Competition Law and Digital Markets in Africa and Europe

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Primerio

Primerio International and **Quinn Emanuel Brussels** recently collaborated to provide an insightful webinar discussing recent competition policy, legislative and enforcement developments in digital markets across Africa and Europe, as well as trends, risks and lessons to be learnt.

Michael-James Currie
Partner: Primerio International

Florence Abebe
Chief Legal Officer: FCCPC

John Oxenham
Partner: Primerio International

Juanita Clark:
CEO, Digital Council Africa

Trevor Soames
Managing Partner: Quinn Emanuel, Brussels

Raphael Mburu
Mergers & Acquisitions Manager: CAK

Mark English
Of counsel: Quinn Emanuel

Abraham van der Merwe
Co-Founder & Managing Director: Frogfoot

Primerio recently hosted a webinar in collaboration with Quinn Emanuel Brussels to discuss important developments in competition law policy and enforcement in digital markets from both a European and African perspective. The webinar consisted of a great panel including business representatives, members of key African regulatory authorities as well as legal experts from South Africa and Europe. In case you missed it, see below the key points made by each speaker during the session.

John Oxenham, Partner at Primerio kicked off the webinar by highlighting the importance of the digital sector in light of both policy and enforcement trends in relation to the global economy.

Michael-James Currie, Partner at Primerio, moderated the event and led the discussion through the key developments which have recently occurred insofar from a South African perspective.

Juanita Clark, CEO of Digital Council Africa provided valuable insights into the industry in light of the Covid-19 induced accelerated demand for digital services and the hurdles they encounter as they attempt to encourage investment in Africa and bridge the digital divide.

Abraham van der Merwe, Co-Founder and Managing Director at Frogfoot Networks elaborated on the industry concerns by alluding to the nature of the industry value chain and discussing the complex consolidation issues which underlie the market.

Raphael Mburu, Mergers and Acquisitions Manager at the CAK discussed recent studies and outcomes in the Kenyan banking sector and the risks associated with, and possible solutions to overregulation, particularly in light of the best interests of consumers.

Florence Abebe, Chief Legal Officer of the FCCPC described the uniqueness as well as the benefits which come with developing a country's digital market with reference to the recent experiences of the Nigerian competition authority.

Trevor Soames Partner and **Mark English**, Of-Counsel, at Quinn Emanuel Brussels provided their valuable insights from a European perspective by providing an overview of developments in Europe and recounting their experiences concerning significant cases in the EU and UK.

John Oxenham (Primerio)

John opened the discussion on digital markets by noting the significant transformation in digital markets globally. He noted that exponential growth poses concerns for both policy and enforcement of competition worldwide. Global enforcement efforts have focused on the promotion of competition through new antitrust policy, the establishment of new digital market regulators as well as the review of killer acquisitions. However, John described that despite these developments, regulatory agencies continue to grapple with various nuances in regulating the digital economy.

The OECD highlights how competition authorities continue to grapple with uncertainty in evolving digital markets, as they are required to consider new forms of misconduct and abuses of dominance.

As a priority sector, the South African Competition Commission has taken an active approach to enforcement of digital markets. John described that the Commission's intentional regulation is in effort to avoid outcomes that could harm the development of small businesses, consumers and ultimately economic growth.

The digital markets debate, particularly in relation to what the appropriate policy should be and the level of regulatory intervention that is required, is certainly something which is not confined to Europe and the United States and the more developed economies. According to John, the debate is very much at the forefront of what's going on in South Africa too.

John noted the likelihood of a trend that parties active in the digital space are going to be called on more frequently to notify even competitively benign transactions based on these thresholds. The Commission has also recognized that for the requisite developments to be affected in South Africa, particularly given its emerging market status and the economic position of many South Africans, infrastructure must be focused on.

In relation to the recent market inquiry into online intermediation platforms, John noted the increasingly pressing risks which follow the market inquiry powers having changed quite substantively two years ago. While the Commission previously conducted market inquiries and then simply recommended remedial steps to be taken up by legislature or parliament, the Commission now has powers to impose remedial actions or remedial measures, following market inquiries, themselves. These powers include behavioral remedies and structural remedies. Although the latter remedies need to be confirmed by the Tribunal, the threshold upon which to assess whether features in the market are distorted is much lower than the standard substantial lessening of competition threshold.

Additionally, the Commission is mandated to assess the impact that the market or market features would have on the ability of a designated class of competitors, commonly termed historically disadvantaged persons, or small or medium enterprises, to participate meaningfully in the market. Therefore, John emphasized the importance of the Commission having a good grasp of the different aspects of the digital economy, ranging from infrastructure to platforms. Inimical to this, the Commission must also understand how businesses within those platforms work and what the key investment and commercial decisions are that inform their functioning.

From the private practice perspective, John noted that there is a legitimate concern that the Commission's market inquiries are based on the premise of "big is bad", which increases the risk of over-intervention and may well compromise the objective standard which should be based on economic and quantifiable evidence.

John made the important caveat that it would be unfair to suggest that the Commission has overstepped this mark, since the recommendations of the market inquiry are still draft form. Nonetheless, there is certainly a noteworthy risk.

Michael-James Currie (Primerio)

In response to the highlights shared by John, Mike noted that although the Commission has published a Policy Paper to address these matters, the Commission has taken the view that the Competition Act in its current form is sufficient to address abuse of dominance conduct as it arises in respective markets. In this regard, Mike contends that we should not expect too many legislative changes. In concluding this part of the discussion, Mike noted that there has been significant interaction with federal regulators from Africa and abroad, which has informed the policy direction taken in South Africa.

John and Mike handed over to Raphael and Florence who provided valuable insights into developments in Kenya and Nigeria. In particular, Raphael and Florence discussed the position of their respective agencies in developing and formulating competition policies to address the unique challenges posed by digital markets.

Raphael Mburu (CAK)

Directing the conversation towards the developments in Kenya, Raphael detailed the advent of digital markets, which started with the entry of Uber into the country. The competition agency was tasked with protecting and stabilizing the traditional markets, and in this case, regulating traditional taxi drivers. Currently in Kenya, there are more than six taxi hailing apps operating. This has allowed consumers to use multiple platforms and moving away from traditional taxi hailing. Co-operative societies that can empower the drivers has allowed a lot of growth in the digital economy and significant expansion in e-commerce markets.

Raphael described a recent study in the Kenyan banking sector, performed together with the central bank and other financial regulators focused on digital lenders. The CAK highlighted that first and foremost, it is important to understand what challenges consumers are facing, and where the CAK has a role to play. In this regard, ascertaining market shares required a mechanism, whereafter establishing who the players in the market are, the CAK commenced the process of registering digital lenders.

Raphael emphasized the need for the CAK to improve their guidelines, especially to cater for cases relating to pure data driven markets. This need, according to Raphael, brought about a key amendment to the merger guidelines, to ensure that assets also become part of what is captured in a transaction and that asset value is not based on book value.

By means of an example, Raphael explained that someone might purchase seemingly basic IP, but which is valued at a million dollars. The same rules have allowed the agency to refer back to transactions that would have been excluded from notification, and it reviews these.

In relation to killer acquisitions, the CAK has had instances where large corporates were trying to buy a small company, and such transactions were subsequently reviewed and noted within the guidelines. The reviews included the relevant ratios, to ensure a detailed view of these transactions.

Nevertheless, there is still a big discussion regarding dominance in this market. Are potentially dominant firms behaving? Can the firm influence what's happening in their market without necessarily being dominant? Raphael contended that various aspects surrounding digital markets are still in preliminary stages, as is the definition of a market.

Another principle which is applied, is the element of substitutability. Using Google’s recent ruling as an example, Raphael explained that the findings are not to be taken as a given, and that only those which are applicable must be assimilated into their context.

Moreover, the Data Protection Act and office of Data Protection Commissioners in Kenya have played a critical role in the digital economy. These

resources act as a key driver, particularly in how to provide and analyze data. The handling and analysis of data, for example, in a market conduct case, concerns how parties are allowed to provide the regulator with the necessary data in terms of the regulations and what the concomitant benefits are.

In Kenya, the government is the biggest consumer of some digital products. A small study recently established that almost every government machine in Kenya has Microsoft Office on it. In light of this, Raphael posed the following question to the audience: in instances where the companies are being investigated, what is the impact on government delivery, its services and the overall government agenda? How much do they regulate, to ensure there's a balance with the overall government agenda? And, at the end of the day, how do they ensure that consumers are deriving benefit from the product?

Michael-James Currie (Primerio)

Mike responded with two questions. Firstly, he questioned the extent to which the CAK is looking at non-traditional competition factors or public interest factors as part of their digital markets. What is the overarching guiding principle?

The second, more technical question, related to the merger control side and threshold determination. Is the asset value reflected as book value and are there going to be other mechanisms of valuation, or would the Commission use purely purchase price type of methodologies? Is there any guidance at this stage as to what the thinking is?

Raphael Mburu (CAK)

Raphael answered the questions posed by Mike with reference to a study conducted in 2021, in the banking sector. The study intended to define traditional markets and new forms of banking. In a recent example where a Kenyan bank merged with a telecommunication subsidiary, instead of the entity being looked at as fitting into a traditional market, it was considered in terms of which markets it was dipping into. Unfortunately, this approach raises another risk, which is where to draw the line? For instance, when dealing with one's bank account using a mobile phone, how is it different from going to the bank? Is it a mere improvement in terms of convenience? Evidently, there is a dynamic element to this competition assessment.

The CAK is also faced with the question of how intervention is likely to help spark growth both across the country and regionally. If one looks at what is happening in the African community, there is certainly substantial growth as competition agencies continue to actively check into competition matters. In parallel with the growth in relation to competition matters, the African competition authorities are definitely placing more emphasis on public interest considerations.

When it comes to merger control and threshold determination, Raphael noted that if an acquisition involves a small company, the purchase price is usually not much different to the asset valuation that was done for the company, and that is very critical.

Florence Abebe (FCCPC)

With reference to Nigeria, Florence commenced with a delineation of the dual mandate which the Federal Competition and Consumer Protection Commission ("FCCPC") has with respect to protecting consumers and ensuring that there is a level playing field for all businesses. In this regard, she noted that the scope of the FCCPC spans across all commercial activities in Nigeria. Therefore, the FCCPC is able to enforce any enactment that borders on consumer protection or competition in Nigeria. Essentially, the most important aspects of competition analysis are sustaining the key pillars, it being price, quality, output, choice or innovation, how the market is defined or how to assess market power. Thereafter, the question remains whether

competition law can adequately deal with the challenges in the digital sector. In Nigeria, the approach is somewhat more flexible and adaptable in its interpretation of the local laws.

In other words, to properly regulate competition and consumer protection in the digital space, regulators must begin to see data for what it is. It's now the new currency. Florence consequently emphasized the importance of how the data collected, how it is stored, and the issues of interoperability and consumers choice and consent.

Insofar as a 'digital markets' update is concerned, Florence noted that Nigeria is currently investigating the digital money lending space, and that it has taken a slightly different approach to regulation. They have decided that collaboration is key. Hence, the FCCPC is collaborating with other sector regulators such as the Central Bank of Nigeria and the Nigerian Communications Commission. The FCCPC is using an interim guideline to set up a joint task force and asking businesses to come and assess their business processes.

One of the key problems that it has highlighted is access to consumers data and sharing of consumer data with third parties. Consequently, the FCCPC launched an investigation by setting up a joint task force. Some accounts of the digital money lenders were frozen, apps were removed from the Google Play Store and entities were given a 90-day ultimatum. Just as in Kenya, it was difficult to identify the digital money lenders, particularly in light of there being no fiscal infrastructure on the ground because a lot of these platforms, apps, applications, were using online application stores.

The FCCPC then prohibited any new registrations of money lenders and warned that if existing money lenders did not get a waiver from the FCCPC, they would also be given a 90 day ultimatum.

More importantly, the Nigerian data Protection Bureau, who is responsible for privacy issues, privacy policies and data collection, is now auditing these data service providers, and encouraging their participation in how the guidelines are implemented.

Florence noted that the FCCPC has only recently issued its market definition notice and taken cognizance of the digital markets specifically. In light of the novelty of digital markets in Nigeria, one of the key responsibilities of the FCCPC is to enforce any developments within the market which borders consumer protection or competition. Ideally, the FCCPC is looking at making data as accessible as possible to all.

Earlier on this year, the FCCPC set out its abuse of dominance regulations, which clearly indicate how prices are to be determined and how the FCCPC intends to look at other parameters that can influence the dominant undertaking, for their benefit.

The FCCPC has taken three approaches to regulating the digital space, namely by issuing regulations, enforcement, and collaborating with other local or international competition agencies. By way of an example of the FCCPC's efforts, Florence noted that the FCCPC recently entered into a memorandum of understanding with the Competition Commission of South Africa and is currently looking into one with the Egyptian Competition Authority.

In comparison, Florence noted that Europe is far more developed in their thinking, both from a policy perspective and in terms of legislative developments. In this regard, Mike noted that it would be very interesting to get Trevor and Mark's thoughts, particularly in terms of what Europe successes and shortfalls, to get a sense of the sort of regulatory intervention in this space.

Trevor Soames (Quinn Emanuel)

Trevor opened the discussion on the European developments by noting that there are a lot of cases ongoing against major digital companies. Some of these cases are high profile, including

litigating against Facebook in the United Kingdom with a class action in relation to data. He noted a crucial caveat, however, that market circumstances, political circumstances, and civil circumstances of each nation in Africa are fundamentally different from what's going on in Europe or the UK. Hence, Trevor noted that it is appropriate that competition enforcement should be linked to the public policy concerns of the specific country.

Incidentally, until very recently, with the current administration under Joe Biden and the changes at the FTC, the United States had been very far behind the European Union in terms of enforcement of abuse of dominance and related competition matters in the digital high-tech space. What relevance these developments will have to the situation in Africa, will be a matter for each jurisdiction to decide. One of the great motivations behind the EU Digital Markets Act ("DMA"), for example, was what happened with Cambridge Analytica and the misuse of Facebook personal data, to the advantage of certain persons in the elections in the United States.

In relation to digital markets and tech, experience has shown that the market can tip very quickly, to become a winner takes all scenario. A digital market with a powerful network has a very rapid effect and soon can have a situation where that company dominates the market and does not allow any effective competition with it.

Mark English (Quinn Emanuel)

Mark noted that Europe is likely further down the path of thinking on this topic, and that it perhaps has some solutions that would be appropriate in other jurisdictions, which stems from considering both what the EU has done wrong, as well as what it does right. He observed that in today's interconnected world, what happens in Europe necessarily has some bearing on what certain large platforms do around the world.

In discussing the DMA, Mark comments that this is a piece of legislation, that has been in the works in the EU for many years. A near final text will enter into force in the coming months and this will be applicable as from 2023. Upon implementation, the European Commission will designate what they consider to be "gatekeepers" during the course of next year, and compliance by those gatekeepers will be obligatory by early 2024.

Mark described the DMA as form of ex-ante regulation aimed squarely at the tech and the platform economy and seeks to improve fairness and contestability and concerns things such as preventing self-preferencing by "gatekeeper" platforms, encouraging interoperability, encouraging data portability, and limiting automatic and pre-installation of various apps and platforms and services.

The European Commission, which oversees the implementation of the DMA and its enforcement, will have the power to impose very significant fines of up to 10% of global revenue, which is similar to what we see in terms of EU antitrust rules. The DMA, however, goes even further than that. In the case of repeated infringements, the Commission has the power to impose fines of up to 20% of global turnover and ultimately even structural remedies.

The Digital Services Act ("DSA"), largely considered the sister legislation of the DMA, is again expected to enter into force around the end of this year start of next. The goal of the DSA, however, is different from the DMA. The DSA aims to provide consumers with safety from illegal content and protects consumers in terms of their fundamental rights online. In this sense, it acts in a complementary manner to the DMA.

Moving on to merger control, Mark noted that regulators have expressed various concerns relating to digital markets. Very recently, on the substantive side, the re-emergence of theories of harm have been observed. As an example, a vertical transaction was recently prohibited by the European Commission in the *Illumina/GRAIL*

transaction. Mark stated that he believed that the decision will be appealed to the EU Courts.
Previously the European Commission would review cases referred by national authorities only where they handed over jurisdiction to the European Commission. Now, in line with the revised guidance, the Commission said they will keep doing that, but also take and assert jurisdiction over transactions where the referring national authority did not itself have jurisdiction to review the deal. This revised practice creates jurisdiction to review a deal where previously there was none.

This was certainly controversial, and it came to the fore also in the *Illumina/GRAIL* transaction. where the European Commission accepted jurisdiction where EU and national merger notification thresholds were not met and indeed, the target, was not even active in Europe at the time of notification.

Illumina then took the European Commission to court, arguing that the Commission did not have jurisdiction for review. The European Commission, however won its case, which allowed it to proceed with the investigation and ultimately prohibition of the transaction. It is expected that Illumina will appeal this ruling to the EU Court of Justice.

Mark also noted that the Commission is looking to "dust off" old case law which predated the existence of the EU merger regulation, and which allows the Commission to use Article 102 TFEU to investigate M&A transactions. As such, the Commission is, again with an eye on "killer acquisitions," attempting to allow itself to call sub-threshold transactions that have not been referred under Article 22 for investigation of potential abuses of dominance.

According to Mark, the case which will determine this with some certainty, is currently pending before the EU Court of Justice. This is also an open question with parallel developments in other EU member states.

The Commission has been and continues to be proactive in the digital markets space by investigating making infringement decisions against the well-known tech companies and tech platforms.

The Commission's enforcement agenda received a setback in the recent *Qualcomm* judgment, where the Commission decision and EUR 1 billion fine were fully overturned by the EU General Court. The European Commission did not appeal, leaving a definitive judgment, which serves as a cautionary tale about where an investigating authority can go wrong, and how these errors can be exposed during judicial review.

On the other hand, Mark noted that in the *Google Android* judgment, handed down a few hours earlier, the EU General Court overturned part of the European Commission's reasoning but upheld almost the entire multibillion Euro fine. The European Commission is likely to interpret this ruling as an endorsement of its enforcement activity in the tech space. [Note: since the webinar, Google has confirmed its intention to appeal the General Court ruling to the EU Court of Justice]

Michael-James Currie (Primerio)

The conversation was then shifted back to Africa and more specifically the infrastructure side of digital markets.
Introducing Abraham, a very well-established infrastructure provider in the fiber space, Mike inquired as to his thoughts on improving competitiveness in the market, and whether he contends that there is a right way to go about it.

Abraham van der Merwe (Frogfoot)

Abraham contends that the challenge in the infrastructure business, especially in South Africa, is that the value chain is quite complex. Although legislation caters for a layered approach, where there are infrastructure providers and retail service providers layered on

top of infrastructure providers, the reality is that there are multiple layers of these providers, and this is not always a neatly stacked value chain as some of the infrastructure providers buy from each other or share infrastructure in different ways.

By means of an example, Abraham explained that an FTTH infrastructure provider acquires some back-door services from another infrastructure provider and therefore becomes dependent on that other infrastructure provider. It then sells its services to a retail services provider who might be buying from both infrastructure providers and in fact the provider of the back-door services might even be competing with the FTTH provider by selling similar services.

Where this situation gets complex, is in circumstances where both infrastructure providers are competing in the same geographical areas. In such instances, they may have overlapping networks in an area, giving rise to competition issues if one infrastructure provider's input costs are dependent on what the back-door costs are from other infrastructure provider. The issue, more specifically, is that one provider then holds leverage over the other one. This power could then be exerted over the infrastructure providers and some of the consumers as well.

These are examples of complex cases which influences consumers' buying decisions and the level of competition that exists in a specific geographical area.

Consequently, these kinds of issues are often relevant considerations in mergers where there are several parties competing in the market. However, only a few players directly or indirectly control the value chain in a market. Thus, when the parties merge or when one of them disappears, this can substantially reduce competition.

By creating certain circumstances in a market, competition can effectively be eliminated or discouraged. Abraham noted, for instance, that there are several overlapping networks and where some of them merge, the level of competition in those areas decreases. The key challenge for the Competition Commission is to understand the landscape, the market players, the interdependencies between infrastructure providers and retail service providers, as well as how these issues affect the consumer.

Juanita Clark (Digital Council Africa)

Juanita continued the conversation around infrastructure by noting that one of the critical issues which continues to riddle the continent is the digital divide. She emphasized the need to deliver on the issue of digital infrastructure deployment, which leads to one of the most important questions, which is how this may be done effectively? In the background, there remains concerns about overregulation and opportunities to encourage operators to be slightly more flexible. Other issues, in addition to what Abraham mentioned, include that duplication of infrastructure must be avoided, as this is something which simply does not make business sense.

As of now, there are greater opportunities for collaboration between operators to help push broadband networks further into lower income areas. The problem here, however, is that there is almost no funding available. Similarly, Juanita noted from her experience, the Council collaborates closely with international bodies.

Unfortunately, Juanita noted that smaller companies struggle with effective implementation, whereas the larger companies can implement some of the stringent policies and some of the obligations that are placed on them, especially when it comes to data. In this regard, Juanita pointed out that the promulgation and implementation of POPIA is no exception when it comes to the smaller entities.

Michael-James Currie (Primerio)

In concluding the conversation, Mike noted that one of the difficulties on the infrastructure side is obtaining a balance between efficiencies and economies of scale, while still ensuring that whoever wins that race does not abuse its market position.

The debate on ex-ante regulation versus the exposed, is equally relevant. In light of the consolidation that's going on in South Africa, there is an increasing importance for the competition authorities to get their assessments right based on a good understanding of the market and of the evidence.

That having been said, Mike noted that it is probably not just a competition issue which the industry is facing, as there are most likely several other regulators and commercial barriers that need to be addressed in order to eliminate the overarching concern, which is infrastructure penetration.

Insofar as the debate concerning "killer acquisitions" is concerned, as raised by Trevor and Mark, Mike noted that in many cases the primary issues concerned determining whether this small target will at some point in future provide a meaningful competitive constraint to the acquiring firm. In addition, this not only increases the risk of speculation, but it also demands a very good understanding of the relevant market it was operating in.

African Digital Markets Webinar

Key Developments in the EU

Quinn Emanuel Urquhart & Sullivan, LLP, Brussels Office

14 September 2022

The Digital Markets Act (DMA)

- Enters into force in October 2022 and becomes applicable in April 2023. EC will designate companies as "gatekeepers" by August 2023. Compliance with DMA obligations by designated "gatekeepers" by February 2024.

- Objective: "unlock" potential of rivals so they can reap benefits of platform economy in "**fair**" and "**contestable**" environment; promote innovation; quality of services; fair and competitive prices; choice.

- Imposes a stringent *ex ante* regulatory regime on to-be-specified large online platforms ("gatekeepers") offering "core platform services" in the digital sector.

- EC in charge of the DMA implementation and enforcement: open formal proceedings, adopt infringement decision, impose fines and remedial measures. Fines of up to 10% - or 20% if repeated infringements – of annual global revenue.

- Seeks to address "weak contestability" and "unfair" practices by gatekeepers that fall outside or cannot be effectively addressed by existing EU antitrust rules, in particular: (i) self-preferencing; (ii) interoperability; (iii) data portability; and (iv) auto- and pre-installation.

- Will require "gatekeepers" to inform the EC of all intended acquisitions of tech companies or any transactions that enable the collection of data.

- The DMA leaves many procedural "gaps" that will need to be filled, e.g., time limits, defence rights, access to file, role of hearing officer, which EC decisions are appealable acts, complaint mechanisms.

The Digital Services Act (DSA)

- Expected to enter into force in October/November 2022 and to become applicable in January 2024.
- Objective: implement a new framework of obligations applying to all digital services to keep users safe from illegal goods, content or services, and to protect their fundamental rights online (not competition considerations).
- Applies to a wide range of online intermediaries: internet service providers, cloud services, messaging, marketplaces, or social networks.
- Specific due diligence obligations apply to hosting services, and in particular to online platforms, such as social networks, content-sharing platforms, app stores, online marketplaces, and online travel and accommodation platforms.
- Digital Services Coordinators will have enforcement powers in each Member State, including the power to impose penalties.
- The EC will be the primary regulator for “very large online platforms” or “very large online search engines.”
- Businesses may need additional resources to implement any required changes and seek legal advice to ensure compliance with the requirements of the DSA: information gathering and reporting, display/provision of information under transparency obligations, and notice and action/take down processes.

General Data Protection Regulation (GDPR)

- The GDPR came into force on 25 May 2018, replacing the 1995 EU Data Protection Directive.
- The GDPR has extraterritorial scope: no matter where in the world the company and website is located, it must comply with the GDPR if it has visitors from inside the European Union.
- The GDPR applies to businesses that target EU data subjects (i.e., individuals whose personal data are processed) in the following instances: 1) offering goods or services or 2) monitoring online behavior.
- Key points: (i) users' right to manage personal information that organizations collect about them; (ii) explicit consent from users to process their data; (iii) legitimate purpose of data collection; (iv) accuracy, security and integrity of the data gathered; (v) storage limitation; (vi) lawfulness, fairness and transparency in the data collection.
- Companies that breach the regulation face a maximum penalty of €20 million or 4% of their annual global turnover (whichever is higher). Less severe infractions top out at €10 million or 2% annual global turnover.

Merger control

- Emerging theories of harm, e.g., innovation theory of harm in vertical transactions (Case M.10155 - *Illumina/Grail;* Case M.9987 – *NVidia/Arm*).

- Guidance on application of Article 22 EUMR and so-called "*killer acquisitions*" (March 2021):

  - Focus on transactions involving innovators with competitive potential that do not yet generate high revenues.

  - The GC has recently approved the EC's revised approach to rely on Article 22 EUMR in order to assert jurisdiction where EU thresholds not met and national competition authorities not competent to the review the transaction (Case T-227/21 – *Illumina v Commission*).

- The EC is seeking to "dust off" old case law: application of Article 102 TFEU to non-notifiable transactions (Case C-449/21 *Towercast v Autorité de la concurrence* (pending)).

- Parallel developments at EU Member State level but through legislation.

Abuse of dominance

- Same old tool, new cases:
  - Building on history of enforcement in high tech, IP, digital with recent emphasis on multi-sided platforms and so-called “gatekeepers.”
  - Pro-active EC enforcement of Article 102 TFEU.
  - EC investigations into Google, Apple, Facebook, Amazon…
- Review by EU Courts:
  - The *Intel saga* continues – EC has appealed GC ruling to the Court of Justice (T-286/09, C-413/14 P, T-286/09 RENV, C-240/22 P).
  - *Qualcomm* GC judgment handed down on 15 June 2022 quashed the EC decision finding Qualcomm nearly EUR 1 bn on numerous substantive and procedural grounds (T-235/18 *Qualcomm v Commission*).
  - *Google Android GC* judgment 14 September 2022 (T-604/18 *Google and Alphabet v Commission*).

Cooperation and Collusion

- The EC published new Vertical Agreements Block Exemption Regulation and Guidelines on 10 May 2022 (in force since 1 June 2022). Focus on the growth of e-commerce and online platforms.

- Novel theories of harm and pro-competitive justifications:
  - Shared data includes sensitive data from a competition-law perspective.
  - Competitors could agree to reduce or limit level of protection for users' personal data (equivalent to agreement to reduce or limit the quality of the parties' products).
  - Codes of conduct and agreements between companies in the same industry regarding data protection policies can have significant benefits.
  - Algorithms may be able to facilitate collusion although difficult to obtain evidence.
  - Non-traditional competition law factors in environment chapter of new draft EC Horizontal Cooperation Guidelines, published in March 2022, expected to enter into force in January 2023.

EU National Competition Authorities (NCAs)

- The EC is the primary enforcer of competition rules in the EU but NCAs are also active. E.g.,:
  - German and Austrian competition authorities published updated joint guidance on "value of transaction" thresholds (2021): concept of "*target with substantial domestic operations.*"
  - Section 19a German Competition Act (2021): prohibition of anti-competitive practices involving undertakings with "*paramount significance for competition across markets*" (obvious candidates include Amazon, Alphabet/Google, and Meta/Facebook).
  - Italian competition authority issued wide-ranging proposal to amend the Italian competition law (2021): possibility to designate digital players as "*companies of primary importance for competition in several markets.*"
  - The newly appointed chairman of the French competition authority, Benoit Coeuré, stated that the digital sector would be one of the principal subject matters of his chairmanship (January 2022, hearing before the France's National Assembly).
  - Multiple national investigations ongoing: strong focus on digital platforms (Apple Store, Amazon's marketplace, Google's data and tech practices, Facebook's use of data, etc.).
  - EC's revised position on "below threshold" mergers could push national enforcers to adopt more positive findings.

United Kingdom post-Brexit

- Following *Brexit*, UK no longer bound by EU competition law and regulation -> potential for divergence.
- Parallel cases, e.g., *Facebook* investigations (ongoing), *Nvidia/Arm* merger review (2021-2022), *Cargotec/Konecranes* (2022 – cleared by EC, but prohibited by CMA).
- Various studies and recommendations:
  - Online Platforms and Digital Advertising Market Study (final report), July 2020.
  - A new-pro competition regime for digital markets proposed in July 2021.
    - Digital Market Unit (DMU) created within UK CMA in April 2021.
    - Proposed designation of companies with "*Strategic Market Status*" (SMS).
  - Announcement of wide-ranging reforms to UK competition and consumer law policy (e.g., turnover thresholds to be modified, safe harbor for small mergers), April 2022.
  - Code of Conduct Advice for Platforms and Publishers, May 2022.
  - Mobile Ecosystems Market Study (final report), June 2022.
- New Prime Minister, Liz Truss, took office on 6 September 2022.

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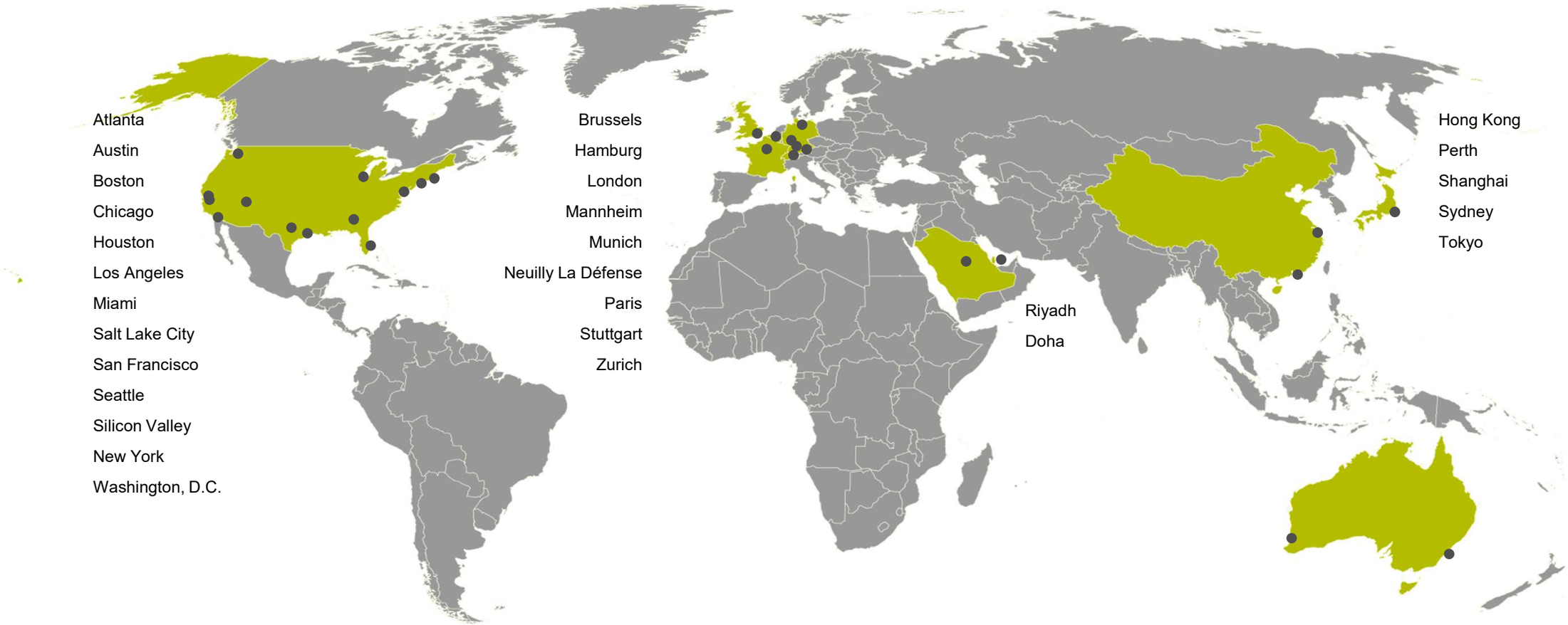
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