QUEEN MARY, UNIVERSITY OF LONDON

### School of Law

#### SOLM297 Competition Law in the Digital Era

 **Course convenor:**

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Aims and objectives

We live in a world of unprecedented technological change. The way we live our lives today, with the most essential services being only a click away, has radically transformed our consumption activity. We can shop for less money, interact with friends and public, compare products in real time, search virtually any question, hail a cab on our mobile phone, order any kind of food in an instant – the list is seemingly endless. As such, these technological advancements have transformed consumers’ behaviour and impacted consumers’ choice, yet they have simultaneously created new causes of concern about competition in the marketplace and the role of consumers within it.

The characteristics of the digital economy and the role of powerful platforms has triggered a heated policy debate and is widely covered in a range of policy reports that keep proliferating. Such policy discussions aim to culminate with changes in the competition law and regulatory framework with the European Commission (Commission) being one of the first regulators to propose concrete changes. Eight Member States (Belgium, Bulgaria, Austria, Romania, Lithuania, Iceland, Germany and Greece) have also amended or are in the process of amending national competition laws. Apart from the contemplated legislative changes, there is by now an observed significant enforcement activity against powerful platforms, i.e. Google, Amazon, Facebook and Apple, both in the EU, as well as internationally.

The rise of a handful of platforms in the digital economy, controlling and processing vast amounts of data, allows firms to better exploit consumer biases. Equally, the dominance of a handful of platforms acting as information gatekeepers allows the manipulation of information to their benefit at the detriment of consumers.

Following the completion of this course, students will be able to identify and critically evaluate the particular characteristics of digital markets and their impact on competition. They will also be in a position to critically reflect on competition law enforcement against Big Tech and the need to adopt additional regulatory tools.

###### Teaching arrangements, participation and written work

There are no pre-requisites for this course. The course will be taught on the basis of a three-hour seminar each week in the second part of the first semester.

This course is assessed by a written 4000 words essay. During the seminar, we will discuss mock essay topics and students will be given guidance on the required essay structure and content.

Reading list:

**Please note that the reading list and the module weekly syllabus is indicative.** Prior to each seminar detailed guidance will be provided with essential and recommended reading (including case law, where relevant)

Averitt and Lande, “Using the ‘consumer choice’ approach to antitrust law”, 74 Antitrust L.J. (2007), 175

BEIS, “Modernising consumer markets”, Consumer Green Paper (Apr. 2018)

Big Innovation Centre, “What is AI?”, Report prepared for the 1st meeting of the All-Party Parliamentary Group on Artificial Intelligence, (2017)

Calo, “Digital market manipulation”, Geo. Wash. L. Rev. (2014), 995

CC3 (Revised), “Guidelines for market investigations: Their role, procedures, assessment and remedies”, (Apr. 2013)

CMA, “Consumer vulnerability in digital markets: Summary of stakeholder roundtable”, (23 July 2018)

CMA, “Digital comparison tools market study: Update paper”, (28 Mar. 2017)

CMA, “Online search: Consumer and firm behaviour – A review of the existing literature”, (7 Apr. 2017)

Ducci, *Natural Monopolies in Digital Platform Markets* (CUP 2022)

Ezrachi and Stucke, “The rise of behavioral discimination”, 37 European Competition Law Review (2016), 485

Ezrachi and Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (HUP 2016)

Graef, “Algorithms and fairness: What role for competition law in targeting price discrimination towards end consumers?”, (2017)

Lundqvist and Gal (eds), *Competition Law for the Digital Economy* (Edward Elgar 2019)

Lynskey, “Regulating platform power”, LSE Law, Society and Economy Working Papers 1 (2017)

Moore and Tambini (eds), *Regulating Big Tech - Policy Responses to Digital Dominance* (OUP 2022)

Maggiolino, “Personalized prices in European competition law”, (2017)

Monopolkommission, “Competition policy: Challenges of digital markets”, Special Report No. 68 (2015)

OECD, “Algorithms and collusion: Note from the European Union”, (21–23 Jun. 2017)

OECD, “Designing and testing effective consumer-facing remedies: Background note” (DAF/COMP/WP3(2018)2, 18 May 2018 – note prepared by the UK CMA)

OECD, “Designing and testing effective consumer-facing remedies: Background note”, DAF/COMP/WP3(2018)2 (18 May 2018 – note prepared by the UK CMA)

OECD, “Protecting consumers in peer platform markets: Exploring the issues”, (2016)

OECD, Digital Economy Outlook 2017 (OECD Publishing, 2017)

OECD, Does AI have a dark side when it comes to competition?

<https://oecdonthelevel.com/2021/08/17/does-ai-have-a-dark-side-when-it-comes-to-competition/>

OECD, Digital Ecosystems – a New Economic Paradigm?

<https://oecdonthelevel.com/2021/01/09/digital-ecosystems-a-new-economic-paradigm/>

OECD, Consumer Data Rights and Competition - Background note (2020)

[https://one.oecd.org/document/DAF/COMP(2020)1/en/pdf](https://one.oecd.org/document/DAF/COMP%282020%291/en/pdf)

OECD, Big data: Bringing competition policy to the digital era (2016)

<https://www.oecd.org/daf/competition/big-data-bringing-competition-policy-to-the-digital-era.htm>

OFT 1224, “What does behavioural economics mean for competition policy?”, (March 2010)

OFT 1324, “Consumer behavioural biases in competition: A survey”, Final Report (May 2011)

OFT 1489, “Personalised pricing”, (May 2013)

Ohlhausen and Okuliar, “Competition, consumer protection, and the right (approach) to privacy”, 80 Antitrust L.J. (2015), 121

Pasquale, *The Black Box Society* (Harvard University Press, 2015)

Patterson, *Antitrust Law in the New Economy* (Harvard University Press, 2017)

Preliminary Opinion of the European Data Protection Supervisor, Privacy and Competitiveness in the Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection in the Digital Economy, 26 Mar. 2014,EDPS/2014/06

Schwab, *The Fourth Industrial Revolution* (WEF, 2016)

Sokol and Comerford, “Antitrust and regulating big data” (2016) Geo. Mason L. Rev., 1129

Stucke and Ezrachi, “When competition fails to optimize quality: A look at search engines”, 18 Yale J.L. & Tech. (2016), 70

**For a collection of interesting podcasts:**

[Digital Markets Research Hub](https://www.youtube.com/%40digital.markets)

Australian Competition Law – Competition Law video and podcasts

[https://www.australiancompetitionlaw.info/podcasts/tag/competition+lore](https://www.australiancompetitionlaw.info/podcasts/tag/competition%2Blore)

**Interesting blogs:**

Chillin’ Competition

<https://chillingcompetition.com/>

The Platform Law Blog

<https://theplatformlaw.blog>

@WavesBlog

<https://competitionwave.blogspot.com>

You can also check OECD, Competition and the Digital Economy

<https://www.oecd.org/en/topics/competition-and-digital-economy.html>

**Course syllabus and outline:**

Seminar 1 Introduction: competition law and policy

 Challenges in digital markets

Seminar 2 Hub and spoke agreements and algorithmic collusion

 Online distribution

Seminar 3 Exclusionary and exploitative abuses

 Mapping enforcement actions against GAFA

Seminar 4 The Challenges with Data-Driven Mergers

Seminar 5 Remedies and regulatory responses

 The DMA and beyond

**Seminar 1**

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| **Introduction: competition law and policy**  |
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| **Challenges with digital markets** |
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**Reading**

Whish and Bailey: Competition Law OUP 2024: ch. 1

UNCTAD, Digital Economy Report (2019) (p. 1-9)

<https://unctad.org/system/files/official-document/der2019_en.pdf>

Jens-Uwe Franck and Martin Peitz, ‘Market Definition and Market Power in the Platform Economy’ (2019) CERRE Report

P Ibanez Colomo, “The role and limits of competition law in digital markets: on the reports and the reforms proposed” (2021) 29 Zeitschrift für Europäisches Privatrecht 8

[Commission Notice on the definition of the relevant market for the purposes of Union competition law (2024)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202401645)

You may want to look at:

2022 OECD Global Forum on Competition Discussion on the Goals of Competition Policy

<https://www.oecd.org/competition/globalforum/the-goals-of-competition-policy.htm>

Ariel Ezrachi, Competition and Antitrust Law: A Very Short Introduction (OUP 2021)

Jones, Sufrin and Dunne (EU Competition Law (Oxford, 2023)): ch. 1

M Gal, “Algorithmic challenges to autonomous choice” (2017) < <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971456>

Ezrachi and Stucke, “How your digital helper may undermine your welfare, and our democracy”, (2017) Berkeley Technology Law Journal

Gal and Elkin Koren, “Algorithmic consumers”, 30 Harvard Journal of Law and Technology (2017), 1

John Newman, ‘Antitrust in Zero-Price Markets: Foundations’ (2018) 164 University of Pennsylvania Law Review 149-206

Amelia Fletcher, Digital competition policy: Are ecosystems different? (2020, Note to OECD Hearing on Competition Economics of Digital Ecosystems)

[https://one.oecd.org/document/DAF/COMP/WD(2020)96/en/pdf](https://one.oecd.org/document/DAF/COMP/WD%282020%2996/en/pdf)

BEUC, “Market Definition in EU Competition Law Enforcement: Need for an Update” (2020)

<https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-092_beuc_response_public_consultation_on_market_definition.pdf>

Relevant reports that will be using throughout the course

J Furman, D Coyle, A Fletcher, D Mc Auley and P Marsden, Unlocking Digital Competition: Report from the Digital Competition Expert Panel (March 2019)

Stigler Center, Committee for the Study of Digital Platforms: Report by the Market Structure and Antitrust Subcommittee (2019)

J Crémer, y de Montjoye and H Schweitzer, Competition Policy for the digital era : Final report (2019) (“Commission Report”)

Committee on the Judiciary (Subcommittee on Antitrust, Commercial and Administrative Law), “Investigation of Competition in Digital Markets” (Majority Staff Report and Recommendations) (2020)

For an overview of these reports see F Lancieri and P Sakowski, “Competition in Digital Markets: A Review of Expert Reports” (2020) < <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681322>

**Aims and objectives**

The purpose of this seminar is provide the context for the seminars to follow. We will cover the key features of the digital economy and their potential impact on competition and competitive assessment. We will also discuss the challenges for competition authorities when enforcing competition law in the digital era. We will critically discuss the limits of market definition in the digital economy, the rise of ecosystem competition and possible regulatory responses.

**Questions**

1. What are the key characteristics of the digital economy? How can they affect competition and competitive assessment?
2. What are the aims of competition law? Do the characteristics of the digital economy call for a reconceptualization of the respective aims?
3. What is the purpose of market definition? What are its limits? Should market definition be adjusted when assessing competition in the digital economy?
4. What are ecosystems? Is traditional competition law assessment adequate for assessing ecosystem competition?
5. What is a “gatekeeper”? A company with “strategic market status”? A company of “paramount significance for competition across markets”?

**Seminar 2**

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| **Hub and Spoke Agreements – Algorithmic collusion** |
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| **Online distribution** |

**Reading**

\*OECD, Hub-and-spoke arrangements in competition (2019)

[**https://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm**](https://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm)

\*OECD, Algorithms and collusion (2017)

<https://www.oecd.org/daf/competition/algorithms-and-collusion.htm>

Bundeskartellamt and Autorité de la Concurrence, ‘Algorithms and Competition’ (2019)

UK – CMA – Algorithms: How They Can Reduce Competition and Harm Consumers (2021)

OECD – Hub-and-Spoke Arrangements (Background Note) (2019)

\*Ariel Ezrachi and Maurice Stucke, Algorithmic Collusion: Problems and Counter-Measures (OECD Roundtable on Algorithms and Collusion 2017)

\*Maurice Stucke and Ariel Ezrachi, ‘Sustainable and Unchallenged Algorithmic Tacit Collusion’ (2020) 17 Northwestern Journal of Technology and Intellectual Property 217

Joseph Harrington, ‘Developing Competition Law for Collusion by Autonomous Price-Setting Agents’ (2019) 14 Journal of Competition Law & Economics 331

Pieter van Cleynenbreugel, ‘Article 101 TFEU’s Association of Undertakings Notion and its Surprising Potential to Help Distinguish Acceptable from Unacceptable Algorithmic Collusion’ (2020) The Antitrust Bulletin 1

Salil Mehra, ‘Antitrust and the Robo-Seller: Competition in the Time of Algorithms’ (2016) 100 Minnesota Law Review 1323-1375

Ulrich Schwalbe, ‘Algorithms, Machine Learning, and Tacit Collusion’ (2018) 14 Journal of Competition Law & Economics 568

Antonio Gomes and Pedro Gonzaga, Pricing algorithms: the risk of collusion and personalised pricing in I Kokkoris, Research Handbook on the Law and Economics of Competition Enforcement (Edward Elgar 2022)

Commission (EU), Guidelines on Vertical Restraints (Communication) [2022] OJ C 248/1

Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L 134/4

\*David Evans, “Vertical Restraints in a Digital World” (2020) < <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551597> >

Yves Botteman, Daniel Barrio, “From Pierre Fabre to Coty and Beyond: How Far Can Suppliers Ban Online Sales?” (2019) 10 Journal of European Competition Law & Practice 519

Pinar Akman, “A Competition Law Assessment of Platform Most-Favoured-Customer Clauses” (2016) 12(4) Journal of Competition Law and Economics 781-833

Pinar Akman, “Online Platforms, Agency, and Competition Law: Mind the Gap” (2019) 49 Fordham International Law Journal 209

**Aims and objectives**

The aim of this seminar is to critically examine various forms of anticompetitive agreements in the digital economy. We will first discuss the risk of algorithmic collusion and the adequacy of the competition law framework to address it. We will also discuss potential concerns with vertical agreements in the online world that highlighted the need for the evaluation and adoption of the new Vertical Block Exemption Regulation.

**Questions**

1. What is an algorithm? Can you identify different types of algorithms? What are their respective benefits and risks?
2. Can algorithms facilitate collusion? How many different scenarios can you identify?
3. What is a hub-and-spoke agreement? Is Uber’s business model similar to a hub and spoke agreement?
4. Restrictions on selling online in general or on selling on online marketplaces are always anticompetitive? Can they be justified?
5. Are MFN clauses anticompetitive? What about brand gating agreements?

**Seminar 3**

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| **Exclusionary Abuses** |
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| **Exploitative Abuses** |
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| **Mapping enforcement actions against GAFA** |

**Reading**

\*M Ioannidou, “Digital Agoraphobia”: Exploitative Abuses in Digital Markets in I Kokkoris, Research Handbook on the Law and Economics of Competition Enforcement (Edward Elgar 2022)

V Robertson, “Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data” (2020) 57 CMLRev 161

A Ezrachi and V Robertson, “Competition, Market Power and Third-Party Tracking” (2019) 42 World Competition 5

\*Bania, “The role of consumer data in competition enforcement”, 14 European Competition Journal (2018), 38

\*Botta and Wiedemann, “EU competition law enforcement vis-à-vis exploitative conducts in the data economy exploring the terra incognita”, Max Planck Institute for Innovation and Competition Research Paper No. 18-08 (2018)

N Economides and I Lianos, “Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective” (2020)

M Buiten, “Exploitative Abuses in Digital Markets: Between Competition Law and Data Protection Law” (2020) Journal of Antitrust Enforcement

M Botta and K Wiedemann, “Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision” (2020) JECLAP 465\

G Colangelo and M Maggiolino, “Data accumulation and the privacy–antitrust interface: insights from the Facebook case” (2018) 8 International Data Privacy Law 224

Schneider, “Testing Art. 102 TFEU in the digital marketplace: Insights from the Bundeskartellamt’s investigation against Facebook”, 9 Journal of European Competition Law & Practice (2018), 213

Philip Marsden, ‘Google Shopping for the Empress’s New Clothes – When a Remedy Isn’t a Remedy (and How to Fix It)’ (2020) Journal of European Competition Law & Practice

\*Pablo Ibanez Colomo, ‘Self-Preferencing: Yet Another Epithet in Need of Limiting Principles’ (2020) 43 World Competition 417

Damien Geradin and Georgios Katsifis, ‘The Antitrust Case against the Apple App Store’ (2020)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583029>

S Voelcker and D Baker, ‘Why There Is No Antitrust Case against Apple's App Store: A Response to Geradin & Katsifis’ (2020)

https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3660896

Pedro Caro de Sousa, ‘What Shall We Do About Self-Preferencing?’ (2020)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659065>

L Khan, “The Amazon’s Antitrust Paradox” (2017) Yale Law Journal

<https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf>

For a concise overview you can check

OECD Global Forum of Competition 2020 – Abuse of Dominance in Digital Markets

<https://www.oecd.org/competition/globalforum/abuse-of-dominance-in-digital-markets.htm>

**Aims and Objectives**

The aim of this seminar is to critically discuss the application of competition law against certain practices of powerful platforms. We will cover self-preferencing practices, data related practices (exploitative and exclusionary) as well as practices related to restrictions imposed by powerful platforms on rivals.

**Questions**

1. What is ‘self-preferencing’? Is ‘favouring’ a new type of abuse? Can you identify cases where such theory of harm was relevant?
2. What are the Commission’s concerns with respect to Apple’s App Store practices?
3. What was the theory of harm in the German Facebook case?
4. “Privacy should be taken into account in competition law analysis’. Discuss.
5. What were the issues in the Commission’s Amazon’s case, which the Amazon’s commitments aimed to address?

**Seminar 4:**

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| **Challenges with Data Driven Mergers** |

**Reading**

\*OECD, Start ups, killer acquisitions and competition law (2021)

<https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>

Commission (EU), “Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases” (C(2021) 1959 final) (26 March 2021)

I Lianos and P Regibeau, “Digital Mergers: A Primer” (2021)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837281>

C Zhijun, C Chongwoo ,C Jiajia and M Noriaki, “Data-driven mergers and personalization” (2020) ISER Discussion Paper 1108, Institute of Social and Economic Research, Osaka University

UK – Ex Post Assessment of Merger Control Decisions in Digital Markets (Lear Report) (2019)

OECD, ‘Start-Ups, Killer Acquisitions and Merger Control – EU Contribution’ (2020) pp 1-5

OECD, ‘Start-Ups, Killer Acquisitions and Merger Control – US contribution’ (2020)

Elena Argentesi, Paolo Buccirossi, Emilio Calvano, Tomaso Duso, Alessia Marrazzo, Salvatore Nava, ‘Merger Policy in Digital Markets: An Ex Post Assessment’ (2020) Journal of Competition Law & Economics

Marc Bourreau and Alexandre de Streel, ‘Big Tech Acquisitions: Competition and Innovation Effects and EU Merger Control’ (2020) CERRE Issue Paper

Pierre Régibeau, Killer acquisitions? Evidence and potential theories of harm in I Kokkoris, Research Handbook on the Law and Economics of Competition Enforcement (Edward Elgar 2022)

**Aims and Objectives**

The aim of this seminar is to critically assess the application of merger control rules to Big Tech acquisitions. We will discuss the main challenges related to such acquisitions that may highlight the limits of the current legislative framework. We will also critically discuss proposals for reform.

**Questions**

1. What are the jurisdictional rules under EU merger control? Are these satisfactory in capturing Big Tech acquisitions?
2. What are the main concerns with respect to Big Tech acquisitions?
3. What were the main concerns in Google/Fitbit? Are the remedies offered sufficient to address the Commission concerns?
4. “The approach with respect to Big Tech acquisitions should be revised”. Discuss.

**Seminars 5**

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| **Remedies and Regulatory Responses** |
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| **DMA and Beyond** |
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| **Revision** |
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**Reading**

[Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925)

G Monti, “The Digital Markets Act – Institutional Design and Suggestions for Improvement”, TILEC Discussion Paper DP 2021-004

P Akman, “Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act”, (2022) European Law Review (forth)

M Ioannidou, “ Unpacking multi-level elements in digital markets: Informing effective enforcement and remedial design in EU competition law” in Carlo Maria Colombo, Kathryn Wright, Mariolina Eliantonio (eds), The Changing Governance of EU Competition Law: a Constitutional Challenge? (Hart 2023) (forth)

OECD, Ex Ante Regulation and Competition in Digital Markets (2021)

<https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>

**Aims and Objectives**

The aim of this seminar is to critically evaluate proposals to reform the competition law enforcement and possibly adopt regulation for the conduct of digital platforms.

**Questions**

1. What were the proposals for reform in the EU Commission Report and in the UK Furman Review?
2. What is the scope of the DMA? Is it complimentary to competition law?