

Outlook 2021

EU Competition Law Briefing



Agenda



Digital Markets Act / New Competition Tool

Edmon Oude Elferink



Rules for Vertical Restraints (VBER/guidelines)

Malgorzata Urbanska & Amaury Le Bourdon



Rules for Horizontal Restraints (HBER/guidelines)

Michael Bauer



Territorial Supply Constraints

Michael Bauer



Competition Law & The Green Deal

Björn Herbers & Virginie Coursiere-Pluntz



What else?

Kai Neuhaus & Björn Herbers

Digital Markets Act / New Competition Tool

Edmon Oude Elferink

Digital Markets Act

What is it about?

EC flagship project concerning online platforms:

- **Digital Services Act (DSA):**
 - consumer protection tool
 - combatting illegal content and counterfeiting
- **Digital Market Act (DMA):**
 - competition tool
 - regulation of core online platform providers that are gatekeepers
 - Original proposal EC to create “New Competition Tool” folded into DMA

Current state of play

Key legal concepts DMA:

- **Core platform service:**
 - E.g.: online **intermediation services** (E-Bay), online **search engines** (Google), online **social networking services** (Facebook), **video-sharing platform services** (YouTube), **cloud computing services** (Microsoft)
- **Gatekeeper:** core platform service provider with
 - annual EEA turnover of EUR 6.5 billion in the last three years
 - activities in at least three Member States
 - more than 45 million monthly active end users and more than 10 million business users in EU

Digital Markets Act

Potential Outcome 2021

- DMA game changer for gate keepers:
 - Mandatory notification if core online platforms qualify as gate keepers
 - Large numbers of obligations for gatekeepers such a
 - No self preferencing
 - No broad price parity and most favoured nation clauses
 - No bundling
 - Merger notification requirement (to prevent killer acquisitions)
 - Fines of up to 10% of total turnover

Next Steps

- EC published **proposals** on 15 December 2020
- **EU co-decision procedure**: European Parliament and Council
- **Lobbying** on behalf of stakeholders, and gatekeepers in particular, is bound to continue
- **National developments** that potentially undermine DMA, particularly in Germany

Rules for Horizontal Restraints (HBER/guidelines)

Michael Bauer

Rules for Horizontal Restraints (HBER/guidelines)

What is it about?

- Two block exemption regulations
 - BER for R & D Agreements
 - BER for Specialisation and joint production
- Guidelines for horizontal restraints
 - Details concerning BERs
 - Info exchange, joint purchasing, joint commercialization, standardization
- BERs expire 31/12/2022
- Need to adopt to new developments
 - Case law
 - Industry development

Current state of play

- Public / NCA consultation closed
- Topics raised:
 - **R&D/Specialisation:** no (real) issue
 - **Information exchange:** more guidance re
 - Signaling
 - Dual distribution (interplay with VGL)
 - Benchmarking
 - Data pooling / sharing
 - Hub & Spoke
 - Algorithms
 - **Joint buying:** clarifications
 - Joint buying vs. collective boycott/buyer cartel
 - **New areas:**
 - Sustainability agreements
 - Digital economy / platforms

Rules for Horizontal Restraints (HBER/guidelines)

Potential Outcome

- Update of section on information exchange
- Reference to digital economy where appropriate
 - E.g. data sharing by SME (*Vestager*)
- Clarifications re joint buying
- New section on sustainability

Next Steps

- Q1/2021: Publication of the results of the COM's evaluation

Competition Law & The Green Deal

Björn Herbers & Virginie Coursiere-Pluntz

Competition Law & The Green Deal

What is it about?

"Things are changing. Our world is coming to grips with the choices we need to make, to protect our environment, and keep climate change from running out of control ...

So the time has come to launch a European debate on how EU competition policy can best support the Green Deal ... [and] apply our rules in ways that better support the Green Deal..."

EVP Margrethe Vestager, Renew Webinar,
22 September 2020

Current state of play

- Debate on sustainability initiatives on **national level** (the Netherlands, Greece, Germany...)
- **EU Green Deal** (December 2019)
- **Vestager speech** (September 2020)
- **Commission call for contributions** (October-November 2020)
 - Commission received around 200 contributions
- **Commission Conference** "*Competition policy contributing to the EU Green Deal*" on 4 February 2021

Competition Law & The Green Deal

Results of the Call for contributions

State Aid

- More important role of public funding - investment in transformation
- Green bonus
- ...and malus?
 - *"no public money into polluting industries"*
- State aid for R&D
- EU Taxonomy Regulation

Antitrust

- First mover disadvantage
- Need for industry wide co-operations
- How flexible is Art 101 (3) TFEU:
 - Wider benefits
 - "fair share" and bias in willingness to pay
- "Green washing"
- Lack of legal clarity
 - Guidance
 - Comfort letters

Merger Control

- "Green" factors as part of competitive assessment
- Efficiencies
- Killer acquisitions
- Impact of mergers on R&D and innovation

Competition Law & The Green Deal

Potential Outcome 2021

- Commission still in the process of discussing ideas and finding a way forward
- Major changes to legal framework seem not likely - green "adjustments and clarifications"
 - Rather adaption of current legal framework to reflect sustainability objectives than relaxation of rules
 - Clarifications, especially in relation to co-operations, information sharing
- Innovation "key theme"
- Commission prepared to give guidance

Next Steps

- Report on feedback of call for contributions "before summer"
- Reflection of input from call for contributions in ongoing reviews of competition rules
 - State Aid: "in the weeks to come"
 - Draft revised Energy and Environmental State Aid guidelines ('EEAG')
 - Draft revised Regional Aid Guidelines
 - Antitrust: rules on horizontal co-operations and vertical supply agreements

Rules for Vertical Restraints (VBER/guidelines)

Malgorzata Urbanska & Amaury Le Bourdon

Review of the rules on Vertical Restraints

What is it about?

- 2010 VBER to expire on 31 May 2022
- EC review of the current rules to decide whether it should
 - let them lapse?
 - renew them?
 - revise them?

Current state of play

Evaluation

- Evaluation launched (3 Oct 2018)
- Open public consultation (4 Feb - 27 May 2019)
- Summary of contributions received (30 July 2019)
- Stakeholder workshop in Brussels (14-15 Nov 2019)
- External evaluation study published (25 May 2020)
- Staff working document published (8 Sept 2020)

Impact assessment

- Inception Impact Assessment published (23 Oct 2020)
- Public consultation (18 Dec 2020 – 26 March 2021)

Review of the rules on Vertical Restraints

Potential Outcome 2021

- **EC to explore revisions / clarifications in the following areas**
 - dual distribution rules
 - restrictions of active sales
 - online sales
 - parity obligations
 - RPM
 - tacitly renewable non-compete obligations, etc.
- **... as well as to clarify and simplify the rules by**
 - incorporating recent case law
 - filling in gaps, notably as regards restrictions that has recently emerged / become more prevalent

Next Steps

- Draft of the revised rules for stakeholder comments – expected in the course of 2021 (S2?)
- May 2022 – VBER 2010 expires / New VBER effective

Territorial Supply Constraints

Michael Bauer

Study on TSCs

What is it about?

- Not competition law in the narrow sense
- Project by DG Grow
- Study on TSCs in EU retail sector
 - Check scale & nature of TSCs and impact on the Single Market
 - Check gap left by competition rules, which do not catch unilateral policies by non-dominant suppliers
 - No 101 due to lack of agreement
 - No 102 due to lack of dominance
 - Focus: FMCG
 - ... but some indications beyond

Current state of play

- Questionnaire in Q1/2020 - Study concluded in June
- Results in Nov 2020 - Workshop in Dec 2020
- Focus: 12 countries – 6 product categories
- Results
 - Most common practices:
 - refusal to supply
 - product differentiation
 - S/times: promotion limitations
 - W/o TSC:
 - ... consumers could benefit from cost savings if resellers were to pass on savings ...
 - ... but no certainty whether this would materialize

Rules for Horizontal Restraints (HBER/guidelines)

Potential Outcome

- B2B regulation by DG Grow seems unlikely
 - Negative effects on consumers not obvious
 - Interference with EU Comp law
- Stricter scrutiny by DG Comp?
 - Recent case law

Next Steps

- Q1/2021: Publication of the results of the COM's evaluation

What else...?

Kai Neuhaus & Björn Herbers

Foreign subsidies

What is it about?

- Creation of instruments to remedy the impact of subsidies granted by non-EU governments to companies operating in the EU
- Mix between EU **competition** rules, **trade** defence instruments and **public procurement** rules

Potential Outcome 2021

- Commission or national authorities empowered to remedy negative impact of foreign subsidies
- Compulsory notification for foreign subsidies
 - facilitating acquisitions of EU companies
 - in procurement procedures

Current state of play

- Public consultation closed (>150 submissions)
- Inception Impact Assessment closed (22 submissions)
- Commission now drafting proposals

Next Steps

- Commission expected to propose draft regulation(s) in Q2/2021

Review of the Market Definition Notice

What is it about?

- Update of the 1997 Market Definition Notice
- Guidance for concepts of relevant product and geographic markets EU competition law

Potential Outcome 2021

- Update of Notice with regard to
 - Digitalisation
 - Innovation driven markets
 - Globalisation
 - Potential competition

Current state of play

- Public consultation closed
 - 99 stakeholder contributions
 - 29 NCA contributions
- Summary of the consultation published

Next Steps

- First half 2021: Commission Staff Working Document
- 2022: Revised notice

Reform of EU merger control

What is it about?

- Evaluation of EU merger control rules
 - Simplification
 - Functioning of the turnover-based jurisdictional thresholds
 - Functioning of the case referral mechanisms

Potential Outcome 2021

- No introduction of additional transaction value threshold
- Change of policy: Commission will accept referrals from NCAs even if NCAs did not have the power to review the case themselves
- Simplification

Current state of play

- Evaluation started in 2017
- Vestager speech "The future of EU merger control" (11/09/2020)

Next Steps

- Spring 2021: Report on outcome of evaluation
- Adaption of referral policy mid 2021
- In the months ahead review of
 - Best practices
 - Notice simplified procedure
 - Implementing regulation

IoT sector inquiry

What is it about?

- Investigation in of the Consumer IoT market
 - Voice assistants, smart devices, consumer IOT services
- Deep dive into the market while it is still growing and it is not too late to fix possible competition issues

Potential Outcome 2021

- Issues
 - Consumer lock-in
 - Monopolisation
 - Foreclosure strategies

Current state of play

- Opening decision 16/07/2020
- RFIs to 400 market participants (130 – 150 question), deadline October 2020

Next Steps

- Spring 2021: Preliminary report
- Summer 2022: Final report
- AT investigations?
- Legislative initiatives



Thank you for joining us!



Law . Tax

Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.

cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Riyadh, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law