EU competition law and the digital economy – FIDE 2020 Topic 3 General Report Update

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This brief update contains an overview of the developments that have characterised EU competition law and the digital economy in the February 2020-November 2021 time frame. Following the structure of the General Report, I will pay particular attention to Member States' enforcement developments (I.), to changes in substantive competition law (II.), to developments in terms of remedies and to the relationship between competition law and (digital) regulation (III.). Although the principles and parameters governing debates on EU competition law and the digital economy have not changed, important developments have taken place in the abovementioned time frame

I. Enforcement activities at EU level and in Member States: an ever-increasing focus on FAANG firms?

In the General Report, we identified the emergence of more or less extensive enforcement activities and procedural/institutional upgrades among Member States. The following developments deserve to be highlighted in that respect.

At EU level, the following additional enforcement and policy activities can be mentioned:

- A Statement of Objections against Amazon: on 10 November 2020, the European Commission sent out a statement of objections against Amazon. The Commission is of the preliminary view that Amazon has breached EU antitrust rules by distorting competition in online retail markets. According to its press release, the Commission particularly takes issue with Amazon systematically relying on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with those third-party sellers.[2]
- A Statement of Objections against Apple: in June 2020, the European Commission had opened investigations against Apple in relation to the conditions under which its App-store had to be used. In particular in the realm of music streaming services, Apple imposed on developers the mandatory use of Apple's own proprietary in-app purchase system as well as restrictions on the ability of developers to inform iPhone and iPad users of alternative cheaper purchasing possibilities outside of apps.[3] On the basis of a preliminary investigation, the Commission sent out a Statement of Objections on 30 April 2021, informing Apple of its preliminary view that it distorted competition in the music streaming market as it abused its dominant position for the distribution of music

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[2] See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

[3] See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.

streaming apps through its App Store.[4] In a similar context, Epic Games also brought a complaint against Apple with the European Commission.[5]

- Opening of an investigation against Facebook: on 4 June 2021, the Commission opened an investigation against Facebook. The aim of the investigation is to assess whether Facebook violated EU competition rules by using advertising data gathered in particular from advertisers in order to compete with them in markets where Facebook is active such as classified ads. According to the Commission, the formal investigation will also assess whether Facebook ties its online classified ads service "Facebook Marketplace" to its social network, in breach of EU competition rules.[6] At the time of finalising this update, the investigation is still on-going.
- In the realm of concentration control, the European Commission proposed further guidance on the issue of referrals of notified concentrations to the European Commission under Article 22 of Concentration Control Regulation 139/2004.[7] Although the digital economy has not been the only sector targeted by that guidance, the Commission made it clear that 'market developments have resulted in a gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market(s) at stake despite generating little or no turnover at the moment of the concentration. These developments appear particularly significant in the digital economy, where services regularly launch with the aim of building up a significant user base and/or commercially valuable data inventories, before seeking to monetise the business'. It therefore invited Member States to refer (digital) cases to the Commission in case the concentration threatens to significantly affect competition. Those clarifications must make it possible for concentrations similar to the non-notified Facebook/Instagram merger to be evaluated by the European Commission.[8]

Member States have for their parts also not shied away from taking enforcement actions against FAANG firms (Facebook, Amazon, Apple, Netflix and Google). The following activities stand out in that context:

- Changes to Austrian competition law: in September 2021, Austrian competition law has been modified as had been announced in the 2020 national report; modified merger thresholds and a modified dominance definition have been adopted in that context.[9]
- Changes to the German Competition Act: in January 2021, the 10th Amendment to the German competition Act (GWB) was published.[10] The Amendment introduces a section

[4] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061.
[5] As apparent from https://www.theverge.com/2021/2/17/22286998/epic-games-apple-european-comission-antitrust-complaint-app-store-fortnite.
[6] See https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848.
[7] https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf
[8] As also highlighted in the press, see by way of example, https://www.politico.eu/article/eu-steps-up-big-tech-crackdown-with-in-depth-probe-of-latest-facebook-kustomer-deal/.
[9] See for the 2021 Amendment to the Austrian Competition Act, https://www.ris.bka.gv.at › BGBLA_2021_I_176 and for background the blogpost by M. Mayr, http://competitionlawblog.kluwercompetitionlaw.com/2021/09/20/austria-introduces-significant-changes-to-its-competition-law/.
[10] http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s0002.pdf

19a into the GWB, allowing the Bundeskartellamt to prohibit certain types of behaviour of undertakings of paramount importance for competition across markets. It is no secret that digital economy players have been primarily targeted in that respect.[11] On the basis of the new Act, the German Bundeskartellamt has initiated proceedings against Google, Apple and Amazon.[12]

- A proposal to update the Greek Competition Act in order to tackle abuse of power in an ecosystem of structural importance for competition.[13]
- The decisions taken and investigations opened by the French Autorité de la Concurrence against Google and Facebook.[14]
- The investigation launched by the Dutch ACM against Apple, in which commitments have been solicited from the latter.[15]

II. Substantive competition law

Although the key provisions of (EU) competition law have remained intact, reflections have been on-going against the background of increased attention for the digital economy.

In that context and as mentioned in the previous section, Austrian and German competition laws have been adapted to take this new reality into account. Those modifications especially highlight the important 'gatekeeper' function digital economy players may fulfil in order to justify intervention by competition authorities. Although formally extending and specifying competition law provisions, the German Act entrusts the Bundeskartellamt with more ex ante action powers. That development responds to concerns also addressed by EU regulatory developments that are nevertheless situated formally speaking outside the scope of EU competition law (including the Digital Markets Act, currently under negotiation and touched upon in section III.).

In addition, on-going reflections on and updates of the European Commission's market definition notice[16] as well as the vertical agreements block exemption and vertical agreements guidance[17] show that those updates can no longer deny the specifics of digital markets, as also highlighted in the update offered by the institutional rapporteur.

The developments highlighted here demonstrate above all that the digital economy invites serious debates about whether or not to fine-tune generally applicable competition law

[11] See for that confirmation, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

[12] See for an overview in that respect, https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html.

[13] See the update provided to the national report by A. Komninos.

[14] https://www.autoritedelaconcurrence.fr/fr/article/lautorite-de-la-concurrence-sanctionne-google-hauteur-de-220-millions-deuros-pour-avoir and https://www.autoritedelaconcurrence.fr/fr/article/publicite-en-ligne-facebook-propose-des-engagements-lautorite

[15] https://www.bleepingcomputer.com/news/apple/netherlands-orders-apple-to-offer-more-app-store-payment-methods/.

[16] See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3561.

[17] See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3585.

provisions, so as to avoid questions on their application to digital economy activities. It remains to be seen how that debate will translate into specific changes in substantive (soft law) rules.

III. Remedies in competition law and its overlap with regulation in the digital economy

In terms of remedies and regulatory overlap, the General Report concluded that relatively little innovation was to be found in this context, especially as Member States and the EU were considering whether or not to complement competition law frameworks with additional regulatory tools. In this update, that conclusion still holds. Although the use of competition law remedies has not been abandoned completely (i.), one could anticipate that attention to remedies will especially increase once a complementary regulatory instrument enters into force. Developments surrounding the the Digital Markets Act (DMA) go to the heart of those questions (ii.)

i. Competition law remedies in the digital economy

Digital economy cases have also given rise to the imposition of interim measures or remedies to alleviate competition law concerns. As already confirmed in the General Report, those remedies are relatively traditional and focus predominantly on behavioural obligations imposed.

At EU level, the Google/Fitbit merger serves as a vivid illustration of this approach. The European Commission allowed the acquisition of Fitbit by Google to proceed, but only to the extent that Google committed itself to respect, for a 10-year period and supervised by a trustee, important behavioural measures.[18] By way of example, Google committed not to use for Google Ads the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EEA, including search advertising, display advertising, and advertising intermediation products.[19]

The French Autorité de la Concurrence also imposed behavioural interim measures on Google in a case involving Google's refusal to display links to or parts of articles from news media that did not waive copyright claims against Google. In 2020, the French Autorité took interim measures that required Google to enter into individual negotiations with relevant copyright holders[20], a decision which was upheld by the Paris Court of Appeal.[21] As Google failed to comply in this respect, the Autorité imposed a fine of €500 million as a consequence.[22] The saga shows that the Autorité considers interim measures to offer a valuable tool to avoid competition by digital players to be distorted. It remains to be seen, however, whether the use

[18] Summary of Commission Decision of 17 December 2020 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.9660 – Google/Fitbit) (notified under document C(2020) 9105), [2021] O.J. C194/7.

[19] See also for a summary the relevant press release, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

[20] https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-demandes-de-mesures-conservatoires-presentees-par-le-syndicat-des-editeurs-de.

[21] https://www.autoritedelaconcurrence.fr/sites/default/files/appealsd/2020-10/ca_20mc01_oct20.pdf.

[22] https://www.autoritedelaconcurrence.fr/fr/decision/relative-au-respect-des-injonctions-prononcees-lencontre-de-google-dans-la-decision-ndeg.

of fines to nudge firms into compliance is a sufficient tool to ensure that competition is restored. The observations made in the 2020 General Report still hold in that regard.

ii. Towards a complementary remedial and regulatory framework?

When we finalised our General Report in April 2020, reflections were still-ongoing with regard to the adoption of a so-called 'new competition tool' that would complement existing competition law provisions at EU level. Inspired by similar reflections and initiatives in the United Kingdom[23], the Commission proposed a Digital Markets Act (DMA) regulation on 15 December 2020. If and when adopted, the DMA proposes to have in place specific rules and oversight mechanisms that would allow to ensure that digital markets remain contestable and fair whenever so-called gatekeepers are present.[24]

The DMA applies to those undertakings considered to be digital gatekeepers. The European Commission, following a market investigation, will take a decision on gatekeeper status. To qualify as such, the proposal outlines substantive and quantitative criteria. First, the undertaking concerned would need to provide one or more so-called core online platform services to business users established in the Union or end users established or located in the Union,.[25] The DMA proposal more particularly distinguishes the following categories: (i) online intermediation services (including for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy) (ii) online search engines, (iii) social networking (iv) video sharing platform services, (v) number-independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services.[26] Second, in order to be qualified as gatekeepers, core online platform services providers need to (i) have a significant impact on the internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or be expected to enjoy an entrenched and durable position in their operations.[27] Those criteria would be met when a number of quantitative thresholds are present. a service provider has (i) a significant impact when the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States. It operates (ii) an important gateway whenever it provides a core platform service that has on average throughout the last year more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year. It enjoys (iii) an

[23] See https://www.gov.uk/government/collections/digital-markets-unit.
[24] Art. 1(6) Commission Proposal for a Regulation of the European Parliament and of the Council n contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final (hereafter DMA proposal). According to Art. 1(3), the proposal does not apply to electronic communications network markets and non-interpersonal communication services offered on such markets.
[25] Art. 1(2) DMA proposal.
[26] Art. 2(2) DMA proposal.
[27] Art. 3(1) DMA proposal.

entrenched position whenever the previous two criteria have been fulfilled over the past three financial years.[28] Whenever not all quantitative criteria have been met, the Commission may still designate a core online platform services provider as a gatekeeper when it concludes, on the basis of a qualitative assessment, that the three substantive criteria have been met nonetheless. Inversely, a provider meeting all quantitative criteria would be able demonstrate that it does not act as a gatekeeper.[29]

The proposal also outlines in considerable detail the behaviour that cannot be engaged in by gatekeepers. That behaviour includes […]. Those obligations are directly inspired by types of behaviour of which businesses such as Google, Facebook and Amazon have been accused and for which EU competition law provisions had been mobilised.[30] The European Commission could, by means of a delegated Regulation, modify or update those obligations and requirements.[31]

In case of systematic non-compliance with DMA regulatory obligations, the Commission could initiate a new market investigation. In that context, the Commission, by means of a decision adopted at the latest twelve months after opening the market investigation, impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with the DMA Regulation.[32] This provision allows to speculate that the Commission could break up big digital players and force them to have their different services provision activities separated. Such decision would amount to a structural remedy, whereby the Commission orders market structures to be changed. Although it is theoretically possible that this could be done, the DMA proposal states that the Commission 'may only impose structural remedies (…) either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper concerned than the structural remedy'.[33] It remains to be seen how that obligation would take shape in practice.

At the time of finalising this update, legislative discussions on the DMA are still on-going. It remains to be seen what kind of agreement will be found between the Member States in the Council on that matter, especially with regard to the roles of national competition authorities in DMA enforcement.[34] It cannot be denied, however, that the DMA will raise important questions on the intersection between competition law and regulation. It will most likely fall upon the Court of Justice to clarify those questions in the not so distant future.

[28] Art. 3(2) DMA proposal.
[29] Art. 3(4) DMA proposal.
[30] See for that argument, C. Caffarra and F. Scott Morton, 'The Digital Markets Act: a Translation', available at https://voxeu.org/article/european-commission-digital-markets-act-translation.
[31] Art. 10 DMA proposal.
[32] Art. 16(1) DMA proposal.
[33] Art. 16(2) DMA proposal.
[34] Member States such as France, Germany and the Netherlands explicitly asked for this in a joint Report, see for background, https://www.euractiv.com/section/digital/news/france-germany-the-netherlands-press-for-tighter-rules-in-dma/.