it did not have a significant impact on the internal market. Whilst the GC acknowledged that low EU turnover might in certain circumstances demonstrate a lack of significant

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impact on the internal market, it found that the Commission was entitled to consider ByteDance's high global market value (mainly attributable to its activities in China), combined with the large number of TikTok users in the EU which reflects the firm's financial capacity and its potential to monetise those users in the near future (and therefore shows its significant impact on the internal market).

ByteDance also argued that it did not have an ecosystem or network or lock-in effects, and TikTok was smaller than some other online social networks, and for these reasons, TikTok was not an important gateway for business users to reach end users. However, the GC rejected these arguments, referencing the sharp increase in TikTok users in the EU since its launch in 2018. The GC stated that TikTok has, in a short time frame, reached half the size of Facebook and Instagram with a high engagement rate, especially amongst young users.

Finally, the GC rejected ByteDance's argument that it did not have an entrenched and durable position. It noted that whilst TikTok initially entered the EU market as a challenger firm in 2018, the platform has grown expeditiously and has strengthened its position over the years.

ByteDance can bring a further appeal to the Court of Justice but for now, the company is to continue to comply with the relevant gatekeeper obligations under the DMA. For more details on the judgment, see our ["The Lens" blog post](#).

CMA secures undertakings and consumer refunds from Wowcher over countdown timers

On 31 March 2023, the UK CMA launched an [investigation](#) into Wowcher's 'pressure marketing' practices. This includes its use of countdown timers and marketing claims on its website, such as 'Running out!' and 'In high demand!'. The CMA raised concerns that these online selling practices may create a false sense of urgency and misleadingly influence customers' purchasing decisions. The CMA found evidence that such claims risk giving the misleading impression that products will increase in price or will not be available when this is often not the case. The CMA also flagged concerns related to practices such as hidden charges and the use of pre-ticked boxes to enrol consumers on to VIP memberships.

On 16 November 2023, the CMA announced that it had written to Wowcher asking it to sign undertakings to address its concerns. On 19 July 2024, the CMA [announced](#) that it has secured undertakings from Wowcher to change the way it promotes products and services to customers (as well as regularly reporting back to the CMA over the coming year). These include:

- **Countdown timers:** countdown timers must be clear and accurate and must not mislead consumers or give a false impression that they must act quickly to avoid missing out on a deal. Wowcher will also remove its permanent countdown timer at the top of its homepage which suggests those deals may then change or end.
- **Marketing claims:** claims about the scarcity of a deal must accurately reflect Wowcher's remaining stock levels. Claims about the popularity of a deal must accurately reflect Wowcher's sales figures, as well as how popular a deal is compared to other similar deals.
- **Refunding customers who are signed up to a 'VIP membership' via a pre-ticked box:** Wowcher will provide a credit refund - with the option to exchange to cash - to over 870,000 customers (totalling around £4 million) and will stop the use of pre-ticked boxes for VIP sign-ups, to ensure customers are fully aware of what they are agreeing to.

The investigation into Wowcher forms part of the CMA's programme of consumer enforcement action focused on 'Online Choice Architecture', which is aimed at tackling potentially harmful online selling practices - including pressure selling tactics such as urgency claims. While the CMA currently does not have direct powers to sanction businesses in its own right for a breach of UK consumer law, the Digital Markets, Competition and Consumers (DMCC) Act 2024 will empower the CMA to impose fines directly on companies for UK consumer law breaches. Notably, the DMCC Act introduces consumer protection policy reforms which, amongst other things, focus on subscription traps and countdown timers. For further details on the new DMCC Act, see our [client briefing](#) and a previous edition of our [Newsletter](#).

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FCA/PSR publish call for information relating to competition in digital wallets

On 15 July 2024, the UK Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR) launched a joint call for information titled '[Big Tech and Digital Wallets](#)' on the benefits and risks that digital wallets such as Apple Pay, Google Pay and PayPal bring to people and businesses.

The PSR is interested in how the use of digital wallets impacts consumers' choice of payment options at checkout. It hopes to gain a better understanding of the implications of digital wallets' growing role in payments, and the implications for competition between payment systems. The FCA has a particular interest in how digital wallets may impact competition in the supply of financial services, and the operational resilience and systemic safety of the UK financial services sector. Both regulators are also interested in how digital wallets impact consumer rights and protection.

The consultation closes on 13 September 2024 and the regulators are to publish an update on their work early next year. For further details on the call for information, see our ["The Lens" blogpost](#).

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