

FIDE 2021 Congress - Topic 3: EU competition law and the Digital Economy

Update Institutional Rapporteur Thomas Kramler

Market definition and market power in digital markets

On 12 July 2021 the European Commission has published a Staff Working Document that summarises the findings of the evaluation of the Market Definition Notice used in EU competition law. The evaluation concludes that while the principles of market definition remain unchanged, their application in digital contexts can lead to additional complexities that may not be fully addressed in the current Notice. These include defining markets for multi-sided platforms, in particular where services are supplied at zero monetary price, defining markets for ecosystems¹ or for data, and assessing online vs offline competition. Digitisation may also lead to new barriers to entry and switching costs. Reasons for this include the role of

data (portability), interoperability, privacy questions, network effects and single-/multihoming. In addition, digitisation may increase the need to reflect non-price considerations in substitution assessments. However, the evaluation results also show that not all of the

market definition issues arising as a result of digitisation have been settled into best practices, but rather that practices are likely to evolve further in the future.

https://ec.europa.eu/competition-policy/system/files/2021-07/evaluation_market-definition-notice_summary_en.pdf.

Vertical restraints and digitisation

On 9 July 2021, the European Commission published drafts of the revised Vertical Block Exemption Regulation (³VBER²) and Vertical Guidelines for stakeholder comments. The evaluation showed that the VBER and the Vertical Guidelines are useful tools that facilitate the assessment of vertical agreements and help reduce compliance costs for businesses. It also showed room for improvement, notably the need to adapt both texts to new market developments in particular in digital markets.

https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en#related-links.

Interplay regulation and EU competition law

On 15 December 2020 the European Commission made a proposal for a Digital Markets Act which lays down harmonised rules ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present. Pursuant to recital 9 the Regulation aims at complementing the enforcement of competition law, it should be specified that this Regulation is without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral behaviour that are based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question. Pursuant to recital 10 the Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a

given market. This Regulation therefore aims at protecting a different legal interest from those rules and should be without prejudice to their application.

<https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN>.