FIDE XXIX Congress The Hague 2020

EU Competition Law and the Digital Economy

Questionnaire Topic 3 - FIDE XXIX Congress, The Hague, 2020

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Introduction

The digitalization of the economy has created unprecedented opportunities for businesses and consumers. At the same time, digitalization also disrupts markets and business strategies, creating winners and losers across industries. Market disruption resulting from digitalization comes with increased demands for lawmakers to add layers of regulation to try to cope with the resulting challenges. Moreover, greater weight is placed on competition authorities – at both the EU and Member State ("MS") levels –to enforce existing laws so as to address the specific market failures which stem from this new reality.

Digitalization has had a dual impact on markets. On the one hand, new markets have been created, in which digital players such as online platforms compete with each other in order to attract users to their services. The best known examples are Google and Facebook, which have acquired potentially dominant economic positions in specific markets. On the other hand, digitalization has made it possible for new entrants to the market to offer services and directly enter into competition with incumbent market players. Platforms such as *Uber* and *AirBnB* have come to compete directly with vested taxi and hotel (reservation) operators.

Confronted with market changes triggered by digitalization, calls for action have been followed up by sector inquiries in e-commerce[2] and high profile decisions such as the imposing of multi-billion euros in fines on Google by the European Commission.[3] Action has also been taken at the level of the Member States, e.g. in relation to most favoured nation clauses ("MFN").[4] Moreover, EU lawmakers have adopted regulatory instruments regarding digital businesses' market conduct. These instruments complement, but potentially also conflict with, the EU competition law (enforcement) framework. Major examples include the General Data Protection Regulation (Regulation 2016/679

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[2] See for more information, http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

[3] See http://europa.eu/rapid/press-release_IP-17-1784_en.htm and http://europa.eu/rapid/press-release_IP-18-4581_en.htm

[4] On that topic, see S. Vezzosso, "Online Platforms, Rate Parity, and the Free Riding Defence" in P. Nihoul et P. Van Cleynenbreugel (eds.), *The Roles of Innovation in Competition Analysis*, Cheltenham, UK: Edward Elgar, 2018.

or GDPR[5]), the geo-blocking Regulation 2018/302[6] and, if adopted, the proposed regulation on fairness and transparency for users of online platforms.[7]

As ever with technological change, a normative discussion is taking place as to whether the digital economy requires modification of the current doctrinal, governance and competition policy framework and, if so, what form these modifications should take. It is true that business activities of online platforms (search engines, social networks, e-commerce platforms…) challenge the traditional concepts of competition economics, i.e. market and market power, and require the rethinking of established legal concepts to cover the business conduct of digital economy firms. In turn, the incorporation of these new business forms calls into question whether current tools are sufficiently elastic to reach the set goals of competition laws whilst preserving their enforceability. More fundamentally even, the challenges raised by digitalization reopen the debate on the objectives which competition law and policy aim to achieve.

This questionnaire is intended to provide a framework for national and institutional reports in order to analyze to what extent and how the opportunities created and the challenges caused by digitalization are addressed within the framework of competition law at EU and Member State levels. By analyzing, to what extent the digital economy influences competition policy, the application of competition law, and competition law enforcement, the questionnaire seeks to uncover the direction in which the relationship between EU competition law and the digital economy is heading.

The specific questions that guide the drafting of national reports can be structured into four subtopics

A. **Competition policy in the digital economy: shifts in focus?** – priority setting in competition enforcement, number of cases dealing with the digital economy, division of cases between Commission and Member States, proposals/modifications made, discussion about the goals on competition law (is the consumer welfare standard apt to capture the potential harmful practices?)…
B. **Market definition and market power –** usefulness of relevant market analysis, factors used to define relevant markets, market power of digital firms on those markets, potential

[5] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] O.J. L119/1.See also Topic 2 of this FIDE Conference.
[6] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, [2018] O.J. L601/1.
[7] See for the proposal, https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services

competition analysis, multi sided market theory, zero price markets, new economic tools, differences between Article 102 TFEU and merger control?

C. **Anticompetitive behaviour in the digital economy –** towards alternative theories of harm?: cross leveraging, long term predatory pricing, experience with algorithmic pricing and personalization, abusive behaviour by platforms, justifications offered for behaviour, data as essential facility, data exchange, non-economic justifications, killer acquisitions, recital 8 and 9 of regulation 1/2003 and stricter national laws on unilateral conduct, no fault legislation, M&A bans

D. **regulatory overlap and enforcement challenges –** interplay between ex ante regulation (GDPR, geo-blocking, platform regulation) and ex post competition law enforcement; cooperation between different authorities; role of national courts

A. competition policy in the digital economy: shifts in focus?

The digitalization of sectors of the economy and the rise of online platforms have generated significant debate, both at the European Commission level and in Member States. In Germany, the Monopolies Commission published a seminal report on competition law and the digital economy in 2014.[8] Confronted with these reflections on shifts in competition policy, we seek to question to what extent digitalization (understood as both the rise of markets and competition between digital service providers and incumbent market operators) has indeed become a driver of competition policy change and what specific changes one can witness in that regard, both in terms of policy proposals made and in terms of legislative or enforcement actions taken.

The following sub-questions are of particular relevance in this regard:

Question 1: *What are the main cases dealing with the digital economy (focusing on digital businesses or on the competition between digital businesses and incumbent operators) initiated and completed by your competition authority?*

a. In those cases, have any competition issues been identified which are specific to the digital economy and therefore warrant a particular focus on the digital economy in your jurisdiction?

b. Are other cases currently under investigation? If so, could you give a brief summary of the status of these investigations?

Question 2: *Has your competition authority adapted its enforcement practices in order to keep up with the pace of digital markets?*

a. How have these adaptations taken shape (legislative changes, policy changes, changes in enforcement strategies)?

[8] See for the English version of the Report: https://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf.

b. *Which enforcement tools are or have been available in your jurisdiction to this end? Has the competition authority drafted reports or explicitly adopted guidelines or binding administrative rules tailoring competition law and/or enforcement practices to digital businesses?*
c. *Have legislators or authorities in your jurisdictions been conducting evaluations of (competition) policy regarding digital markets? If so, could you summarize the outcome of those evaluations?*

Question 3: *Is your domestic competition law using the consumer welfare standard as its specific goal?*

a. *If no, what other standards are being relied on as the goal of competition law enforcement?*
b. *If yes, how do you interpret the consumer welfare standard in your jurisdiction?*
c. *Has this standard been applied consistently in cases dealing with digital businesses or with competition between digital businesses and incumbent operators?*

B. Market definition and market power

Digital businesses and more particularly online platforms defy traditional notions of market power grounded in a well-defined relevant product/price and geographic market on which market shares can be determined with relative ease. In the context of digital businesses, services are often not offered for a traditional price; consumers rather pay with their own data or with their time, which may require different tools to analyze market dominance.

Often considered as powerful economic actors, a platform is dependent on the ability of the technology underlying it to maintain and attract users to its services. The compilation and use of an ever-increasing amount of personal data and big data plays an essential role in this regard. Online platforms constitute the best example of this business model. Structured essentially as two-sided markets, scholars have called for a tailored or modified market definition process as well as different parameters for establishing market power. In the US, the Supreme Court held in *Amex* that a single relevant market had to be defined on multi sided transaction platforms. The purpose of this subtopic is to understand whether such different parameters have been put in place or whether the traditional market definition tools have remained in place. The following sub-questions are of particular relevance in that regard:

Question 4: *How does your competition authority define the market with regard to digital economy players?*

a. *Are the traditional price/product and geographic area criteria being relied on in ongoing or completed investigations or is a new data-focused market test taking shape?*
b. *Does your authority make use of a specific methodology when defining markets for online platforms? (e.g. a distinction between transaction and non-transaction platforms or between business models and functionalities).*
c. *Is the particular nature of platform markets taken into consideration in the market definition practice of your jurisdiction?*

d. *Have the authorities or courts been seized with cases involving zero price markets, and how did they define the relevant market?*

Question 5: *How is market power established in the practice of your competition authority in cases relating to digital economy players?*

a. *Are market shares being relied on?*
b. *Is a business' power in related markets taken into consideration? If so, how?*
c. *Has potential or future competition been taken into account when defining market power? Is it used differently for cases in the digital economy?*
d. *Can you notice variations in the use of the concept of market power in digital economy cases compared to other fields?*

Question 6: *Can you notice a difference in ex post assessments (abuse of dominance cases) and ex ante assessments (concentration merger control cases), both in relation to defining markets and conceptualizing market power?*

C. Anticompetitive behaviour in the digital economy

Digital economy businesses rely on new technologies – learning algorithms in particular – and new business strategies involving big data, in order to develop and maintain a stronghold among their competitors. Such reliance on technologies potentially brings with it new ways of colluding and of abusing an economic position. The Court of Justice in *Eturas* recognised that collusion can take place in a digital context.[9] Despite offering some clarifications, the judgment leaves several important questions regarding the scope and nature of anticompetitive behaviour in the digital economy unanswered. Similarly, the notion of abuse in this context has not yet been delineated. This subtopic aims to uncover what theory or theories of harm underlie competition authorities' actions in the field of digital economy and whether or to what extent competitive harm can be justified by other considerations.

The following sub-questions are of particular relevance in that regard:

Question 7: *Which practices in digital markets or involving digital businesses have been analyzed in the decision-making practices or case law of your jurisdiction?*

a. *What types of collusive behaviour have been considered as restrictive by object or by effect? Have others been considered as not posing a restriction? What elements have been taken into account to reach either conclusion?*
b. *Which unilateral practices (tying, refusal to supply, refusing access to data, long term predatory pricing) have been considered as abusive? Have others been considered not to constitute an abuse? What elements have been taken into account to reach either conclusion?*

[9] CJEU, C-74/14, *Eturas*, EU:C:2016:42.

c. *Have mergers or other concentrations involving digital businesses been handled by your authority? What criteria or tests have been relied on to allow or prohibit the envisaged concentration?*

Question 8: *What reasons have been offered by the businesses concerned to justify (prima facie) anticompetitive behaviour?*

a. *Have economic efficiency justifications been offered by digital economy players to justify certain types of behaviour considered as anticompetitive? If so, please summarize them.*
b. *Have these justifications been accepted or rejected by your authority in the cases in which they were offered?*
c. *Has the multi-sidedness of markets been factored into the assessment of potential efficiency justifications?*
d. *Does your authority also take justifications other than those grounded in economic efficiency into account (e.g. in relation to innovations brought by digital players)? Have such justifications also played a role in permitting certain types of behaviour in the digital economy?*

Question 9: *Have you witnessed the emergence of specific theories of harm tailored to digital markets?*

a. *How is harm defined and where does it differ from theories of harm in other sectors?*
b. *Do arguments focused on innovation play a role in determining the presence or absence of harm to competition?*
c. *What standard of proof is relied on to establish harm to competition? If likelihood evidence is used, what level of probability is defined as a threshold for intervention?*

Question 10: *What kind of remedies have been employed in cases relating to digital markets. Do you see any differences to remedies in other markets?*

D. Regulatory overlap and enforcement challenges

The enforcement of EU competition law in the digital economy does not take place in isolation from other fields of regulation. Indeed it seems that, in an attempt to counter criticism that competition enforcement is too slow for highly dynamic digital markets, instruments of ex ante regulation are increasingly used to complement or even to replace competition law as the preferred way to obtain desirable business behaviour. Questions arise as to whether respect for these ex ante regulatory instruments streamlines, facilitates or rather challenges the ex post application of competition law. In this subsection, we aim to uncover both the positive and negative effects of the interaction between competition law and ex ante digital markets regulation. The following sub-questions are of particular relevance in that regard:

Question 11: *Has there been any overlap in practice between ex ante regulation aimed at controlling market behaviour – such as, but not limited to, consumer protection legislation, the proposed platform Regulation, the GDPR, the geo-blocking Regulation, the ePrivacy Directive and/or proposed ePrivacy Regulation, or similar national instruments of legislation in relation to most favoured nation clauses– and the enforcement practice of competition authorities?*

a. *If no, have steps been taken to tackle potential overlap and conflicts in future cases?*
b. *If yes, has this overlap resulted in conflicting interpretations/visions of how digital enterprises can behave on the market?*

Question 12: *Which authorities are responsible for enforcing competition law in the digital economy in your jurisdiction?*

a. *Are the same authorities entrusted with the enforcement of ex ante digital economy regulation (such as the GDPR and the geo-blocking Regulation, platform regulation) and of competition law?*
b. *If yes, what tools are in place to guarantee a coherent and streamlined enforcement within that authority?*
c. *If not, do these authorities cooperate? Is there room for exchanges of information between them?*
d. *Are authorities' decisions reviewed by courts? Is there one court responsible for reviewing cases coming from different authorities?*