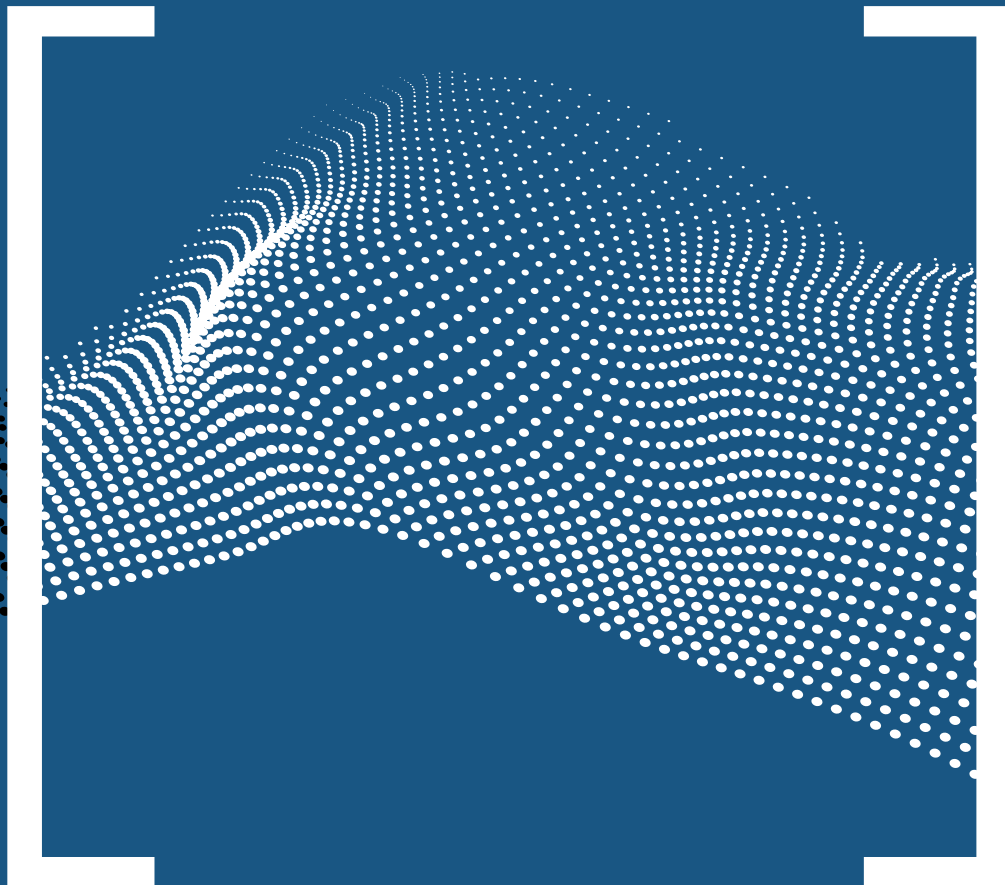


COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA

Focus on Abuse of Dominance in Digital Markets



OECD-GVH Regional Centre
for Competition in Budapest (Hungary)
Newsletter no. 16, March 2021



Inside a competition authority: **ALBANIA**

Contents

Foreword	3
Chaos and Opportunities	
PROGRAMME 2021	4
Abuse of Dominance in Digital Market	6
Market Power by Digital Giants: Use and Abuse	7
A Perspective on the Challenges Facing Eastern-European and Central Asian Competition Authorities	
Consumer Policy: A Complement to Competition Policy in Tackling Dominant Online Businesses	12
An Abuse Of Dominance Case in Bosnia and Herzegovina.	15
Audience Measurement	
Abuse of Dominance In Digital Markets – The Serbian Experience	17
Abuse of dominance in digital markets in Russia	19
Allegro, the Local Giant In Poland You Have Probably Never Heard Of	21
The Brazilian Google Case	23
A win for Innovation in Canada: Abuse of dominance by the Toronto Real Estate Board	25
Digital Markets and Competition Concerns: An Indian Perspective	28
Google Shopping Decision: Paving the Way for Efficient Digital Markets in Turkey	31
News from the Region	33
Creation of an Independent Antimonopoly Body of the Republic of Kazakhstan.	34
Maxim Shaskolsky has been appointed Head of the Federal Antimonopoly Service	36
The recent amendments to the Georgian Law on Competition.	37
News from the OECD	39
Insights from the OECD Competition Week of December 2020 and the 2020 Global Forum on Competition.	40
Inside a Competition Authority: Albania	42
The Albanian Competition Authority and its recent activity.	43
Interview with the Chairperson: Prof. Dr. Juliana Latifi	48
Literature Digest	52

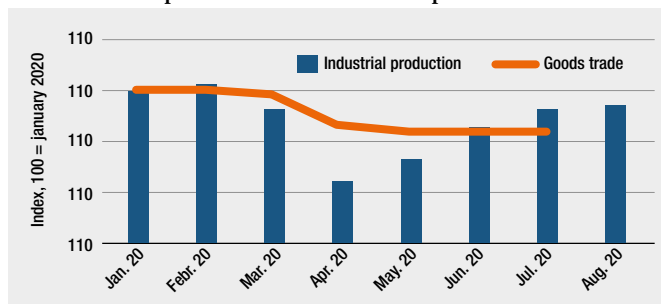
Foreword

Chaos and Opportunities

The COVID-19 pandemic is taking a sizable toll on the outlook for Eastern Europe and Central Asia. The region is expected to **contract by close to 5.5 percent** in 2020, erasing almost three years of economic progress¹.

Regional output collapsed in the first half of 2020, as pandemic-related restrictions affected domestic demand, exacerbated supply disruptions and halted manufacturing and services activity. The sharp decline in remittance inflows contributed to the slide in retail sales. The economies hardest hit were those with strong trade or value chain linkages to the Euro area or Russia and those heavily dependent on tourism or energy and metals exports.

Industrial production and trade in Europe and Central Asia



Source: World Bank, Europe and Central Asia Economic Update

At the end of the year, using the \$3.20 a day poverty line, estimates suggest an additional 2.2 million people may slip into poverty in the emerging and developing countries of the region. At the \$5.50 a day poverty line, customarily used in upper-middle-income countries, this figure can be as high as 6 million².

Once the health and economic crises caused by the COVID-19 pandemic are brought under control, policy efforts in the region will need to focus on structural reforms, strengthen governance and address bottlenecks, including limited exposure to international competition and low innovation rates. These challenges will require a well-targeted reform agenda to increase productivity growth, improve the investment climate and foster digital development.

We believe that **competition policy** and competition authorities have a central role to play in this process. A broad reflection on a virtuous industrial policy that can help promote recovery without distorting competition can help to lay the ground for a resilient and sustainable economy in the long term. Restoring effective competition and addressing possible competition

infringements is also key to ensuring a level playing field and a rapid, consistent recovery³.

This publication intends to be an inspiring forum to address these challenging topics. The present issue is dedicated to **abuse of dominance in digital markets** because the pandemic has sped up the digital transition all over the world, and in Eastern Europe and Central Asia in particular. We collected views and case studies from competition authorities in Brazil, Canada, India and Turkey as well as in our focus region, and combined them with the ongoing reflection on this topic within the OECD. We will adopt the same approach for the topic selected for the next issue of the review, which is bid rigging (see box below).

We also continue our journey across our beneficiary competition authorities. This time you will find a stimulating in-depth report on the **competition authority of Albania**, together with a thought-provoking interview with its Chairwoman Juliana Latifi.

Despite the obvious difficulties brought about by the sanitary crisis – primarily the impossibility for organizing in-person seminars – the OECD-GVH Regional Centre for Competition continues to represent as a leading platform for training and policy discussion. We took the COVID-19 crisis not as a mere limitation, but also as an opportunity to explore **new formats and new paths**. We organized tailor-made virtual seminars, broadened up participation by beneficiary authorities, invited prestigious speakers. Above all, we launched new initiatives that will complement our offer even after the pandemic, like thematic Special supplements to this publication and a set of short, eye-catching videos on the topics addressed in our seminars, to enable continuous and on-demand training.

As General Sun-Tzu would remind us: “In the midst of chaos, there is also opportunity”.

Csaba Balázs Rigó (GVH) and Renato Ferrandi (OECD)

The next issue of the Newsletter will focus on **bid rigging in public procurement**. We would like to learn about investigations and advocacy initiatives by your competition authorities, including cooperation with public procurement bodies, aimed at preventing or tackling bid rigging. We invite you to submit your contributions by **15 May 2021**.

1 IMF COUNTRY FOCUS - Central, Eastern, and Southeastern Europe After COVID-19: Securing the Recovery Through Wise Public Investment, September 2020.

2 World Bank, “COVID-19 and Human Capital”, Europe and Central Asia Economic Update (Fall 2020).

3 OECD, Competition policy responses to COVID-19, April 2020.



PROGRAMME 2021

The Programme of the OECD-GVH Regional Centre for Competition for 2021 has been conceived to be able to flexibly adjust to the developments of the current Covid-19 pandemic, particularly in the first semester 2021. As long as circumstances permit, we will organise in-person seminars, which represent the most complete and satisfactory format for training and networking purposes. However, should the Covid-19 outbreak still impose travel restrictions, in-person seminars will be replaced by virtual seminars.

In line with last year's programme, traditional seminars on competition law (Section A of the Programme) are complemented by other initiatives aimed at developing the potential of the Regional Centre (Section B). The Heads of the beneficiary Agencies will discuss and further explore these innovative activities at the 15th Anniversary Celebration of the OECD-GVH RCC "Reviewing the past to design the future".

A. Seminars on competition law

2-4 March Budapest	Virtual Seminar – Tackling bid rigging in public procurement Bid rigging involves groups of firms conspiring to raise prices or lower the quality of the goods or services offered in public tenders. OECD countries spend approximately 12% of their GDP in public procurement. This percentage can be higher in developing countries. Competition authorities may play a key role in preventing and tackling this anti-competitive practice, which costs governments and taxpayers billions of dollars every year. Expert competition officials will illustrate enforcement and advocacy actions conducted in their jurisdictions, also in light of the OECD Guidelines for Fighting Bid Rigging in Public Procurement.
April-May Budapest	GVH Staff Training Day 1 – Competition and consumer protection enforcement in the digital era: adjustment or reform? The seminar will focus on a number of issues and developments that can be traced back to digitalisation: the role of data, additional criteria for assessing vertical restraints, the relationship between consumers and online platforms, and enforcement cooperation in global cases. As usual, particular attention will be devoted to the evolution of the EU case law. Day 2 – Breakout sessions In separate sessions, we will provide dedicated trainings and lectures for the merger section, the antitrust section, the economics section, the consumer protection section and the Competition Council of the GVH.
September Moldova (3 days)	Outside Seminar – The assessment of abusive conduct by dominant players Cases of abuse of dominance are becoming increasingly complex for competition authorities. Building on the best international practices, this seminar will go through the steps that lead to a careful and informed assessment, starting from market definition and the identification of market power. The discussion will then focus on the methods and tools that competition authorities may deploy to evaluate the effects of the conduct on competition and on consumers, in order to distinguish unlawful practices from legitimate competitive initiatives.

A. Seminars on competition law

**Early
November**
Budapest
(1 day)

15th Anniversary Celebration of the OECD-GVH RCC – Reviewing the past to design the future

In a globalised world, high expertise and international cooperation have become indispensable for competition authorities. Building on the successful experience of the Centre over the last 15 years and the international initiatives in these areas, the event will explore the ways in which the RCC's role as a catalyst for capacity building and enhanced regional cooperation can be further enhanced.

Late November
Russia (3 days)

RCC-FAS Seminar in Russia

December
Budapest
(3 days)

Introductory Seminar for Young Staff – Competition law principles and procedures

The aim of this seminar is to provide young authority staff with an opportunity to deepen their knowledge of key notions and procedures in competition law enforcement. Experienced practitioners from OECD countries will share their knowledge and engage in lively exchanges with the participants on cartels, mergers and abuse of dominance. We will discuss basic legal and economic theories as well as the relevant case law. Participants will also have a chance to face and discuss procedural issues through practical exercises.

B. Additional initiatives

Training course on competition principles: first set of videos

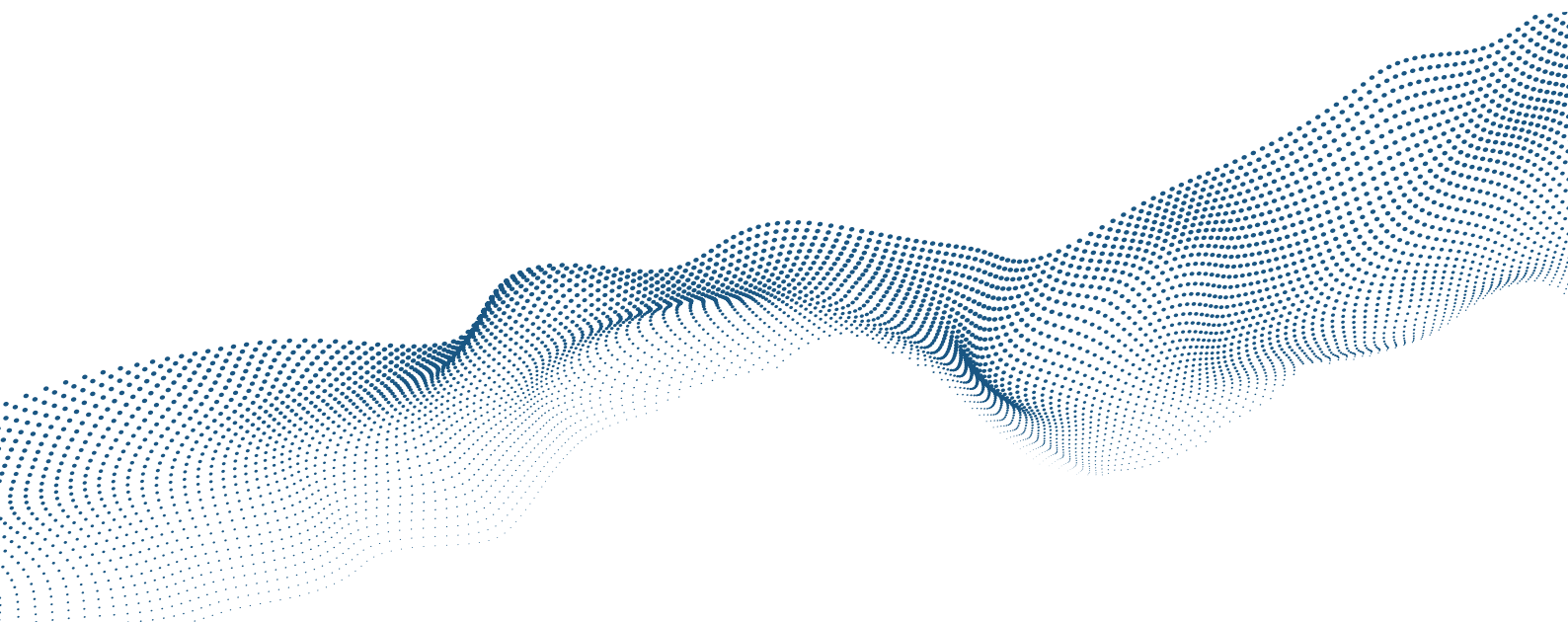
Scoping exercise on the future of the RCC: Questionnaire for Heads of Agency

In preparation for the celebration of the 15th Anniversary, the RCC will circulate a questionnaire aimed at collecting the views and comments of the Heads of Agency on a number of future opportunities for the Centre, e.g. regarding policy discussion, internal dissemination within the agencies, enforcement cooperation and synergies with other RCCs. The replies will be elaborated into a working document to be discussed at the Anniversary.

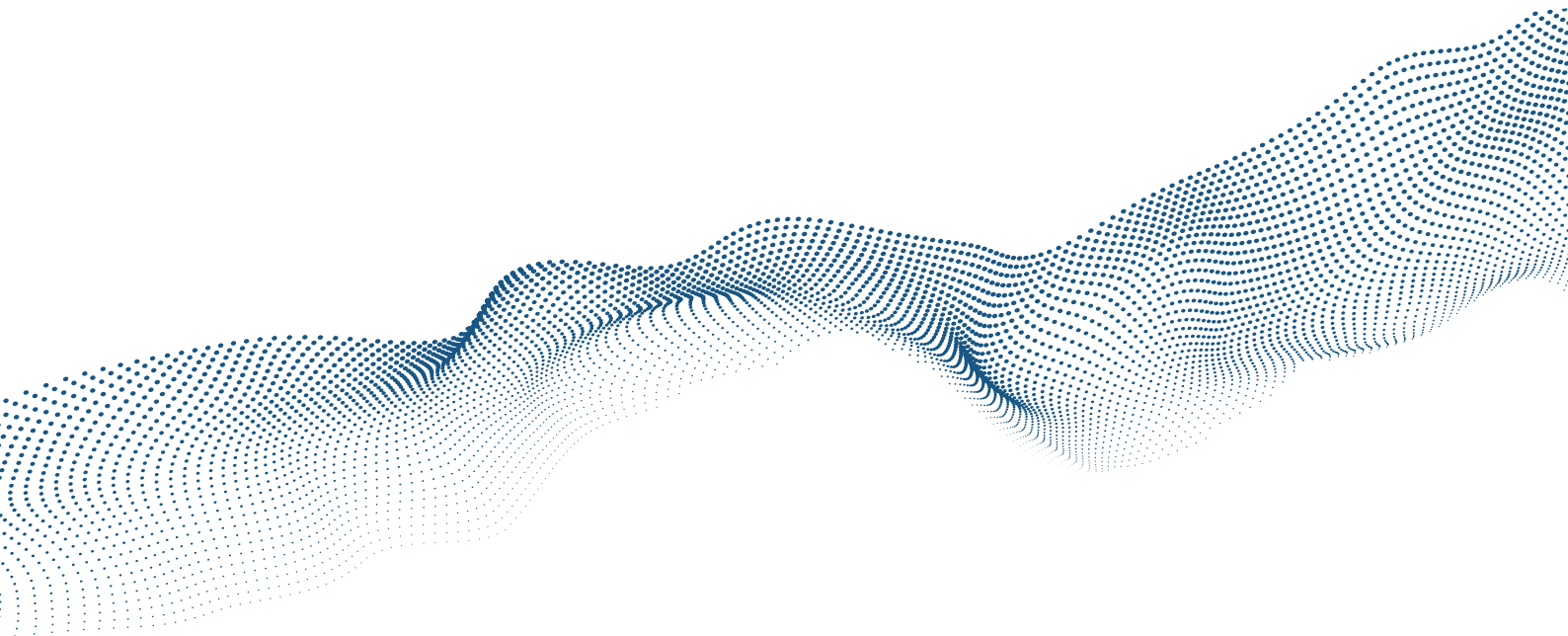
15th Anniversary Publication: Special supplement to the RCC Newsletter on regional and international cooperation

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Abuse of Dominance in Digital Market



Market Power by Digital Giants: Use and Abuse

A Perspective on the Challenges Facing Eastern-European and Central Asian Competition Authorities



James Mancini
Competition Expert, OECD

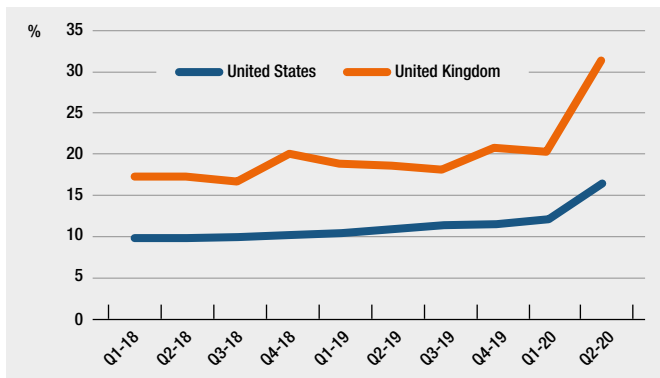


Renato Ferrandi
Senior Competition Expert, OECD

The Covid-19 digital pandemic

It is a matter of fact: the outbreak of Covid-19 has shifted several human activities to a digital screen. From school to work, from social interaction to shopping, we are getting used to virtual life. This transition has boosted E-commerce all over the world. In the EU Members, online retail sales in April 2020 increased by 30% compared to April 2019, while total retail sales diminished by 17.9%. In the United States, the share of e-commerce in total retail spiked to 16.1% between the first and second quarter of 2020 after slowly increasing between the first quarter of 2018 and the first quarter of 2020 (from 9.6% to 11.8%). The United Kingdom followed a similar pattern, although less marked (see Figure 1). In the People’s Republic of China, the share of online retail reached 24.6% between January and August 2020, up from 19.4% in August 2019 and 17.3% in August 2018⁴. The effect of the COVID-19 crisis on e-commerce has not been uniform across sectors or sellers. In the United States, for example, items related to personal protection (e.g. disposable gloves), home activities, groceries or ICT equipment boomed, while demand dropped for travel, sports or formal clothing⁵.

Figure 1. Share of E-commerce in total retail sales, US and UK

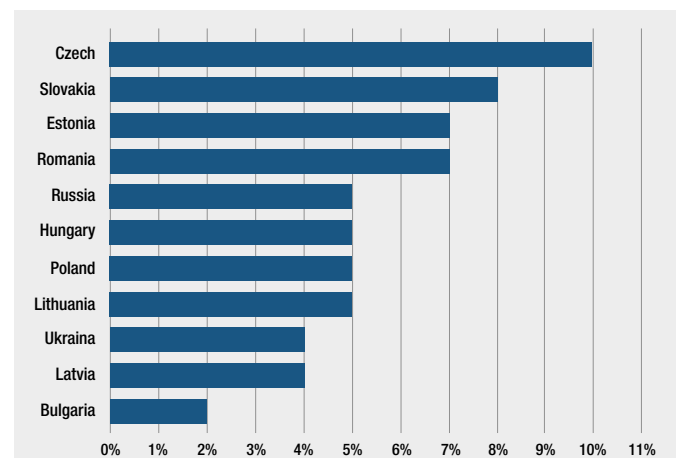


In Eastern Europe and Central Asia, these developments impacted economies that have been slowly but steadily turning

to online purchases. Although Western Europe is still the most developed E-commerce market in Europe (it accounted for 70% of the total E-commerce value in Europe in January 2020), the biggest growth in 2019 occurred in the eastern part of Europe, where Romania and Bulgaria recorded an increase of 30%⁶.

In Central and Eastern Europe, the weight of E-commerce in the domestic retail market ranged from 2% in Bulgaria to 10% in the Check Republic (see Figure 2).

Figure 2. Share of e-commerce in the retail market in Central and Eastern Europe, January 2020



Statista 2020 (<https://www.statista.com/statistics/1167300/e-commerce-share-in-cee-by-country/>)

Abuse of dominance in digital markets: the competition concerns

Many digital markets exhibit characteristics that result in high market shares for a small number of firms, namely low variable costs, high fixed costs and strong network effects. In some cases, this can even lead to “competition for the market” dynamics, in which a single firm captures the vast majority of sales. Therefore, the state of competition in digital markets

4 OECD, E-commerce in the times of COVID-19, 7 October 2020, <http://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8/#back-endnotea0z3>
 5 OECD (2020), “Connecting businesses and consumers during COVID-19: trade in parcels”, OECD Policy Responses to Coronavirus (COVID-19), <http://www.oecd.org/coronavirus/policy-responses/connecting-businesses-and-consumers-during-covid-19-trade-in-parcels-d18de131/>
 6 Ecommerce News, *Ecommerce in Europe: €717 billion in 2020*, July 9, 2020, <https://ecommercenews.eu/ecommerce-in-europe-e717-billion-in-2020/>

has become a major concern for policymakers, the media, and, increasingly, the general public. New investigations are being announced regularly, expert panels are being commissioned, and there is no shortage of calls for competition authorities to do something. But what exactly should that be?

One tool in a competition authority's toolbox is an abuse of dominance, or monopolisation, investigation. It focuses on situations in which a dominant firm uses its position to exclude rivals, raise rivals' costs or (in some jurisdictions) impose unfair terms on consumers. These investigations should be approached with caution – they can be lengthy and resource-intensive. In addition, they focus on conduct that might be procompetitive or anticompetitive, depending on the situation. Thus, authorities must carefully balance the risks of over- and under-enforcement.

Despite these challenges, more authorities are opening or considering abuse of dominance investigations in digital markets, for several reasons. First, dominance may be a relatively common feature of digital markets. Second, some strategies and digital product features could make anticompetitive conduct more attractive and impactful. Third, the growing importance of digital markets to the economy could justify greater prioritisation of enforcement in these markets.

Competition authorities in Eastern Europe have not remained idle.

The Polish authority UOKiK opened formal proceedings in December 2019 against Allegro, the largest E-commerce platform in Poland. Notably, Allegro claims to have 20 million customers (unique visitors) visiting the platform each month, being equivalent to 80% of all Internet users in Poland. It debuted on Warsaw Stock Exchange in October 2020 and immediately became the largest company ever listed in Poland. The UOKiK alleged that Allegro abused its role as e-commerce platform by granting favourable treatment to its own online store, e.g. by prioritising its products in search results.

In Serbia, in January 2020 the Commission for the Protection of Competition found that the two major online operators offering cross-border money transfer services collectively abused their joint dominant position by imposing restrictive agreements on commercial banks in the country.

The FAS Russia has investigated several alleged abuses of a dominant position by digital operators over the last five years, including Google, Apple, Microsoft, Booking, as well as digital taxi and job search platforms.

We can expect that these initiatives will inspire other competition authorities in Eastern Europe and Central Asia, which may become more active in addressing digital abuse of dominance cases. In doing so, they could benefit from a clear grounding in economic theories of harm, and caution with respect to enforcement errors that could harm consumers rather than benefit them. This article will summarise some key strategies for tackling abuse of dominance investigations in digital markets.

What is dominance in a digital market?

Authorities conducting abuse investigations should not overlook the need to assess dominance first. It is a crucial question

because many types of conduct that could constitute an abuse of dominance would be harmless, or even procompetitive, when carried out by non-dominant firms. Thus, dominant firms have special obligations, and so care is justified in determining whether these obligations should be applied in each case.

While the exact legislative definition varies across jurisdictions, dominance is generally rooted in the concept of market power: the ability of a firm to profitably raise prices, or reduce quality, away from competitive levels, and to keep them that way. In other words, dominance means that a firm has enough market power so that it is not significantly constrained by the response of its consumers and competitors from making certain decisions.

Competition authorities often use market shares as an initial indicator of dominance, and in several jurisdictions have identified a threshold under which firms can be certain they will not be considered to be dominant. However, this is only an initial step. In digital markets, especially when some products are provided at a price of zero, there are likely to be several different market share measurements. Thus, a broader understanding of a market is needed.

An abuse of dominance investigation should spend time determining whether a firm truly has market power – whether it is able to make unilateral pricing or other business decisions because it does not fear the response of its competitors or consumers. This step of an investigation will be helpful and important for evaluating theories of harm.

Perhaps the most fundamental issue to analyse when evaluating whether a firm is dominant is substitution in the market. Market power arises when there are significant limitations on the ability of consumers to select alternative products, and limited risk of new entry by other firms (such as those active in related markets). The calculation of demand elasticities is one technique that can be used to evaluate substitutability on the demand side. Where data or time is limited, an event study could be a good alternative – looking at the response of consumers to a change in the market, for example the introduction of a rival product. Even when quantitative assessments are not possible, substitution and elasticity can be important concepts to guide an authority's assessments.

Some indirect indicators of dominance can also be helpful. For example, an authority could seek to identify factors that might prevent a firm from being challenged by new competitors. In digital markets, these can take the form of network effects,⁷ costs for consumers to switch, and access to consumer data. Rather than creating a long list of subjectively-determined entry barriers, authorities should use a holistic assessment of the factors that make the emergence of competition within the next few years likely or unlikely.

In sum, understanding the sources of dominance in a market is key to understanding the effects of potentially anticompetitive conduct, and thus should not be a purely formalistic exercise based on market shares.

⁷ Which arise when the value of a product to a consumer increases as other users purchase the product. For example, the value of a social networking site will increase for a user as more potential connections or content creators join.

What kinds of abuses arise in digital markets?

A firm does not violate competition law simply by being dominant. Rather, an abuse of dominance occurs when it uses its position to engage in anticompetitive conduct. The term abuse of dominance refers to a wide range of conduct – a range that is expanding as new theories are being identified with respect to digital markets. Authorities in Eastern Europe and Central Asia can use the broad categories below when assessing a potential abuse of dominance. In each case, an effects-based assessment is advisable – each of the strategies below could generate efficiencies for consumers and be beneficial overall.

Refusals to deal arise when a vertically-integrated firm denies rivals access to an important input. These cases are generally limited to situations involving an *indispensable* input that can be *feasibly* provided to the rivals in question. These cases can be particularly difficult to remedy, and many have called for caution given that they may create disincentives for firms to invest in developing a given input. Thus, for concerns about digital platform access and data, for example, alternative approaches may be more practical.

Predatory pricing generally involves a firm cutting prices in order to force rivals out of a market, at which point prices can then be increased. In digital markets, these strategies may be particularly effective, since they can deny rivals sufficient network effects and scale in order to compete. To assess the effects, authorities could determine whether the strategy has economic sense apart from its potential exclusionary impacts (since alternative tools, such as price-cost tests, may be inoperable in digital markets).

Margin squeeze theories of harm are considered in some jurisdictions, and involve a vertically-integrated dominant firm attempting to narrow the margins of its rivals, thus making it more difficult for them to compete. Many digital platform markets involve some degree of vertical integration, and thus these theories of harm may arise with some frequency. Margin squeeze can be assessed as predatory pricing when it involves a firm charging high prices upstream and subsidising its downstream operations to force rivals out of the market. Alternatively, if a firm simply offers its downstream rivals worse terms, for example when a digital platform engages in “self-preferencing,” some jurisdictions may determine that a “discriminatory” margin squeeze has occurred. Such cases can be assessed based on whether there is an objective economic justification for this conduct (apart from the harm it imposes on rivals), although it may be hard to distinguish when this has occurred. Authorities seeking to prioritise cases may wish to focus on conduct that results in the exit of a competitor “as efficient” as the dominant firm, and cases involving indispensable inputs.

Exclusive dealing clauses and loyalty rebates can also be a mechanism to exclude rivals from a market or raise their costs. These strategies can be justified, generate consumer benefits, and lead to rigorous competition *for* the consumer (rather than a share of consumer purchases). However, in digital markets, these strategies may also be used to deny rivals network effects and access to a customer base.

Tying and bundling strategies consist of selling products together, either by refusing to sell the products individually or by offering a discount for a bundle purchase. These strategies can be beneficial for consumers, but in some cases, may be used to leverage market power in one market to exclude competitors in another. Dominant digital firms may use technical means to tie or bundle products together, such as limited compatibility, default settings and, more controversially, “nudges” that take advantage of consumer behavioural biases.

Exploitative abuses focus not on exclusion or raising rivals’ costs, but rather the use of a dominant position to impose unfair prices or conditions on consumers. In digital markets, these may arise in areas other than price, for example data collection. Determining what constitutes unfair terms, however, can be a significant challenge, particularly in digital markets that involve the provision of services at zero monetary prices, and cross-subsidisation business models. Authorities may wish to take into account the effect of this ambiguity on market participants, and consider alternative competition policy tools when clear guidelines cannot be articulated.

An example of abusive conduct: Google Search (AdSense)

In March 2019, the European Commission (EC) imposed a 1.49 billion euros fine on Google for abusing its dominant position in the online search advertising intermediation market by preventing competition on the merits.

Through AdSense for Search, Google provides search advertisements to owners of “publisher” websites. Google is an intermediary, like an advertising broker, between advertisers and website owners that want to profit from the space around the results on their own search results pages. Google was by far the strongest player in online search advertising intermediation in the European Economic Area (EEA), with a market share above 70% from 2006 to 2016.

Starting in 2006, Google included exclusivity clauses in its contracts with website owners. This meant that publishers were prohibited from placing any search advertisements from competitors on their search results pages. Then, Google gradually began replacing the exclusivity clauses with so-called “Premium Placement” clauses. These required publishers to reserve the most profitable space on their search results pages for Google’s ads and request a minimum number of Google ads. As a result, Google’s competitors were prevented from placing their search adverts in the most visible and clicked on parts of the websites’ search results pages. Finally, Google also included clauses requiring publishers to seek written approval from Google before making changes to the way in which any rival adverts were displayed. This meant that Google could control how attractive, and therefore clicked on, competing search adverts could be.

The European Commission concluded that Google’s conduct harmed competition and consumers, and stifled innovation. Google’s rivals were unable to grow and offer alternative online search advertising intermediation services to those of Google. As a result, owners of websites had limited options for monetizing space on these websites and were forced to rely almost solely on Google.⁸

8 See https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770

How should authorities adjust their approach in digital markets?

Each of these theories apply to both digital and traditional markets, although some adaptations are needed for digital markets. In particular, authorities may need to pay particular attention to non-price factors when assessing the nature and effects of a potentially anticompetitive strategy. This is because non-price dimensions of competition such as innovation, advertisement exposure, or even personal data collection, may be of particular relevance in digital markets

More broadly, competition policy practitioners and observers have called for authorities to adjust the way they address abuses of dominance in digital markets. This includes releasing more guidance, so firms have a clearer idea of what conduct would constitute an infringement. In addition, new economic tools may be needed in the analysis of abuses, for example insights from behavioural economics on switching patterns and nudges.

Other proposals focus on increasing the intensity of enforcement activity, by changing the balancing of risks between over- and under-enforcement. Another idea along these lines is to reverse the burden of proof so that dominant firms may need to justify their conduct in some situations. Interim measures, which seek to prevent harm from becoming permanent before a case can be finalised, may also be considered.

What are the alternatives to abuse of dominance investigations in digital markets?

Digital market abuse of dominance cases may apply in a range of different situations. However, they cannot remedy every competition concern. Even in circumstances when an abuse of dominance theory of harm could apply, there may be more effective alternatives – especially when the theory is new and cannot be grounded in either established theories or cases in other jurisdictions. Competition authorities therefore face the challenge of making a strategic decision about how to address a given issue, given the resource requirements and length of time involved in abuse of dominance cases, and the potential disadvantages of alternative approaches as well.

First, authorities may wish to focus on preventing harm in at least some markets by ensuring rigorous merger review procedures. While this would not prevent every abuse of dominance, effective merger control may be a key ingredient to ensure dominant firms continue to face competitive pressure – particularly in digital markets where this pressure may come from smaller start-ups or emerging competitors active in other digital markets.

Second, competition authorities may wish to make use of market studies, which permit a more holistic examination of the conditions that give rise to dominant positions, and any associated anticompetitive effects. Market studies can identify competition problems that stem from regulation, structural issues in a market, or even demand-side problems that prevent consumers from harnessing competition to its full potential.

Some jurisdictions, such as the EU, are actively considering enhanced market study powers to allow the imposition of remedies to address these broader issues.

Third, many digital expert panels have pointed to the need for further regulation in digital markets that could address competition issues not easily tackled through abuse of dominance enforcement. These could include specific rules for dominant platforms, and measures to empower consumers by reducing barriers to switching (e.g. through data portability).

An example of possible regulation in digital markets

The European Commission proposed two legislative initiatives to upgrade the rules governing digital services in the EU: the Digital Services Act (DSA) and the Digital Markets Act (DMA). The DSA and DMA have two main goals: to create a safer digital space and to establish a level playing field to foster innovation, growth, and competitiveness.

In particular, the Digital Markets Act includes rules that govern large companies identified as “gatekeepers” according to objective criteria. Gatekeeper platforms are digital platforms (such as search engines, social networking services, certain messaging services, operating systems and online intermediation services) with a systemic role in the EU internal market that function as bottlenecks between businesses and consumers for important digital services.

There are three main cumulative criteria that bring a company under the scope of the Digital Markets Act: a size that impacts the EU internal market, the control of an important gateway for business users towards final consumers and an (expected) entrenched and durable position.

Under the Digital Markets Act, companies identified as gatekeepers will carry an extra responsibility to conduct themselves in a way that ensures an open online environment that is fair for businesses and consumers, and open to innovation by all, by complying with specific obligations laid down in the draft legislation. For example, they will have to: allow third parties to inter-operate with the gatekeeper’s own services in specific situations; provide companies advertising on their platform with access to the performance measuring tools and the necessary information; allow business users to promote their offers and conclude contracts with their customers outside the gatekeeper’s platform; provide business users with access to the data generated by their activities on the gatekeeper’s platform. At the same time, gatekeepers will no longer be allowed to: block users from un-installing any pre-installed software or apps; use data obtained from their business users to compete with these business users; restrict their users from accessing services that they may have acquired outside of the gatekeeper platform.

The European Commission consulted a wide range of stakeholders in preparation of this legislative package. These stakeholders included the European and non-European large platforms, users of digital services, civil society organisations, national authorities, academia, international organisations and the general public.⁹

9 See https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

Conclusion

Competition authorities in Eastern Europe and Central Asia may, like many other authorities around the world, be faced with potentially anticompetitive conduct by dominant digital firms. In fact, abuses of dominance may be particularly harmful in digital markets. In seeking to address these concerns, authorities face the challenge of avoiding arbitrary or erroneous decisions that may either fail to address anticompetitive harm, or even harm consumers through over-enforcement.

To surmount these challenges, authorities must carefully assess the dominance of the firm in question, and then proceed to an assessment of the effects of the conduct. This assessment can take inspiration from the categories of abuse set out above – while they may not be all-encompassing, they provide a helpful

guide. Thus, while the markets, dimensions of competition, and analytical techniques may be new, the core principles of abuse of dominance cases remains the same. When authorities find they are departing too far from these principles, or are concerned about the efficacy of an abuse of dominance case to address a given competition harm, they may also consider alternative competition policy tools at their disposal. In sum, caution is required, but authorities have many options to ensure that anticompetitive conduct in digital markets does not go unaddressed.

The topic of abuse of dominance in digital conduct was discussed at the 2020 OECD Global Forum on Competition. Further materials on this topic are available [here](#)¹⁰.

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

Consumer Policy: A Complement to Competition Policy in Tackling Dominant Online Businesses



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Consumer benefits and risks of the digital transformation

The digital transformation benefits consumers greatly, including by providing easy access to an array of innovative and competitively priced products from a range of online businesses. These include dominant online platforms offering ‘free’ search or social media services funded by advertising (e.g. Facebook or Google) and marketplaces matching consumers with sellers or other consumers from across the globe (e.g. Amazon, Apple’s App Store or Booking.com). Consumer data is at the core of these ecosystems, powering personalised products accessible through a variety of devices. New technologies, such as the Internet of Things (IoT) and artificial intelligence (AI), enable such products to be customised, improved and patched remotely, throughout their lifetime. But there are ongoing and emerging consumer challenges and risks, including in relation to information disclosure; misleading or deceptive commercial practices; discrimination and choice; privacy and security; and fraud. Of key concern are deceptive and misleading data practices, as well as ‘dark commercial patterns’, which prey on behavioural biases in order to nudge consumers into making ill-informed and potentially harmful decisions and can be scaled to many online consumers at low cost.¹¹ Dominant online platforms in particular, through significant asymmetries in information and bargaining power with respect to consumers, have the potential to cause substantial consumer detriment.¹²

Interface of consumer, privacy and competition policies in data-driven online markets

Competition policy seeks to ensure that online businesses with a dominant position do not abuse that position. But consumer and privacy policies are also instrumental to redressing power imbalances between consumers and such businesses. Indeed today’s dynamic data-driven online markets have prompted a growing nexus of consumer, competition and privacy policy areas. In some cases, consumer policy, potentially coupled with privacy policy, may be better suited to addressing the consumer detriment resulting from dominant online businesses’ commercial practices. Steps taken in one policy area may also benefit another. Consumer protection and empowerment can support competitive markets, as discussed below, while privacy rules also help build trust and empower consumers to make better choices with their data.¹³ In turn, vigorous competition can help discipline businesses into adopting better consumer protection and privacy practices.

Consumer, privacy and competition policy: alternative routes to tackling dominant online businesses

In recent years, consumer and privacy policies have played a significant role in mitigating the consumer detriment occasioned by dominant online businesses, in particular as a result of misleading practices.¹⁴ For example, in 2018, the Italian Competition Authority (AGCM) fined Facebook EUR 10 million for two data practices in breach of the Italian Consumer Code, which emphasised the free nature of the service despite ‘payment’ in the form of data and involved the sharing of consumer data with third-parties without express consumer consent.¹⁵ In the same year, following action by the Australian Competition and Consumer Commission (ACCC) Apple was ordered to pay AUD 9 million for misleading consumers about their rights with faulty iPhones and iPads.¹⁶ In 2019, the US Federal Trade Commission (FTC) fined Facebook a record USD 5 billion for

11 Dark commercial patterns can be understood as techniques used by e-commerce businesses in the design of their websites and applications to prey on behavioural biases in order to coerce, steer, or deceive consumers into making unintended and potentially harmful decisions.

12 As noted in e.g. ACCC (2019), *Digital Platforms Inquiry - Final Report*, <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

13 As noted in e.g. ACCC (2019), *Digital Platforms Inquiry - Final Report*, <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

14 For more details on recent consumer law enforcement cases, see OECD (2019), “Good Practice Guide on Consumer Data”, *OECD Digital Economy Papers* 290, https://www.oecd-ilibrary.org/science-and-technology/good-practice-guide-on-consumer-data_e0040128-en and OECD (2019), “Good Practice Guide on Online Advertising: Protecting Consumers in E-Commerce”, *OECD Digital Economy Papers* 279, https://www.oecd-ilibrary.org/science-and-technology/good-practice-guide-on-online-advertising_9678e5b1-en

15 AGCM media release, ‘Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers’ data for commercial purposes’ (7 December 2018) (see: <https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes/>)

16 US FTC media release, ‘FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook’ (24 July 2019) (see: <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>).

repeatedly using deceptive disclosures and settings, as well as making misleading statements, to undermine users' privacy preferences in violation of a previous FTC order and the FTC Act.¹⁷ Following coordinated action by the European Commission and consumer authorities of EU member states over 2019 and 2020, leading hotel and travel booking sites Booking.com and Expedia committed to aligning their misleading presentation of accommodation offers with EU consumer law.¹⁸ In July 2020, the ACCC launched proceedings against Google, alleging that it misled consumers to obtain their consent to collect and use their personal data.¹⁹ And in December 2020, the French data protection authority (CNIL) fined Amazon EUR 35 million and Google EUR 100 million for failing to obtain consent from consumers for the use of cookies.²⁰

In contrast, in 2019, the German competition authority (Bundeskartellamt) argued that in failing to obtain meaningful consent for use of consumers' data and putting them in a take-it-or-leave-it position as regards its data practices, Facebook entrenched its dominant position in the social media market.²¹ Accordingly, in addition to consumer and privacy policy, a dominant online business' inadequate data practices could also be grounds for competition law enforcement, where it is seen to abuse its dominance by lowering consumer or privacy protections.²² Agencies vested with both competition and consumer powers may therefore be well positioned to consider action via either route. Consumer law has the advantage, from an enforcer's perspective, of not requiring a complex assessment of the relevant market and whether a firm has market power. However, in some jurisdictions consumer law may not apply where non-monetary transactions are involved, and in many, penalties for violating consumer law are often relatively low.²³ In that regard, in 2018 maximum penalties for contraventions of consumer law were raised to those for competition law in Australia.²⁴

The role of consumer protection and empowerment in supporting competition

That inadequate consumer protection may constitute an abuse of dominance is also emblematic of the broader role of consumer policy in supporting competition. Dominant online businesses may have greater potential to use dark commercial patterns to maximise profitability – for example urgency or scarcity cues (“Only one room left, book now!”), misdirection, social proof (“Friends in your area also bought this!”), or misleading discount claims – owing to better consumer targeting through access to consumer data and to relatively little risk of losing their customer base. Research by the Norwegian Consumer Council, for example, found that Facebook and Google employed various techniques involving deceptive app designs to steer consumers into giving up more personal data than they might have desired.²⁵ Despite various trust tools implemented by online businesses, including large marketplaces, it can be difficult for consumers to distinguish businesses that seek to better protect consumers – for example through less deceptive data collection, less advertising targeting vulnerabilities or better product safety processes – from those that do not. Consequently, some businesses may be tempted to employ harmful practices just to stay in business – and more competition could worsen the problem through a race to the bottom.²⁶ Up-to-date online consumer protection rules, including prohibitions on misleading and deceptive practices and requirements to take certain steps to protect consumers, therefore help level the playing field between dominant online businesses and their competitors.

Dominant online businesses might also have greater potential to employ dark commercial patterns and other practices to maintain market share, through restricting consumer choice and disincentivising searching for other options. Examples include obstructing price comparison; presenting certain settings or products as defaults; use of take-or-leave-it terms and conditions; or locking consumers in through automatic, potentially

17 European Commission press release, ‘More transparency: Following EU action, Booking.com and Expedia align practices with EU consumer law’ (18 December 2020) (see: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2444)

18 ACCC media release, ‘ACCC alleges Google misled consumers about expanded use of personal data’ (27 July 2020) (see: <https://www.accc.gov.au/media-release/correction-acc-alleges-google-misled-consumers-about-expanded-use-of-personal-data>)

19 CNIL media release, ‘Cookies: financial penalty of 35 million euros imposed on the company AMAZON EUROPE CORE’ (7 December 2020) (see: <https://www.cnil.fr/en/cookies-financial-penalty-35-million-euros-imposed-company-amazon-europe-core>); CNIL media release, ‘Cookies: financial penalties of 60 million euros against the company GOOGLE LLC and of 40 million euros against the company GOOGLE IRELAND LIMITED’ (7 December 2020) (see: <https://www.cnil.fr/en/cookies-financial-penalties-60-million-euros-against-company-google-llc-and-40-million-euros-google-ireland>)

20 Bundeskartellamt (2019), Decision of the Bundeskartellamt B6-22/16 regarding Facebook, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5

21 See OECD (2020), *Consumer data rights and competition - Background note by Secretariat*, <https://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>, for further discussion.

22 For discussion on the use of either competition and consumer law enforcement and the differences in penalties between the two regimes, see e.g. Botta, M. and K. Wiedemann (2019), “The Interaction of EU Competition, Consumer and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey”, *The Antitrust Bulletin*, Vol. 64/3, pp. 428-446, <http://dx.doi.org/10.1177/0003603X19863590>.

23 ACCC media release, ‘Consumer law penalties set to increase’ (23 August 2018) (see: <https://www.accc.gov.au/media-release/consumer-law-penalties-set-to-increase>)

24 See Norwegian Consumer Council (2018), *Deceived by Design: How tech companies use dark patterns to discourage us from exercising our right to privacy*, <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf> and Norwegian Consumer Council (2018), *Every Step You Take: How deceptive design lets Google track users 24/7*, <https://fil.forbrukerradet.no/wp-content/uploads/2018/11/27-11-18-every-step-you-take.pdf>.

25 For further discussion on the role of consumer and privacy protection in levelling the playing field. See e.g. Committee for the Study of Digital Platforms (2019), *Final Report*, George J. Stigler Center for the Study of the Economy and the State, <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>; and OECD (2020), *Consumer data rights and competition - Background note by Secretariat*, <https://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>.

26 For further discussion of consumer-facing remedies, see OECD (2018), *Designing and Testing Effective Consumer-facing Remedies - Background Note*, <https://www.oecd.org/daf/competition/consumer-facing-remedies.htm>; and Fletcher, A. (2016), *The Role of Demand-Side Remedies in Driving Effective Competition - A Review for Which?*, http://www.regulation.org.uk/library/2016-CCP-Demand_Side_Remedies.pdf.

hidden, renewals and complicated switching or cancelling processes. Consumer policies that seek to empower consumers to exercise choice and make informed decisions can therefore also help competitors challenge dominant online businesses. Examples of such approaches include requirements for clear and comparable product information disclosures; restrictions on use of defaults, automatic contract renewals and switching fees; fostering digital comparison tools or switching services; as well as promoting the portability of consumer data or interoperability of services.²⁷ Using behavioural insights to optimise choice architecture in the design of such remedies - for example through salient information disclosures and reminders to consider other offers, or the use of opt-in rather than opt-out defaults - is critical to maximising their effectiveness.

Towards protected and empowered consumers in the marketplace of the future

Governments and consumer protection authorities continue to work to modernise and assess the effectiveness of consumer policy for the digital age, supported by the OECD's Committee on Consumer Policy (CCP) and key OECD Recommendations²⁸ on E-commerce, Consumer Product Safety, Consumer Policy Decision-Making, and relevant guidance. The CCP is conducting further work to better understand specific benefits and risks online consumers face, including in relation to online marketplaces, businesses' use of AI, IoT, disclosure effectiveness and dark commercial patterns. Closer cooperation with competition and privacy policy areas will also be critical to ensure the most effective policy responses to consumer detriment in light of increasingly crosscutting issues. All these issues and others will be explored at an OECD international conference on *The Consumer Marketplace of the Future* to be held on 15-17 June 2021.

The views expressed herein are the author's and do not necessarily reflect the positions or views of the OECD or the OECD Committee on Consumer Policy

27 In particular OECD Recommendations on E-commerce, (<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0422>); Consumer Product Safety (<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0459>); and Consumer Policy Decision-making (<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0403>)

28 See OECD (2019), "Good Practice Guide on Consumer Data", *OECD Digital Economy Papers* 290, https://www.oecd-ilibrary.org/science-and-technology/good-practice-guide-on-consumer-data_e0040128-en; OECD (2019), "Good Practice Guide on Online Advertising: Protecting Consumers in E-Commerce", *OECD Digital Economy Papers* 279, https://www.oecd-ilibrary.org/science-and-technology/good-practice-guide-on-online-advertising_9678e5b1-en; and OECD (2019), "Good Practice Guide on Online Consumer Ratings and Reviews", *OECD Digital Economy Papers* 288, https://www.oecd-ilibrary.org/science-and-technology/good-practice-guide-on-online-consumer-ratings-and-reviews_0f9362cf-en.

An Abuse Of Dominance Case in Bosnia and Herzegovina

Audience Measurement



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Claim for initiation of the proceedings

On 14 July 2015, the Competition Council of Bosnia and Herzegovina (hereinafter BiH) received a Claim for the initiation of proceedings from a number of television and advertising agencies against the undertaking “Audience Measurement”. The proceedings aimed to establish Audience Management’s abuse of its dominant position on the market of services for TV rating measurement in Bosnia and Herzegovina. Audience Measurement and operates in the measurement of TV ratings in Bosnia and Herzegovina under license of the multinational company Nielsen. It is the only undertaking that provides this kind of service in BiH. Furthermore, the undertaking is the only laboratory authorised in the country to examine and verify the measurement devices used to measure TV ratings.

At the end of 2014, the Claimants received an offer from Audience Management for the conclusion of a contract for the provision of TV ratings measurement services for 2015, according to which they were given a deadline of three working days to accept the terms of the contract according to the “take it or leave it” principle.

In the event that the Claimants did not sign the contract, Audience Measurement would stop providing daily measurement results. Consequently, the Claimants did not have any alternative but to sign the contract they were offered.

The Claimants would not have been able to provide their services without the mentioned data (which can be considered an essential facility), because they use the historical data provided by Audience Management to plan their strategies for leasing media space to their clients for the periods ahead.

Response of the Opposing Party

Audience Measurement’s claimed that it did not operate independently of the customers who purchased data on TV ratings and that it was therefore not in a dominant position. Given that the relevant market was strictly regulated by the Institute of Metrology, the Opposing Party argued that it had no influence on possible competition.

Audience Measurement opined that the specific market relationships arising in the case resulted in a mutual economic dependence between the concerned parties, not only of the Claimants from the Opposing Party. Finally, the prices were formed on an annual basis, based on objective criteria.

Collecting data

The Competition Council collected data and documentation from a number of public and private broadcasters that were not parties to the proceedings regarding the conclusion of contracts with the Opposing Party and any possible problems arising in relation to this process.

By inspecting the contracts awarded, it is established that the contracts concluded with public broadcasters were different, in terms of the application of a lower price level, to those concluded with other television companies.

Relevant market

The relevant service market concerned by the case, this was found to be the market for the provision services for the measurement of TV ratings.

The relevant geographic market for the process in question was deemed to be the whole territory of Bosnia and Herzegovina, given that Audience Measurement operated across the entire territory of BiH.

Assessing the undertaking’s dominant position

In this case, customers that wished to purchase TV rating data could only obtain this service from the Opposing Party, thus making the undertaking the inevitable partner of all those seeking TV rating services.

In regard to the specificities of the concerned market, it was found to be static over the long term with little to no change taking place. Furthermore, there was found to be no fluctuation in the agreement between the parties concerning the extent of the provided services. There was also found to be no prospect of the market expanding through an increase in the number of customers or through the discovery of new customers.

In addition, the costs of market entry were not negligible (equipment purchase, licenses, verification, etc.) and the scope of the market was small, which meant that potential competitors had little interest in entering the relevant market.

Because of the specificity of the relevant market, there is little probability that an undertaking could easily enter the relevant market due, firstly, to the existing administrative barriers (the

necessary permits of the Metrology Institute, device verification by the Audience Measurement laboratory) and, secondly, to the lack of possibility for the expansion of the customer base of those seeking the provision of services for the measurement of TV ratings, which is a stable/static category.

At the time of the decision, the Opposing Party provided TV ratings measurement services for 20 clients (marketing agencies and television stations), and there was no indication that the number of customers would increase in the near future.

At the oral hearing that was held the Opposing party argued that clients using the services of TV measurement cover the vast majority of the TV market, both in terms of advertisers and viewers. In light of the above, the Competition Council established that Audience Measurement had a market share of 100% in the relevant market of TV ratings measurement services.

Historical data on the measurement of TV ratings are a necessary tool for the work of advertising agencies and television broadcasters given that these data — among other factors — provide the basis on which future plans are made. After the initiation of the proceedings the undertaking in question granted customers access to historical data in 2016, which the Competition Council took into account as a mitigating circumstance in its proceedings.

According to the contracts concluded by Audience Measurement with the Complainants, the undertaking committed to provide its clients with TV ratings measurement services in relation to:

- Television broadcasting data
- Data on broadcasted programmes and programme breaks
- Data on broadcasted propaganda messages (shortened Spot Data Base) for television channels.

More specifically, after the conducted procedure, the Competition Council determined that Audience Measurement had given discounts or charged lower prices to certain broadcasters, i.e. public broadcasters as opposed to private broadcasters, granting them annual discounts ranging from 2.5% to 51.25%.

After examining the text of the contracts concluded by Audience Measurement” with its clients in 2014 and 2015 for the provision of services for the measurement of TV ratings, the Competition Council found that the Opposition Party had also given certain TV broadcasters and agencies various discounts for the same type of service, without any clearly defined criteria for doing so.

Based on the above, the Competition Council found that the concerned undertaking had applied different conditions and different prices for the provision of the same type of service depending on the client in question, thereby placing the Claimants and other clients into an unequal and unfavourable competitive position.

Consequently, the Competition Council found that Audience Measurement d.o.o. Sarajevo had abused its dominant position in the relevant market for the provision of services for the measurement of TV ratings in Bosnia and Herzegovina by applying different conditions to equivalent or similar transactions depending on the particular client in question, contrary to Article 10, paragraph 2, item c) of the Law on Competition²⁹, thereby placing them at a competitive disadvantage.

In addition, it was established that the Opposing Party had forced the Claimants and other clients to sign new contracts for 2015 by threatening – if they refused to enter into the new contracts — to withdraw their access to the historical data they had paid for and used in prior years. The Competition Council concluded that such conduct would have denied the right to use the service to firms that had already paid the same in the previous year.

The Competition Council, in order to eliminate the negative consequences of the abuse of the dominant position of the Opposing party, prohibited the undertaking from engaging in behaviour on the relevant market that would place other undertakings or natural persons in an unequal position on the relevant market.

Fine

The Competition Council imposed a fine of EUR 15,000.00 on Audience Measurement, as well as a fine of EUR 2,500.00 on the director of the undertaking as the person responsible for its operation. The fines were paid within the deadline.

Administrative dispute

The undertaking “Audience Measurement appealed against the decision of the Competition Council and filed a lawsuit with the Court of Bosnia and Herzegovina. The Court confirmed the Decision of the Competition Council.

29 Law on Competition (“Official Gazette of BiH”, No. 48/05, 76/07 and 80/09) <http://bihkonk.gov.ba/en/competition-act-unofficial-consolidated-text.html>

Abuse of Dominance In Digital Markets – The Serbian Experience



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Introduction

In the era of new business models based on digital platforms, competition law is at the crossroad between digitisation, the market power of dominant undertakings and the transformative effects that the phenomenon of digitisation is currently having on shaping the world, including the market environment in which undertakings are active. The Serbian competition law is no exception.

The importance of properly assessing the behaviour of undertakings in digital markets presents a new challenge for competition policy due to the believe that competition authorities have a responsibility to address the concerns raised by market power in digital markets. There are many initiatives to adapt existing competition rules in the context of the digital economy, in order to ensure that analytical tools to deal with digital markets related competition problems are up-to-date and that digital markets remain competitive.

It is thus important that the Commission for Protection of Competition of the Republic of Serbia (hereafter, Commission) takes into account the growing significance of the digital economy as an ongoing concern for competition policy and that it is flexible enough to address the challenges posed by digital markets. It is considered that Serbian competition law is already equipped to adapt to such challenges and to apply a consumer welfare standard and that, therefore, no extensive changes are needed to its guiding principles and goals.

Digital markets in Serbia

The rapid rise of global digital operators induced digital transformation of the national economy and put it high on agenda of the Republic of Serbia. The Serbian government has heavily prioritised digitalisation over the last 10 years, given its perceived importance for facilitating sustainable and dynamic

economic development and for improving domestic macro competitiveness. As an EU candidate country, Serbia has a key goal of joining the EU and its single (digital) market and introducing the national law in line with the EU framework.

Consequently, Serbia is guided by its vision of becoming part of the EU when adopting key national strategic documents and accompanying laws related to the Information and Communication Technology (ICT) Sector. To achieve these objectives, the Government has elaborated a digital agenda that includes a number of strategies, namely the Strategy on development of the information technology industry for the period from 2017 to 2020, Strategy for Development of Networks of New Generations until 2023, Strategy for Artificial Intelligence 2020-2025 and Information Society Development Strategy in the Republic of Serbia until 2020.

These documents aim to strengthen the technological ecosystem in Serbia and to ensure the necessary infrastructure exists for the development of its digital markets, in line with the strategic framework of the EU. According to this framework, the key dimensions of the Serbian digital economy are: telecom sector, broadband, mobile, internet usage, internet services, eGovernment, eCommerce, eBusiness, ICT skills, research and development.

However, Serbia has not taken full advantage of its strategic and regulatory framework to support its digital economy, despite its significant potential. That being said, the Serbian economy saw growth in the share of the ICT sector's value added in its GDP between 2010 and 2017, ranking in the top 10 economies in the world alongside a number of other developing and transition economies, such as Taiwan, India, Hong Kong (China) and Malaysia.³⁰

According to the Digital Economy and Society Index (DESI) for 2018,³¹ Serbia would rank 25th overall among EU member states. This result places Serbia into the cluster of comparable, low-performing countries, such as Romania, Bulgaria, Hungary and Croatia. According to index value (42.2), Serbia is slightly below this clusters' average (43.5), and notably below the EU average (54.0).³² According to the I-DESI, the largest increase in digital performance was recorded by Serbia, which increased its score by 75 per cent between 2013 and 2016 and rose from last place amongst the 45 countries analysed to 34th place in 2016.³³

In "Serbia 2019 Report", it is estimated that Serbia is moderately prepared in the field of information society and media, although some progress was made in the past year, in particular regarding the Digital Single Market and in the area of information society and e-government.³⁴

30 UNCTAD, *Digital Economy Report 2019 – Value Creation and Capture: Implications for Developing Countries*, Geneva, 2019, p. 52.

31 The Digital Economy and Society Index (DESI) is a complex index that summarises relevant indicators on Europe's digital performance and tracks the evolution of EU Member States in digital competitiveness. As a candidate-country, Serbia is still not officially included in the DESI monitoring. The DESI is comprised of five principal policy areas: connectivity, human capital, use of the Internet, integration of technology and digital public services. The International DESI (I-DESI) includes the same five dimensions as the DESI, but it is built on a slightly different set of indicators due to the fact that a number of DESI indicators are not available in non EU countries. It measures the digital economy performance of EU Member States and the EU as a whole in comparison with 17 other countries around the world, including Serbia.

32 See Milovan Matijević, Milan Šolaja, *ICT in Serbia - At a Glance, 2020*, Vojvodina ICT Cluster, 2020, pp. 146-149.

33 European Commission, *International Digital Economy and Society Index 2018*, SMART 2017/0052, Final Report, 2018, p. 14.

34 Serbia 2019 Report, COM(2019) 260 final, Brussels, 29.5.2019, p. 65.

Abuses in the digital age

The application of competition rules in the context of abuse of dominance in digital markets represents an additional challenge for the Commission. The Commission is aware of the importance of accounting for the specific features of digital markets that are particularly relevant to competition policy issues, such as rapid change and evolution, investment and innovation, network effects, the importance of product quality, the two-sided or multi-sided nature of these markets, growth and the significance of big data. While these features affect the practical application of existing tools, it is generally accepted that the methods used to define the relevant market and to assess market power are similar in relation to both digital markets and traditional ‘offline’ markets.

Nevertheless, competition between firms in digital markets occurs on several dimensions – it is not solely about low prices. Therefore, when undertaking an assessment of market power in this context, it requires analysing different criteria which need sometimes to go beyond prices, i.e. non-price effects that contribute to consumer detriment. Based on the EU legal legacy in the field of the protection of competition, the Law on Protection of Competition³⁵ stipulates that the market power of undertakings shall be determined in relation to the numerous relevant economic and other indicators (Art. 15).

It seems that the Commission does not need a new theory of harm and new rules to consider abuses in the digital age as it already has the necessary tools to handle such conducts that are forbidden in line with Article 16. The Commission relies on traditional theories of harm extended to new technologies and digital platforms. However, it is ready to adapt its approach in order to deal with new types of potentially illegal conduct committed by undertakings in digital markets.

Case Eki Transfers/Tenfore

Although the Commission has not dealt with a large number of cases involving abuses in digital markets, one case in particular, namely the Eki Transfers/Tenfore case, is worth specifically mentioning. This case concerned an abuse of collective dominance on the market of consumer cross-border money transfer services.³⁶

In this case, the Commission found that Eki Transfers and Tenfore, companies that were agents of Western Union in Serbia, had abused their joint dominant position on the market of consumer cross-border fast money transfer services between natural persons, non requiring opening an account, in the territory of the Republic of Serbia, by imposing restrictions in cooperation agreements concluded with 24 out of 32 commercial banks in Serbia. These agreements, which allowed for the possibility of automatic renewal and which formed a network of resale contracts, contained the following:

- loyalty and exclusivity provisions that were to remain in force even after the expiry or termination of the cooperation agreements and
- an additional provision, in the case of most contracts concluded by Eki Transfers, which provided for the payment of a penalty for any violation of the exclusivity clause during or after the conclusion of the contracts.

By these restrictive provisions, the Western Union representatives prevented and restricted competition, that is, they limited the market and technical developments to the detriment of consumers. The provisions, which created significant additional entry barriers in the Serbian market for fast international money transfers, resulted in the complete foreclosure of the market for Western Union competitors and therefore restricted the choice available to users of this service. The Commission found that the contracts had a network effect which prevented access to potential competitors. There were already considerable regulatory and other barriers on the concerned market which included, among other things, the inability of new entrants to benefit from economies of scope.

During the investigation, the Commission found that, when adding the two banks - Société Générale and Postal Savings Bank, which were also Western Union representatives, Eki Transfers and Tenfore held a collective dominant position in the relevant market. The Law prohibits any abuse by one or more undertakings of a dominant position and stipulates that two or more legally independent undertakings may have a dominant position if they are economically linked in such a way that in the relevant market they jointly perform or act as one participant (collective dominance) (Art. 15-16).

At the time of this decision, which took place before amendments were made to the Law in 2013, the Law stipulated that two or more undertakings were deemed to have a dominant position on a particular market if no significant competition existed between them, and if their aggregate market share reached or exceeded 50 per cent (collective dominance). In 2013, this rule was removed from the Law. When assessing collective dominance in the case in question, the Commission took into account the market share of the undertakings whose dominant position was being determined, obstacles to entering the relevant market, the power of their potential competitors, and the possible dominant position of the buyer. The Commission concluded that because undertakings act as one participant in the case of collective dominance, dominance is to be determined in a manner that is similar to how it is determined in the case of one undertaking.

As a result, the Commission ordered Eki Transfers and Tenfore to amend the contracts so as to remove the restrictive provisions in their contracts by which the bank is obliged to provide exclusively the Western Union services. The Administrative Court and the Supreme Court both confirmed the Commission’s decision in this case.

³⁵ Law on Protection of Competition (“Official Gazette of the RS”, 51/09, 95/13, hereafter, the Law), <http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/07/Law-on-Protection-of-Competition2.pdf>.

³⁶ See the decision of 12 January 2010, number 5/0-02-10/10-1, <http://www.kzk.gov.rs/kzk/wp-content/uploads/2012/03/Resenje-EKI-Transfers-12.01.2010.pdf> (in Serbian).

Abuse of dominance in digital markets in Russia



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The digital economy is a qualitatively new system of economic legal relations that has emerged and is developing within a new paradigm of digital relations.

And if competition has always been an integral component for the success of economic development, under the new conditions of the digital economy, competition also ensures innovative development in the future, even if the threats to it are not currently that obvious. Now the time has come for the formation of the basic economic groundwork, which in the future will determine global innovative development. It can be stated with adequate confidence that this period will not be long enough to enable countries to take slow and gradual action when it comes to establishing the necessary conditions for the development of a competitive digital economy.

Just like the physical infrastructure in traditional sectors, the digital infrastructure in digital markets is a necessary basis for the functioning of major elements of the economy. The term “digital platform” should be understood to include a wide variety of entities, from operating systems and databases to digital ecosystems, depending on the functioning of specific markets.

And just like in traditional markets, problems relating to access to infrastructure are at the heart of the antitrust investigations of the FAS Russia.

When does a digital platform have market power? When analysing the market in which digital platforms operate, the FAS Russia takes into account the specifics of digital markets, all interconnections in multilateral markets along with the assessment of the impact of network effects.

Digital platforms, as an instrument of legal relations, are created and function in a similar way - as information systems, differing only in the ways in which the results of the platforms are used, based on the purposes that they were set up for. By providing users with access, equipment, virtual space and data, they provide an environment and platform for information exchange, content distribution, e-commerce, social networking and cloud computing.

There is no universal approach to the classification and description of the typology of digital platforms, and the study of digital platforms as subjects of economic relations is carried out by the FAS Russia depending on the objectives of the investigation.

At the same time, two characteristics that are common to all digital platforms can be noted:

- 1) Digital platforms bring together such a large number of participants that the data being created, collected and processed by them determines the significance of their impact on both the market and society as a whole;
- 2) Digital platforms operate in multilateral product markets with cross-platform network effects (both direct and indirect).

From the point of view of the formation of an antitrust regulation strategy, this leads to the need to adhere to a multilateral analytical approach.

In the investigations carried out by the FAS Russia, the owners of digital platforms, as the basic infrastructural framework of digital markets, sought to use the influence of their platforms to provide better conditions for their products in adjacent markets that operate with the use of these digital platforms than those enjoyed by their competitors, limiting or completely prohibiting the use of their platforms by other developers.

Abuses in digital markets are not overtly “hard core” - they are not “self-evident.” The antitrust authority needs to analyse all the multiple interrelationships of the participants in order to identify actions or omissions that need to be stopped or changed.

Thus, in the case against Microsoft, the FAS Russia determined that it was the combination of a number of actions and inaction on the part of Microsoft that led to the creation of discriminatory conditions for the anti-virus software of JSC Kaspersky Lab to be used on Windows 10 in comparison with the Windows Defender anti-virus software of Microsoft Corporation. Each of the identified Microsoft actions by itself, perhaps, would not have had such negative consequences for competition, but their use in their totality led to a restriction of competition in the Russian Federation market for antivirus application software.

It is noteworthy that Microsoft applied restrictive practices only in cases where end users were individuals – as the FAS Russia supposed guided by the fact that individuals lacked sufficient knowledge in the field of information security. As regards corporate users, where decisions about the choice of antivirus software are predominantly made by specialists - software integrators - restrictive practices were not being applied.

Such a situation confirms the need to study all aspects of a multilateral market, in particular, final consumers.

In the FAS Russia vs. Google investigation, it was established that Google’s anticompetitive practices were aimed at promoting exclusively its own products through the most profitable channel for distribution (pre-installation of applications) and at the same time hindering the promotion of competitors’ products.

By virtue of the practice of bundling, while at the same time preventing the pre-installation of competitors’ applications, Google is able to pre-install a large number of its own applications and services without paying any remuneration to the producers. In turn, competing application developers are virtually deprived of the ability to pre-install their applications and services in conjunction with Google Play and on the same

terms as Google applications and services. As a result of the setting up of barriers to access, competitors are being squeezed out of those markets in which applications and services from the GMS package are being distributed.

In August 2020, the FAS Russia uncovered a violation of the Law on the Protection of Competition in the actions of Apple Inc., which, since the end of 2018, has been pursuing a consistent systematic policy aimed at “forcing out” parental control applications from the market by both directly removing applications from the Apple Store and requiring significant limitations of the functionality of third-party applications, while own pre-installed parental control application Screen Time works with full functionality that is getting better for users.

In the case against LLC Headhunter (hh.ru), FAS Russia established that Headhunter restricted the ability of competitors - developers of automated recruitment services to interact with its platform for employment requests and offers - and blocked users (employers) of competing services by denying them the possibility of utilising hh.ru in their work, while proposing that they switch to their service of similar functionality, the one which was developed by hh.ru.

These circumstances constituted a barrier to access to the relevant product market of services for information interaction of applicants, employers and recruitment agencies in the information and telecommunications “Internet” network for the developers of third-party software for automated recruitment.

The behaviour of platforms, aimed at the formation of a closed ecosystem, is dictated both by the commercial interests of the platforms (consumers’ restriction to services within the platform (walled garden)), and by concerns as to the use of their technologies and personal data on consumers, since the platform does not control its processing by third parties.

In such a situation, it becomes extremely important to ensure both competition and the safety of consumers’ personal data.

When considering cases, antimonopoly authorities need to identify the essential factors for the development of the market in order to formulate in its prescription the very conditions that will ensure the development of competition and innovation.

However, when working out the best conditions for the development of competition, it is necessary to take into account the specificity of digital platforms as entities of digital infra-

structure. As a rule, a digital platform is a very sensitive subject from a security point of view - there is always danger of an attack on the databases of a digital platform, which necessitates proper protection of the digital platform in order to avoid both disruption of the information system and data leakage, including user data.

Thus, in the case against Headhunter, FAS Russia analysed the necessary and sufficient conditions for providing access to the Headhunter platform that would ensure proper protection of databases from personal data leakage, as well as ensuring the stability of the platform and protection from unauthorised data parsing.

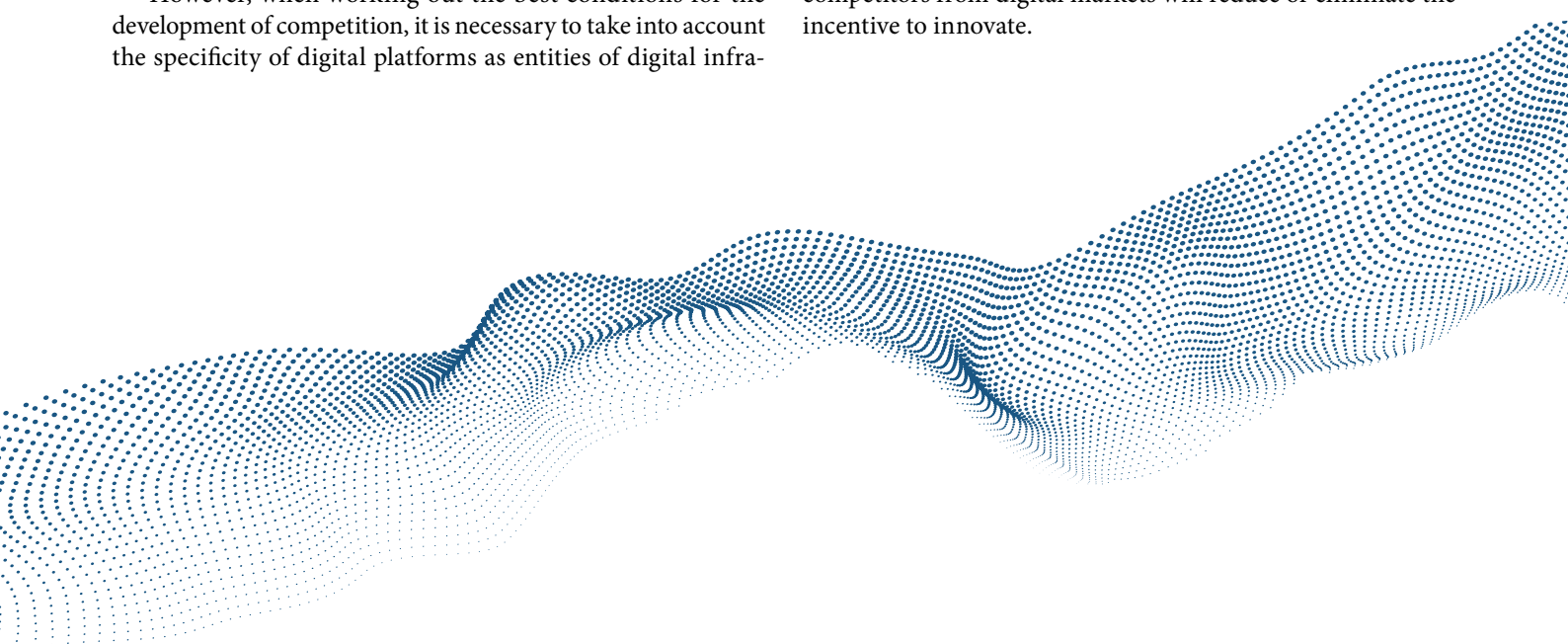
It has been established that these goals can be achieved if the platforms open access to their data through the API, together with all the necessary procedures for checking third-party applications, testing them, identifying undocumented capabilities and, as a result, ensuring high-quality and secure interaction of third-party services with the platform.

It is clear that in circumstances where digital interaction algorithms occur on the side of the dominant entity, for the antimonopoly authority the reasonableness of implementing such algorithms that would provide non-discriminatory access of market participants to the platform is not self-evident and requires special additional study.

The published procedure for interaction between the platform owner and third-party developers, even if it is available to all interested parties, provides for mutual reasonable and sufficient interaction but does not provide a guarantee that consumers and the platform owner will actually interact in an appropriate manner.

In order to exercise control, it seems appropriate to monitor the markets operating on the basis of platforms that have been behaving in a manner that has given rise to identified abuses of their dominant position.

The most important consideration is to find a balance between the immediate convenience of users, which is most often evident when the dominant entity asserts its power, and innovation in the future: fears are strong that crowding out competitors from digital markets will reduce or eliminate the incentive to innovate.



Allegro, the Local Giant In Poland You Have Probably Never Heard Of



Aneta Pazio Krawczak
Managing Partner at Pazio-Krawczak
Law Firm

What is Allegro.pl?

Allegro.pl was founded more than 20 years ago as a home-grown rival to eBay and is probably central Europe's most recognised e-commerce brand. The COVID-19 pandemic has made shopping on-line more appealing and Allegro is therefore attracting new visitors as consumers go online.

The company was purchased by online auction site QXL Ricardo plc in March 2000. QXL Ricardo plc (changed its name to Tradus plc in 2007) was acquired by Naspers in 2008. In October 2016, Naspers sold Allegro to an alliance of investor funds: Cinven, Permira and Mid Europa Partners. Allegro debuted on the Warsaw Stock Exchange just last month (October 2020) and immediately became the largest IPO in Poland's history, as well as the largest company ever listed in Poland.

In 2011, Allegro claimed to have over 11 million users. In 2017, Allegro claimed to have over 16 million users and more than 20 million accounts. Now the company claims to have 20 million customers (unique visitors) visiting the platform each month, being equivalent to 80% of all Internet users in Poland³⁷.

As previously mentioned, the Polish Allegro was created in response to the international success of eBay. At the time almost all online services were free of charge and so was Allegro. Features like free access to buyers, ease of showcasing the products on offer and advertising opportunities quickly gained recognition among sellers.

The evolution from a flea-market auction model to a paid platform was a gradual process. Initially, at the centre of Allegro's strategy was competing with eBay as it entered the Polish market. Allegro's widely recognised brand, number of sellers and volume of transactions resulted in eBay, despite its initial success, not being able to acquire a big share of the Polish e-commerce market.

Having successfully competed with eBay, Allegro's strategy shifted to changing its business model. Inspired by Amazon's success, transaction fees were introduced and the e-commerce offer, which was initially limited to flea market style online auctions, was extended with online retailing capabilities. This

transformation, firstly, aimed to maintain Allegro's competitive advantage over eBay and, secondly, to capitalise on the growing wealth of Poles that coincided with the launch of Allegro's online retailing. For quite some time now, Allegro has complemented, and for many sellers, even replaced the need for them to have their own e-commerce platforms. It is worth mentioning that retail giants like Auchan also use Allegro's platform.

In 2015, Allegro launched its own store (Oficjalny Sklep Allegro - Official Store Allegro - OSA), initially offering a limited range of toys which was gradually expanded.

Complaints of merchants

Soon after OSA was launched merchants noticed and made public claims that Allegro's algorithms, which help customers to search the Allegro database, favoured the offers of OSA³⁸. Consumers looking for specific products were automatically directed to the products offered by OSA if these were available. Additionally, Allegro provided OSA with promotional functions (additional advertising) that were not available to other merchants. According to the merchants, all this translated into a distortion of consumer choices, which favoured OSA over independent sellers.

All of that, in conjunction with the above-mentioned dominant position of Allegro on the market of provision of online platform intermediation services for business, meant that Allegro was abusing its dominant position.

It should be noted here that there are over 100,000 sellers active on the platform. Some of them are professional merchants, others are occasional sellers who, from the point of view of relations with Allegro, look more like consumers (service recipients) than professionals.

For many merchants, Allegro is their only channel for selling goods. It is for this reason that a significant number of complaints were lodged with the Polish NCA whenever a change was perceived as being unfavourable for these sellers.

The investigation

Historically, the antimonopoly proceedings against Allegro began with an investigation proceeding that was launched in June 2017. In July 2017, the Polish Office of Competition and Consumer Protection (hereinafter UOKiK) carried out dawn raids on the premises of Allegro in connection with the investigation proceedings.

– We want to make a preliminary determination as to whether the activities of Grupa Allegro may have amounted to competition-restricting practices. What we are trying to verify is whether the company is according favourable treatment to its own

37 Member of the District Bar Association in Warsaw. She specializes in dispute resolution and in providing comprehensive legal advice to business entities, including drafting and reviewing of commercial contracts. She has years' experience in representing clients before the courts of general jurisdiction.

38 <https://www.allegro.eu/who-we-are/at-a-glance>

39 The self-preferencing behaviour objected to here is similar to that in the 2017 Google Shopping Case

online store, including, in particular, by prioritising the products offered in search results — says Marek Niechciał, President of the UOKiK⁴⁰.

In December 2019, UOKiK stated that they had launched a full-fledged investigation, i.e. the investigation proceeding opened in 2017 was replaced by a formal antimonopoly proceeding against Allegro.

In this proceeding, UOKiK alleges that Allegro, by operating a vertically integrated business model combining online sales intermediation services on an e-commerce platform with running its own sales activities on the same platform, privileged its own store.

Allegro allegedly privileged its store in various ways, such as by distorting search results so that its own store appeared in the first position, to depriving independent merchants of the promotional functions that were available to OSA. It appears that the majority of the merchants' complaints were confirmed by the materials collected during the initial investigation.

Firstly, the company might have used information on the platform's operation, including the relevance algorithm, that is unavailable to other sellers in order to better position and display its own offers in the search results according to the relevance criterion.

Secondly, some sales or promotional features were only available to the Allegro Official Shop, while other sellers were unable to use them. Suggesting the right search phrase could serve as an example here: when consumers were searching for a particular product via search engines, they received an automatic message suggesting they go to the Official Allegro Shop. Thirdly, only the owner of the platform was able to use special promotional banners, which increased the traffic of its own offers on the platform.

In its announcement confirming the initiation of proceedings against Allegro, the UOKiK stated that 79 percent of consumers shop online using the Allegro platform. This, combined with the results of its preliminary investigation based on the complaints of merchants, gave UOKiK grounds for accusing Allegro of abusing its dominant position⁴¹.

Actions taken by Allegro could have adversely affected the competitive situation of independent on-line shops whose products may have been less visible on the platform compared to Allegro's offers. Consequently, products offered for sale by independent sellers may have been less frequently chosen by consumers, says Marek Niechciał, President of UOKiK⁴².

What is next?

Neither UOKiK nor Allegro has provided the public with any further information about the status of the ongoing proceedings. It is clear from the initiation of antitrust proceedings that the company is alleged to have infringed competition law; furthermore, the announcements that have been made in relation to the case have revealed the scope of the alleged infringement.

However, we do not know if the company has already received a Statement of Objections.

Given the significance of the allegations and the size of Allegro, it can be presumed that a vast amount of documents and data are being analysed and that the company is putting forward a comprehensive defence with the help of lawyers and economists.

It is unlikely that Allegro will be qualified as a “gatekeeper”, given that the definition in the EU Digital Markets Act has not been formalized yet.

The decision of UOKiK in this case is eagerly awaited by merchants. It is worth noting that the community of merchants reacted very clearly and loudly in various forums to changes in the regulations or changes in the way the platform behaves, as well as to the initiation of proceedings by UOKiK.

I am optimistic that a decision in this case will be delivered in 2021, mainly due to the fact that the proceedings have been going on for a year already and UOKiK is concerned about the length of the proceedings.

Regardless of the above, it should be noted that in parallel to the proceedings referred to above, UOKiK is currently in the process of continuing the investigation proceedings it initiated in 2020 regarding Allegro's relations with consumers and merchants. The latter concerns, among others, the issue of commission returns.

This may mean that the company is facing further antitrust proceedings.

Allegro is also in the firing line of the European Commission, which is planning to present new legislation targeting large digital platforms shortly.

EU antitrust chief Margrethe Vestager has often spoken of her concerns over such “dual-role” companies, which both own a platform and also compete for business through that same channel.

40 https://www.uokik.gov.pl/news.php?news_id=13332

41 https://www.uokik.gov.pl/aktualnosci.php?news_id=16013

42 https://www.uokik.gov.pl/news.php?news_id=16014

The Brazilian Google Case



Mauricio Bandeira Maia⁴³

*Commissioner at Administrative Council
for Economic Defense (CADE)*

At the end of 2013, the Brazilian competition authority, CADE, filed an administrative proceeding against Google Inc. and Google Brasil Internet Ltda. to investigate the alleged practice of privileging Google Shopping in Google Search's organic results, which would cause competing price comparison sites to lose audience, traffic, and revenue, meaning higher prices for consumers and losses for rivals. This was the main allegation put forward by price comparison sites.

Moreover, CADE's General Superintendence raised concerns about the structure of image display in Google's advertising spaces and a possible bias against competitors in the sale of space for image ads (called PLAs, or Product Listing Ads).

The case involved interested third parties who claimed to be affected by Google's actions and these parties were given the opportunity to produce evidence of the abusive conduct. Google, in turn, had the opportunity to defend itself in the case with all the means and evidence allowed under Brazilian law.

To assess Google's possible abusive practice, the General Superintendence began presenting an overview of the internet search market and the evolution of the Google platform, showing its various designs from its creation to the present day. It also explained the development of Google Search from the perspective of relevant results, starting from the so-called "ten blue links" – a search algorithm based mainly on the number of historical clicks. Due to the dynamic nature of the market, the algorithm has since enhanced to adapt to user needs, especially after September 11, when the most accessed results could not provide users with relevant information on what had just occurred.

Actually, this fateful event showed the inability of general or horizontal search engines to provide the results expected by users at the occasion, which initiated a process of improvement that led to vertical or thematic search engines and culminated in the introduction of image ads at the top of Google's search page, the so-called PLAs.

We examined the alleged anti-competitive practice according to the rule of reason, i.e. measuring the positive and negative effects on the market; in case it brought about mostly negative effects, the practice constituted a violation called unilateral conduct, punishable by law.

To better understand the market in question, CADE examined the functioning of Google's generic and thematic searches; price comparison websites and marketplaces, their interaction and contact points; and the seeming trend of convergence between the agents of each of these sectors.

Faced with this dynamic and relatively recent market, CADE felt the need to relax the definition of relevant market from a product and geographic perspective, considering that the OECD itself has stated that it is possible to frame market definition as a multi-sided market or to adopt a looser definition without distorting the competitive analysis.⁴⁴

We found out we were dealing with distinct goods; facing a multi-sided platform; and that the information technology sector is broad and has several connections and that, therefore, the services Google provides may at some level substitute those of (i) price comparison sites and (ii) retailers and marketplaces.

Adopting a pragmatic and conservative approach, we selected two relevant markets from the point of view of the product, while also considering the external competitive pressure exerted by retailers and marketplaces. The relevant markets selected were those of (i) generic search tools and (ii) price comparison websites (thematic search – price comparison), which were assessed from the perspective of users and advertisers alike. As for the geographic market, we considered this to be the territory of Brazil.

Then, we addressed market power, identifying whether the company would be able to abuse its power. The traditional definition of market power is that of a company that maintains its prices above the competitive level, increasing profits without losing customers. Alternatively, the abuse may take the form of an firm that hinders the ability of competitors to innovate or increase the quality of their goods/services – a definition that better suited the case at issue.

In addition, one of our findings was that network effects can significantly contribute to the strengthening of market power in multi-sided markets. Likewise, disregarding the multiple connections between different groups of consumers, as well as between the products and services offered, may sometimes induce a distorted measurement of a company's market power. Thus, in assessing the competitive restrictions, we took into account the multiple connections between all sides of the platform and their effects.

By investigating several important market players and Google's own market share, we concluded that the company has an extremely efficient and popular general search platform and that it was impossible to ignore its market power.

The next step was to examine the practices carried out by the company, their potential and concrete effects on the market, and possible efficiencies. Since Google's practices changed as search

⁴³ Rapporteur Commissioner for CADE's case against Google.

⁴⁴ OECD (2018) Rethinking Antitrust Tools for Multi-Sided Platforms, 13. <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>

engines and their algorithms evolved, given the dynamism of the sector, some of these practices lasted only for short periods.

The assessment covered the entire period that the concerned practices lasted, encompassing the duration of both Product Universal and Product Listing Ads, and was structured around three thematic axes: (i) exclusionary conduct; (ii) predatory innovation; and (iii) prominent placement, as well as its respective developments.

Therefore, Google's practices were analysed from several anti-competitive perspectives: restricted access to the essential structure of the platform, refusal to sell, biased treatment of competitors, tying or abusive conditions of sale, predatory innovation, preferential placement of its own products, lack of transparency or misleading advertising, and lack of neutrality in its search algorithm.

The conduct of blocking access to an essential structure was examined from the perspective of the essential facility doctrine, using Google's PLA or even user data retention as examples. In light of these, we found the criteria for an essential structure could not be satisfied, mainly because there are effective substitutes for PLAs and Google's search results page.

Moreover, price comparison sites had access to the search results page and PLAs as long as they met what we considered to be reasonable compatibility features.

In addition, we determined that users' personal data are non-rival, non-exclusionary, ubiquitous assets, and the main difference for competitors is the way in which the data are processed; consequently, it was determined that Google's structure cannot be regarded as essential.

From the vast documentation and information we gathered, we also reached the conclusion that the company had not refused to sell to competitors, given that price comparison websites have always been able to buy and bid for PLAs, provided a product included crucial functions such as a purchase button on its ad landing page. It is not reasonable to demand that a market player change its platform to facilitate price comparison sites' access to their tools, especially as these sites compete with Google and the required change would bring a setback in terms of usefulness to users and retailers/marketplaces.

We also discarded the allegation of tying sale, since the data feed required by the PLAs is essential for its proper functioning. The requirement is part of the market and cannot constitute an abuse of market power.

Lack of transparency regarding the placement of ads was also not proved, given that the company has informed its users of paid/sponsored content from the moment it started to be included in search results with images.

In this very conservative and cautious analysis of the theory of harm, we then looked into Google's behaviour to determine whether it could be giving biased treatment to competitors in the downstream price comparison market. We found it gave prominent placement to its own products, a fact that could theoretically generate negative effects on competition.

Furthermore, we understood that "predatory innovation" and "lack of neutrality of its algorithm" could be confused

with the very effects of these practices. Therefore, we decided to analyse their effects and efficiencies.

As for the effects, the following were examined: lessened visibility for competing sites, reduced organic traffic, increased CPC (cost per click), and limitation on the number of products advertised by retailers/marketplaces.

CADE's Department of Economic Studies carried out an extensive empirical analysis that, despite receiving Google's data of a conduct that lasted several years, did not prove such effects. Price comparison websites did not experience a drop in the traffic coming from Google's organic results page. On the other hand, traffic to marketplaces increased, corroborating the idea of evolution of the market: from price comparison sites to a model where retailers sell the same product coming from several vendors, which enables customers to not only make a direct purchase but also allows them to compare the prices of different suppliers.

Likewise, the increase in CPC after the PLAs were launched was not confirmed. This conclusion, combined with the finding that organic traffic remained the same for price comparison websites, proves that sponsored Google Search results (AdWords) did not lead to a loss of revenue or higher advertising expenses. Thus, it was possible to dismiss the concerns that Google's conduct caused losses in R&D as it was not possible to establish a causal link between the two.

In terms of efficiencies, CADE arrived at the conclusion that PLAs brought efficiencies to both sides of the platform: users are making more purchases and advertisers have increased their conversion rate, with proven benefits for at least these two market participants.

PLAs benefit users by (i) providing detailed and easy-to-understand information about products they may be interested in purchasing based on the search conducted and by (ii) connecting them directly to sellers of that product. For advertisers, PLAs offer a channel to publicise their products, with a high return on investment.

In short, CADE did not find that price comparison websites experienced a sharp drop in visibility or that any such drop could be disconnected from the evolution of the market.

And here it is essential to make a statement: our conclusion is different from that reached in other European countries – like France and Spain. Since Google implemented the Panda algorithm, price comparison sites in these countries have lost visibility, which did not happen in Brazil.

As far as remedies are concerned, although it was not necessary to design remedies in the case in question because Google was not found guilty of abusing its market power, the Rapporteur Commissioner considered that any change in Google's web page would be an intervention in an economic operator's final product. This very unusual remedy could even block the continuous development of that market, which is why following this position was not advisable.

In a nutshell, we have presented an overview of the case and the rationale followed by the majority of CADE's Tribunal, deciding Google's practises were not harmful for price comparison websites and did not constitute anti-competitive behaviour.

A win for Innovation in Canada: Abuse of dominance by the Toronto Real Estate Board



Vik Munyal

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Canada's Competition Bureau (the "Bureau"), headed by the Commissioner of Competition (the "Commissioner"), is an independent law enforcement agency responsible for the administration and enforcement of the Competition Act (the "Act") and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

In Canada, three elements must be established to constitute a violation of section 79 of the Act, which is the abuse of dominance provision:

- one or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof;
- that person or those persons must have engaged in (within the previous three years) or be engaging in a practice of anti-competitive acts; and
- the practice must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market.

The first element, dominance, focuses on whether a person (or persons) possesses a substantial degree of market power in a relevant product and geographic market. The second element considers whether the dominant person (or persons) has engaged in conduct intended to have a negative predatory, exclusionary or disciplinary effect on a competitor. This analysis considers both subjective evidence of intent and the reasonably foreseeable consequences of a practice, as well as any business justifications. The final element involves an analysis of whether competition - on price, quality, innovation, or any other dimension of competition - would be substantially greater in a relevant market in the absence of the anti-competitive conduct.

Real estate boards in Canada are local trade associations that represent brokers and salespeople. In April 2011, the Bureau brought a case against the Toronto Real Estate Board ("TREB"), which is Canada's largest real estate board, with over 50,000 licensed real estate brokers and agents serving a population of nearly 6.5 million Canadians across the Greater Toronto Area

("GTA"). TREB operates a Multiple Listing Service (MLS), which is a cooperative system where member agents list and find properties for sale on behalf of their clients, and also contains an extensive database of property listing and sales information. The information in this database is substantially more extensive and timely than what is available from other sources, such as the provincial land registry, and as a result is a critical source for real estate market information.

The Commissioner applied to Canada's Competition Tribunal (the "Tribunal") alleging that, owing to its control over the MLS and related Virtual Office Website ("VOW") Policy, TREB had abused its dominant position. At its core, the harm in this case related to the control and access of vital data within the Toronto MLS database controlled by TREB. TREB restricted access and use of certain data such as previous listing and sale prices and historical prices for comparable properties in the area.

Because of TREB's restrictive practices, agents did not have the flexibility to use this important data to develop analysis and innovative tools and share this data with customers digitally, such as through password protected Web sites (or VOWs). VOWs permit a customer to search listing information online, before making the decision to tour a home or attend an open house. This enables customers to be more selective and focused, and agents to spend less time trying to find an appropriate property for a specific customer.

While agents could provide detailed MLS listing information not available from public sources to customers by hand, mail, fax, or email, TREB's anti-competitive practices effectively prevented agents from providing the same MLS listing information to customers via a password-protected Web site, reducing the ability of members to compete through providing online services to their customers and clients through VOWs.

Consequently, the Commissioner argued that TREB's restrictions have had the effect of restricting the ability of certain members to use technology and online platforms to deliver more and higher quality services at lower cost to home buyers and sellers in the GTA.

Substantial or complete control

Regarding TREB's control or power over the market, the Tribunal agreed with the Commissioner that the relevant product market was the supply of MLS-based residential real estate brokerage services in the GTA. The Tribunal also agreed with the Commissioner on the assessment of TREB's control of the market (i.e., TREB's market power). The Tribunal held that the power to exclude falls squarely within the definition of market power to the extent that it "...comprises an ability to restrict

the output of other actual or potential market participants, and thereby to profitably influence price...⁴⁵

By controlling access to the MLS system, the Tribunal found that TREB was able to set and enforce rules, thereby insulating "...its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the status quo."⁴⁶ The Tribunal also accepted the Commissioner's argument that brokers and agents cannot compete effectively in the market without access to the MLS® system. In reaching this conclusion, the Tribunal dismissed TREB's argument that the many brokers competing in the relevant market suggested that barriers to entry are low. Instead, the Tribunal emphasized that, even in a market with many competitors, a dominant entity can engage in conduct that results in a less competitive market than may otherwise exist.

Practice of anti-competitive acts

Issues of data privacy were at the forefront of this case. The Tribunal categorically rejected TREB's argument that its restrictions were primarily motivated by concerns regarding consumer privacy, particularly regarding sold information of properties. Instead, the Tribunal held that TREB's concerns about privacy "were an afterthought and continue to be a pretext for TREB's adoption and maintenance of the VOW restrictions."⁴⁷ The Tribunal held that TREB had resisted the emergence of VOW brokerages - not because of privacy concerns - but because of concerns that VOWs could lead to increased price and non-price competition and reduce the role of TREB's members in the real estate transaction.

In reaching this determination, the Tribunal considered the circumstances that led to the adoption of TREB's VOW Policy. It noted the strong and consistent concerns expressed by TREB members and other brokers regarding competition from VOWs and the absence of concerns regarding consumer privacy. The Tribunal could not reconcile TREB's alleged privacy concerns with the fact that all of its members have access to this information and provide it to consumers by fax or by email. On this point, the Tribunal agreed with the Commissioner that, if TREB were truly concerned about privacy, it would, at a minimum, ensure that information such as sold information is not distributed beyond its members, which it found is not the case.

Substantial prevention of competition

With respect to whether competition had been lessened or prevented substantially, the Tribunal noted five anti-competitive effects of TREB's VOW restrictions in their decision:

- Increased barriers to entry and expansion: There has been a significant adverse impact on entry into, and expansion within, the relevant market by web-based and other brokerages in the GTA.

- Increased costs imposed on VOWs: TREB's VOW restrictions undermine the ability of brokerages operating full information VOWs to compete by discriminating against them, raising their costs, and reducing their chances of success.
- Reduced range of brokerage services: But for TREB's VOW restrictions, there would have been, and likely would be, a greater range of innovative and value-added tools, features, and other services.
- Reduced quality of brokerage service offerings: The quality of certain important service offerings in the market would likely be significantly greater but for TREB's VOW restrictions. For instance, market analysis could be based on more comprehensive information, adding value to both the home sellers and the homebuyers.
- Reduced Innovation: But for TREB's VOW restrictions, there would have been, and likely would be, considerably more innovation in the relevant market, and brokerages operating full-information VOWs likely would have an important impact on how dynamic competition unfolds.

The Tribunal held that - in the aggregate - these five effects demonstrated that TREB's restrictions had substantially prevented competition in the GTA residential real estate market. The Tribunal noted that dynamic competition, including innovation, is the most important type of competition and consumers are deprived of the benefits of enhanced services when members are shielded from disruptive competition. The Tribunal concluded that "by preventing competition from determining how innovation should be introduced to the supply of residential real estate brokerage services in the GTA, TREB has substantially distorted the competitive market process and prevented innovative brokers [...] from considerably increasing the range of brokerage services, increasing the quality of existing services, and considerably increasing the degree of innovation in the Relevant Market."⁴⁸ In reaching the above conclusion, the Tribunal also recognized the value of qualitative evidence in assessing anti-competitive harm.

Remedy

The Tribunal's June 2016 order⁴⁹ requires TREB to remove restrictions on its members' access and use of real estate data - including restrictions on the display of historical listings and sale prices online through VOWs. As such, TREB was required to include the disputed data in a data feed for VOWs, and to remove restrictions on both the use of data for display on VOWs and for the use of data in analytics.

Conclusion

Following the Tribunal's 2016 ruling and order, TREB filed a motion to appeal the decision with the Federal Court of Appeal

45 The Commissioner of Competition v The Toronto Real Estate Board, 2016 Competition Tribunal at para 176 <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462979/index.do>

46 TREB 2016 CT at para 198

47 TREB 2016 CT at para 390

48 TREB 2016 CT at para 713

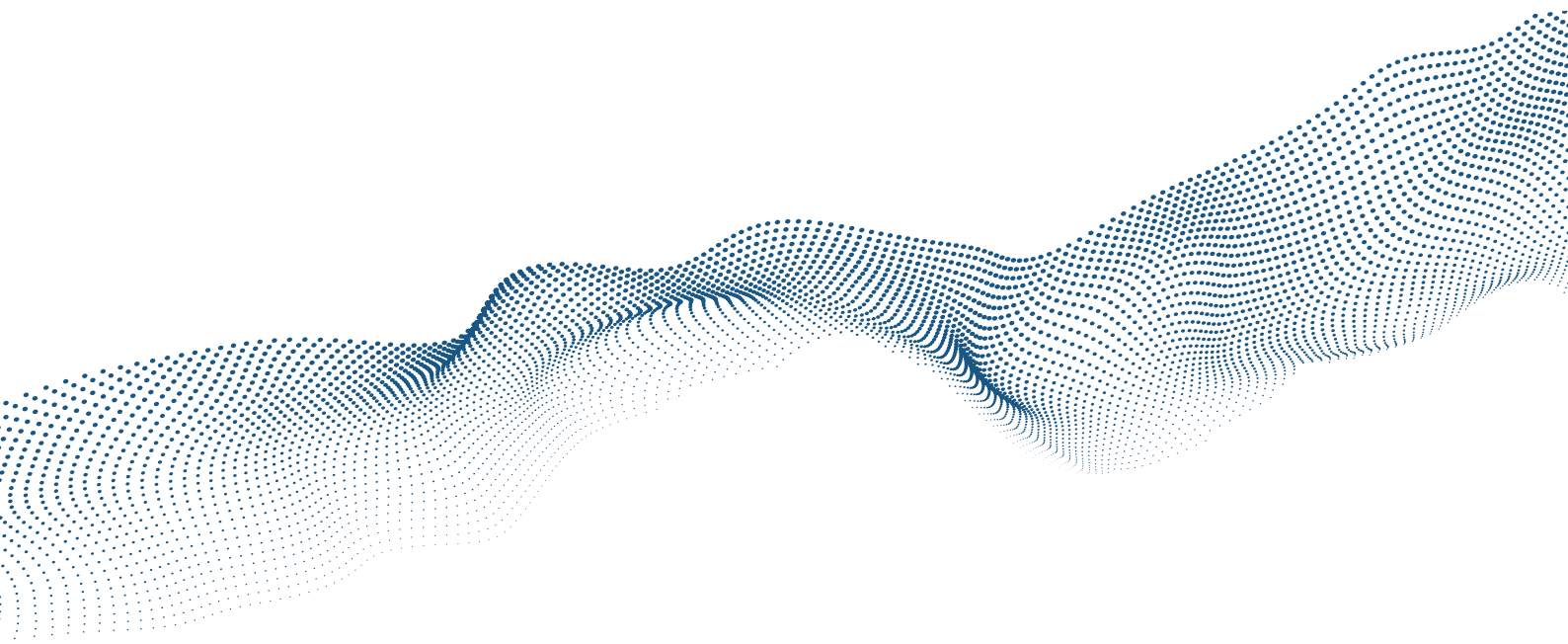
49 <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/462955/index.do>

(FCA), which was dismissed. TREB then filed an application for leave to appeal to the Supreme Court of Canada (SCC). On August 23, 2018, the SCC ultimately ruled in favour of the Bureau and dismissed TREB's application to appeal, meaning the Tribunal order took effect.

The final decision – a win for competition, innovation and consumers in Canada's largest real estate market – concluded seven years of litigation against TREB. It paved the way for

greater competition by enabling greater access to new and innovative real estate services, more in-depth listing information and innovative online analytical tools.

The Tribunal's determination on anti-competitive effects and the importance of qualitative evidence in assessing innovation as a component of effects has also had significant implications for the Bureau's enforcement action in other parts of the digital economy.



Digital Markets and Competition Concerns: An Indian Perspective



Fair Competition
for Greater Good

Competition Commission of
India

In recent years, digital markets have been the major focus area of many competition agencies across the globe. The dynamic growth of digital markets and the increasing shifting of physical markets towards digital markets has necessitated the need to have a closer look at digital markets. On the one hand, digital markets are bringing in innovation but on the other, they are leading to various competition issues. The digital economy typically involves the provision of services or goods through electronic commerce as a medium and in the process entails the collection of a huge amount of data. In this context, the Competition Commission of India (CCI/Commission) has dealt with a number of cases involving issues that serve to highlight the need, relevance and evolution of competition law in digital markets.

The first issue relates to the delineation of relevant markets in the digital economy. With the advent of multi-sided platforms, it is difficult to determine whether one, two, or multiple relevant markets need to be defined. In multi-sided platforms, the interface amongst different sides of the platform raise a number of issues for competition regulation. One issue relates to the situation where one side of the market ends up receiving the services “free of cost” in a multisided market, thereby making the delineation of the relevant market more difficult. This issue came up in a case against Google, namely *Matrimony.com Ltd. v. Google and Consumer Unity & Trust Society v. Google*⁵⁰, where the CCI examined Google’s alleged anti-competitive practices in general search and search advertising markets. Google argued that as the search service is available for free, the company did not have any trading relationship with users, which was a pre-condition for defining a relevant market and a finding of dominance in that market. The CCI rejected this argument by highlighting the two-sided nature of the market and the role that end-users play in the market by providing their “eyeballs”, which are, in turn, monetised through advertising revenues.

Relevant market determination is based on market realities, keeping in mind the factual matrix of each case within the overall framework of law. When the CCI dealt with its first

case relating to an e-marketplace in 2014 involving ‘Snapdeal’, an Indian e-commerce company [*Ashish Ahuja v. Snapdeal.com and SanDisk Corporation*⁵¹], the concerned online and the offline markets were considered to be different channels of distribution for the same product and were not considered as two different relevant markets. Therefore, if the price in the online market increases significantly, then the consumer is likely to shift towards the offline market, and vice versa. Later, the Commission dealt with another case [*Mohit Manglani vs. Flipkart &*⁵²] concerning various e-commerce companies. In this case, it was alleged that the conclusion of ‘exclusive agreements’ between e-commerce websites and sellers relating to the sale of selected products exclusively on the selected portals to the exclusion of other e-portals or physical channels or through any other physical channel resulted in anti-competitive effects. However, in this case the CCI found that online platforms and brick and mortar companies are distinct channels in the same relevant market. It also observed that “[i]respective of whether we consider the e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the entities seemed to be individually dominant”. Thus, consideration was given to the idea of online channels being qualified as a relevant market in itself. With the evolution of e-marketplaces as a prominent mode of business transactions and shopping, the Commission responded in a dynamic and nimble way in its subsequent interventions and calibrated market delineations accordingly and, where found appropriate, considered e-marketplaces to be falling in a separate market, distinct from the offline marketplaces.

In another instance, when the CCI reviewed a merger between two Online Travel Agencies (OTAs) in 2017,⁵³ the Commission considered online and offline channels as forming part of the same relevant market. However, two years later in an antitrust case related to the same OTAs⁵⁴ it was observed that the intervening period had seen the online travel portals gaining a distinct and significantly more prominent position in the hotel reservation space in India. Accordingly, the Commission found it imperative to consider the online segment as a separate relevant market. Following the above evolving approach towards the delineation of the relevant market, the definition adopted approximately two years back may not necessarily work today. Thus, it has been the Commission’s constant endeavour to keep pace with market realities and to adapt its approach to best suit such realities.

The other visible characteristic of digital markets is data. The services which are offered to consumers include electronic communication services, with digital content essentially arising from data. In the Google case [*Matrimony.com Ltd and another*

50 Cases No. 07 and 30 of 2012.

51 Case No. 17 of 2014.

52 Case No. 80 of 2014.

53 Combination Registration No. C – 2016/10/451.

54 Case No. 14 of 2019- Federation of Hotel & Restaurant Associations of India (FHRAI) vs. MakeMyTrip India Pvt. Ltd. (MMT) & Ors.

v. Google LLC and others]⁵⁵ the CCI acknowledged the role of big data in the digital economy and observed that the rise of new business models based on the collection and processing of big data is currently shaping the world. In its decision, the CCI noted that product design is an important and integral dimension of competition and any undue intervention in designs may affect legitimate product improvements. The CCI also highlighted the importance of targeted and proportionate public intervention in digital space due to fast changing innovation cycles disrupting and reshuffling long-established positions. Furthermore, the CCI highlighted the special responsibilities that dominant undertakings have when it noted that Google, being the gateway to the internet for a vast majority of internet users due to its dominance in the online web search market, is under an obligation to discharge its special responsibility. Also emphasising the power of Big Data, the CCI noted in its decision that the emergence of new business models based on the collection and processing of Big Data is currently shaping the world. With the development of data mining and machine learning, businesses are able to offer innovative, high-quality and customised products and services at low or even zero prices, with great gains for consumers. At the same time, it cannot be denied that the benefits of providing Big Data do not come without a cost. Consumers may be increasingly losing control over their data and are exposed to intrusive advertising and behavioural discrimination. Also, other market participants may find the possession of big data by a dominant incumbent to be creating insurmountable entry barriers. The CCI also noted the vital role that innovation plays in channelling and growing the marketing and business solutions of an enterprise, which made this decision particularly important from the perspective of competition law jurisprudence.

In 2019, realising the role that gatekeepers play in digital platforms, the CCI opened another investigation against Google in the case [In Re: Mr. Umar Javed and ors. vs. Google LLC]⁵⁶ for allegedly misusing its position pertaining to the Android operating system – an open source smart phone operating system. The Commission prima facie was of the opinion that the primary relevant market was the “market for licensable smart mobile device operating systems in India”, with Google appearing to be dominant with a market share of about 80% in the aforesaid relevant market. The Commission also delineated a few associated relevant markets. In relation to the alleged abuse, the Commission noted that by making the pre-installation of Google’s proprietary apps conditional upon the signing of the Android Compatibility Commitment for all android devices manufactured/ distributed/ marketed by device manufacturers, Google has reduced the ability and incentives of device manufacturers to develop and sell alternative versions of Android, thereby limiting technical and scientific development. The Commission also held that the mandatory pre-installation of the entire Google Mobile Services suite under the Mobile Application Distribution Agreement prima facie amounted to

the imposition of unfair conditions on device manufacturers and also amounted to the leveraging of Google’s dominance in Play Store in order to protect the relevant markets, such as the online general search market. The investigation is still ongoing.

The other concern in digital markets is that such markets exhibit network effects, which provide a first-mover advantage to the incumbents. The first player in a new market takes advantage of network effects and creates a positive spiral, making it difficult for others to enter into the market or to catch up with the mass users which the incumbent has. Network effects can also potentially be a source of market power because larger firms will have stronger network effects as they have more users.

Recently, the CCI has initiated the following investigations in cases pertaining to Digital Markets: (a) an investigation against Google for allegedly abusing its dominant position, inter alia, by the pre-installation of Google Play on android smartphones and by forcing app developers to mandatorily use Google Play Store’s payment system and Google Play In-App Billing system for charging their users for the purchase of apps on the Play Store and/or for In-App purchases⁵⁷; (b) an investigation against Make My Trip-Go-Ibibo (MMT-Go), a major OTA platform in India for listing of hotels and budget hotels, on grounds of exclusivity and “parity” issues⁵⁸; and (c) an investigation against Amazon and Flipkart, the two largest e-commerce firms in India, for allegedly engaging in anticompetitive practices in the smartphone category.⁵⁹

Concluding remarks

Digital markets are known for their innovative efficiency. They are dynamic in nature and this area is still facing challenges when it comes to the determination of anti-competitive behaviour. In digital markets, it may seem that competition authorities are trying to apply effective ways to determine abuse of dominance on a case by case basis. In its decisions, the CCI has recognised the pace at which innovation, technology and big data is transforming the economic landscape globally and locally. Appreciating the crucial role that digital markets play in driving India into the future, the CCI has iterated that, “intervention in such markets should be targeted and proportionate. Such a calibrated approach in technological markets ensures that intervention remains effective; it does not restrain innovation and helps the market to regulate itself.”⁶⁰

On 8 January 2020, the CCI released a Report on “Market Study on E-commerce in India”. The Study was commissioned with a view to better understand the functioning of e-commerce in India and its implications on markets and competition. Some of the antitrust issues identified in this study were platform neutrality, price parity clauses, exclusive agreements and deep discounts. The Report, taking into consideration the competition related issues arising in the e-commerce market in India, proposed the adoption of self-regulatory measures aimed at ensuring a free market and the avoidance of market

55 In Re: Matrimony.com Limited (“Matrimony.com”) and Google LLC & Ors., Case Nos. 07 of 2012.

56 In Re: Mr. Umar Javed and ors. v. Google LLC, Case No. 39 of 2018.

57 Investigation order may be found at <https://cci.gov.in/sites/default/files/07-of-2020.pdf>

58 Investigation order may be found at <https://cci.gov.in/sites/default/files/01-of-2020.pdf>

59 Investigation order may be found at <https://cci.gov.in/sites/default/files/40-of-2019.pdf>

60 In Re: Matrimony.com Ltd. and Google LLC, Case No. 07 and 30 of 2012.

distortion. These measures include, amongst others, increased transparency concerning the parameters used to rank search results through the provision of a general description of the terms and conditions of the main search ranking parameters drafted in plain and intelligible language and kept up to date, a clear and transparent policy about how discounts are applied, a clear and transparent policy about the collection, use and sharing of data, and the adoption of a transparent approach to users' reviews and rating mechanisms when notifying the business users concerned about any proposed changes to the applicable terms and conditions.

Another important development took place in 2018 when the Government of India constituted the Competition Law Review Committee ('CLRC') to ensure that the Competition Act "is in sync with the needs of strong economic fundamentals".⁶¹ Under the aegis of this Committee, a Working Group was set up with the specific mandate to evaluate the adequacy of the legal architecture in dealing with new age markets and big data. After almost a year of deliberations and discussions, the CLRC submitted its report in July 2019.⁶² In its report, the CLRC deliberated upon many issues, one of which related to ensuring that the Competition Act is able to respond to the current trends in digital and new age markets. It was acknowledged that the nuances in these markets would become clearer in future as jurisprudence is still evolving.

Some of the key observations in the report, inter alia, pertain to the robustness of the present competition law in capturing the evolving concepts and jurisprudence in digital markets. For example, it was observed that the Act already envisages a wider ambit of 'price' to include data as a non-monetary consideration for markets such as zero-price markets. It was simultaneously observed that the factors taken into account when assessing the dominance of a particular entity are wide enough to include the entity's degree of control over data and network effects, which have been observed to be the sources of durable and significant market power in digital markets. Thus, although the CLRC deliberated at length on these issues, the Act was found to be sufficient to deal with the issues arising from new age markets. However, it may be highlighted that the CLRC report recommended the adoption of a transaction value test for reviewing mergers in the new age markets as such mergers generally escape scrutiny due to the low value of assets or turnover.

In conclusion, in the fast-evolving digital markets, the CCI has responded dynamically and has refrained from acting in a pedantic manner when elaborating remedies and targeting interventions. Such proportionate actions have been designed in a way that maintains the incentive to innovate, while at the same time as allowing for market corrections.

61 http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf

62 Ibid.

Google Shopping Decision: Paving the Way for Efficient Digital Markets in Turkey



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In February 2020, the Turkish Competition Authority (“TCA”) announced its decision⁶³ in the Google Shopping Case⁶⁴. The decision had many important ramifications in terms of Google’s commercial existence in Turkish markets and for consumer well-being. In this article we will discuss details of the decision.

The investigation was conducted in order to determine whether Google had violated Article 6 of Act no 4054 on the Protection of Competition (“Competition Law”) by abusing its dominant position in the markets of general search services and online shopping comparison services by placing its rivals in the shopping comparison services into a competitive disadvantage and obstruct their activities. The decision implemented an administrative fine (98.354.027,39 TL (approx. 15 million €) on Google. Furthermore, it imposed a number of obligations on Google aimed at “cease the infringement and re-establish the competition in the market”.

The main purpose of the decision was to increase consumer welfare through better shopping comparison services. As the decision was tailored to lay the foundation for stronger competition in the shopping comparison services where each and every company can compete effectively, the TCA aimed to fuel innovation in the market in order to promote high quality services.

Relevant markets

Relevant markets are defined as “general search services market” and “online comparison shopping market” after detailed investigation of several products to determine the markets.

As a result of the analysis regarding the “general search services market”, that (i) general search services are not a substitute for content search services. While users use general search services to reach content websites, they use content websites to obtain information. Content search services only enable users to search through their limited content and do not allow users to search through all internet content. Further, it was found that (ii) general search services are not a substitute for customised search services. While customised search services allow having detailed information about and making comparisons

between equivalent or similar products, address a homogeneous consumer population and can be used for limited purposes, general search results display more comprehensive results and offer more information sources to a heterogeneous consumer population. Lastly, it was concluded that (iii) general search services are not a substitute for the services provided by social media websites, as social media websites only allow users to search through their own content and offer fewer alternatives.

As a result of the analysis made related to the other relevant market, “online comparison shopping”, it was concluded that (i) online comparison shopping services are not a substitute for comparison shopping services. Users utilise general search services to search over the internet for comprehensive information. On the other hand, users can reach the content belonging to a certain number of online retailers or marketplaces through comparison shopping sites (CSS). It was concluded that (ii) online comparison shopping services are not a substitute for other customised search services. Comparison shopping services cannot replace the services offered by customised search services specialised in different areas such as flights, hotels, restaurants and news. It was established that (iii) online comparison shopping services are a substitute for the Google Shopping service. Both Google Shopping and other CSSs offer online comparison shopping services to consumers. It was found that (iv) online comparison shopping services are not a substitute for online retailing because online retailers sell products on their own websites, whereas CSSs provide users with services to compare the offers and opportunities provided by online retailers for the same or similar products. Further, it was noted that (v) online comparison shopping services are not a substitute for marketplace platforms. Comparison shopping services offer intermediary services by allowing users to compare the offers provided by different online platforms so that they can find the best offers. However, marketplace platforms sell products/services on their websites. Finally, it was concluded that (vi) online comparison shopping services are not a substitute for online search advertising. Users either go directly to comparison shopping websites or reach such websites after making a search query on a search engine. They do not consider online search

63 Decision- 13.02.2020 ve 20-10/119-69 <https://www.rekabet.gov.tr/Karar?kararId=828974ff-6cd9-4318-a9fa-ee43a21f9c07>

64 Alphabet Inc., Google Reklamcılık ve Pazarlama Ltd. Şti., Google International LLC, Google LLC ve Google Ireland Limited.

advertising as a service and they do not make a search query in a search engine for advertising services.

Abuse of dominant position

The TCA conclude that Google was in a dominant position in (i) the general internet search market and in (ii) the comparison shopping market and that it had violated Article 6 of the Competition Law by placing competitors offering shopping comparison services in a disadvantaged position, complicating the activities of competing undertakings and distorting competition in the shopping comparison services market. We will discuss the prominent sections of the decision next.

Firstly, the market shares of Google and its competitors were analysed in the relevant markets, taking into account parameters such as the number of users, page views and traffic. The analyses revealed that Google enjoys considerably higher market shares compared to its competitors in both of the relevant markets. Secondly, the Board evaluated the existence of multi-sided markets, network effects, the vertically integrated structure of Google in various markets, its financial power, brand awareness and the advantages arising from ownership of user data and decided that these constitute serious obstacles to new entry and growth in the relevant markets. Further, considering the fact that significant buyer power is lacking in the markets concerned, the Board concluded that Google enjoys a dominant position in the relevant markets. The specific details of the decision are listed here:

- The traffic from Google is vital for the traffic of its rivals offering online comparison shopping services. Thus, the placement of its Shopping Unit at the top, covering a large area with images had significant negative effects on the traffic as this decreases the chance of other websites finding a place in the first page.
- CSSs can provide consumers with more options than Google Shopping when it comes to certain products. In addition, CSS' purchase conversion rate is higher than Google Shopping. In cases where Shopping did not provide more benefits to consumers when compared to its rivals, where and how Shopping was displayed on the general search results page could artificially affect consumer preference and decrease consumer welfare.
- The conditions for being included in the Shopping Unit in Turkey put rival CSSs in a disadvantageous situation because when they were included in the Shopping Unit they became websites that offered brokering services to third parties instead of websites that offered comparison shopping services.
- The Shopping Unit, which had formerly been displayed as "Google shopping results", was displayed as a "Google search result" and this resulted in this field being perceived as a general search result instead of a shopping result, and led to uncertainty as to the advertisement nature of the Shopping Unit field. Less emphasis on the advertisement nature of the Shopping Unit in comparison to text ads led consumers to see this field as an organic search result

rather than an advertisement field. Also, while the title in question could not be clicked on using mobile devices, this feature was available on desktops. This meant that there was no possibility that users using mobile devices could scroll down to competing websites. Thus, it was not an acceptable practice for the title to be clickable on desktops.

- In queries where the name of the CSS and the name of the product were included together, the Shopping Unit could be placed before the site that was searched for. In this way, users who tried to procure comparison shopping services from Google's rivals were directed towards the Shopping Unit, which was located in the most valuable place of the general search results page and which was visually arresting. Thus, websites that were trying to decrease their dependency on Google by creating customer loyalty were blocked. It is not reasonable to preferentially display the Shopping Unit in such searches.

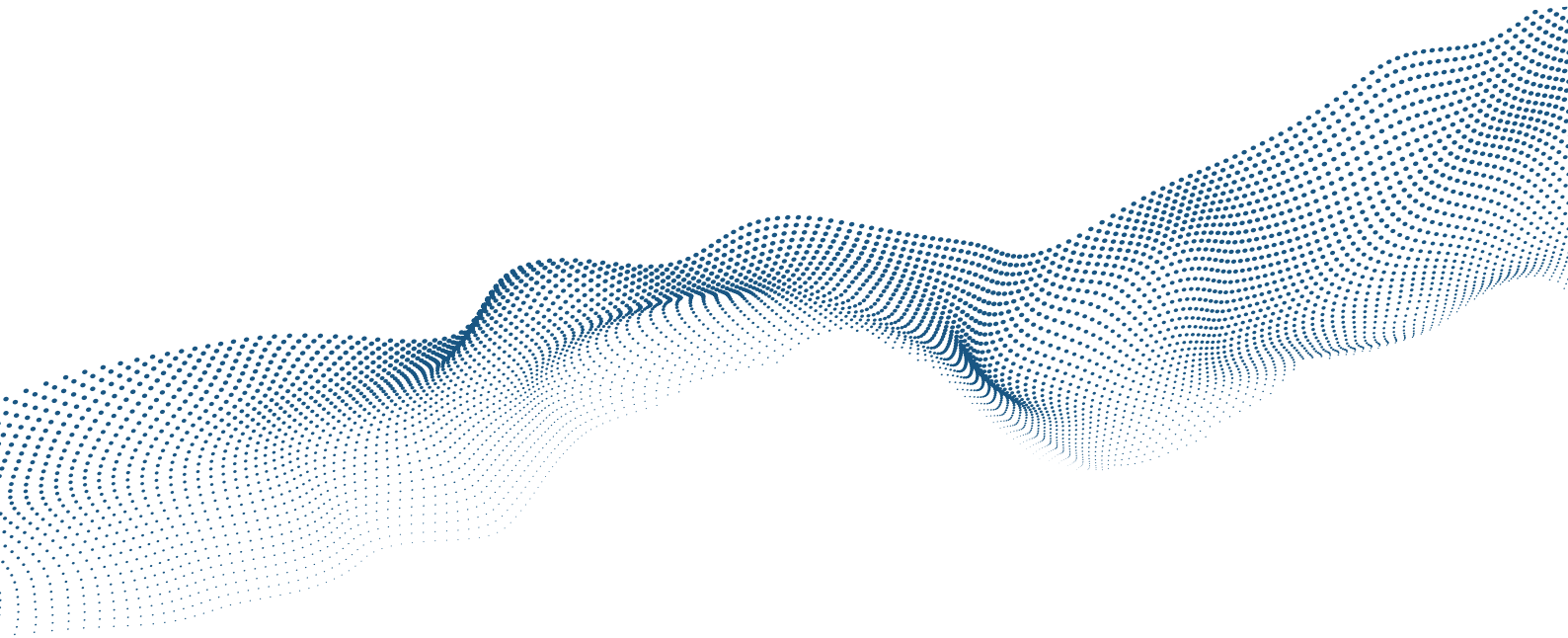
In the decision, the potential effects of the Google Shopping service were also evaluated and the following issues were noted:

- The Google Shopping Unit was displayed for an increasing number of results in Turkey, with the impression rate for the Shopping Unit rapidly climbing within e-commerce queries. There had been a constant increase in the traffic from the Shopping Unit within the total traffic of the undertakings included in the Shopping Unit.
- View rates in Google search results for rival CSSs and product selling e-commerce sites were lower in comparison to Google Shopping. The growth in the traffic volumes of rival CSSs were significantly slower than that of Google Shopping and competitors lost market share.
- Consumers prefer the Google Shopping Unit due to its location in the general search results page.

Considering the nature of the conduct giving rise to the abuse of dominance, the TCA imposed a number of obligations on Google in order to ensure stronger competition in the relevant markets. Firstly, Google must provide the conditions which would allow rival comparison shopping services to be at a no less advantageous position than its own services on the general search results page. Second, Google must remove the clickable title feature of the Shopping Unit from all other environments so that they are in line with the mobile environment. Thirdly, Google must reasonably eliminate the uncertainty concerning the advertisement content of the Shopping Unit field in its title and labelling. Lastly, if a query submitted to Google clearly includes the product name and the brand or website name of one of its competitors offering comparison shopping services, Google must cease granting preferential placement to the Shopping Unit. It should be noted that similar obligations were imposed by the European Commission in its own investigation into similar claims.

The decision was hailed as an important step towards a better and more efficient digital eco-system where consumers can benefit from more providers and service options and high quality and neutral search results.

News from the Region



Creation of an Independent Antimonopoly Body of the Republic of Kazakhstan



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On 1 September 2020, President Kassym-Jomart Tokayev in presenting his Message to the people of Kazakhstan entitled “**Kazakhstan in a new reality: time for action**”, included a requirement to create a strong and independent body for the protection and development of competition with direct subordination to the Head of State.

The main tasks of the new Agency for the Protection and Development of Competition are:

- analysis of the activities of public and private operators authorised to carry out certain economic functions and monopoly provision of services;
- the formation of a legislative mechanism for the state regulation of the activities of public and private operators authorised to carry out certain economic functions and monopoly provision of services that includes, among other things, comprehensive grounds for their establishment, procedures governing their activities and measures aimed at ensuring their accountability to society;
- measures to improve the regulation of the activities of commodity exchanges, including those aimed at ensuring equal access to trading for stock brokers and suppliers of goods, establishing maximum lots and ensuring transactions with shipment, payment for goods included in the mandatory list;
- increasing the volume of centralised trading in electrical energy.

In order to create a pro-competitive climate and facilitate the recognition of competition as a national idea, the Agency is to carry out large-scale work on the development of the **National Competition Development Project**. Within the framework of the National Project, a system of standards shall be introduced that sets out specific target indicators for each state body by industry and region and measures for achieving them, involving the government in active support of developing competition.

In addition, in order to ensure the transparency of the Agency’s activities, establish effective dialogue with the public and entrepreneurs and to involve them in discussions about the decisions taken by the antimonopoly authority, three public platforms in the **Open Space** format were set up that cover the key areas of the Agency’s activities:

- The **Public Council** provides support for the discussion of regulatory initiatives to help improve competition legislation;
- The **Committee on Exchanges** ensures interaction between market participants of exchange trading and relevant government bodies on the issues of improving the mechanisms for organising trading on the commodity market;
- The **Barriers Council** identifies restrictions preventing market entry by new entities and develops proposals for ensuring the principles of “fair trade” in the corresponding commodity markets, something that is important for ensuring the country’s economic growth.

As regards international cooperation

The Agency actively participates in the meetings, conferences and working groups of international organisations such as the OECD, UNCTAD, EEC, CIS, and ICAP.

The participation of Kazakhstan in the work of the above-mentioned international organisations allows for the regular exchange of views on the latest trends in the development of antimonopoly legislation, the development of common approaches to the enhancement of competition legislation and its practical implementation.

The Agency will pay special attention to the development of cooperation within the framework of the OECD.

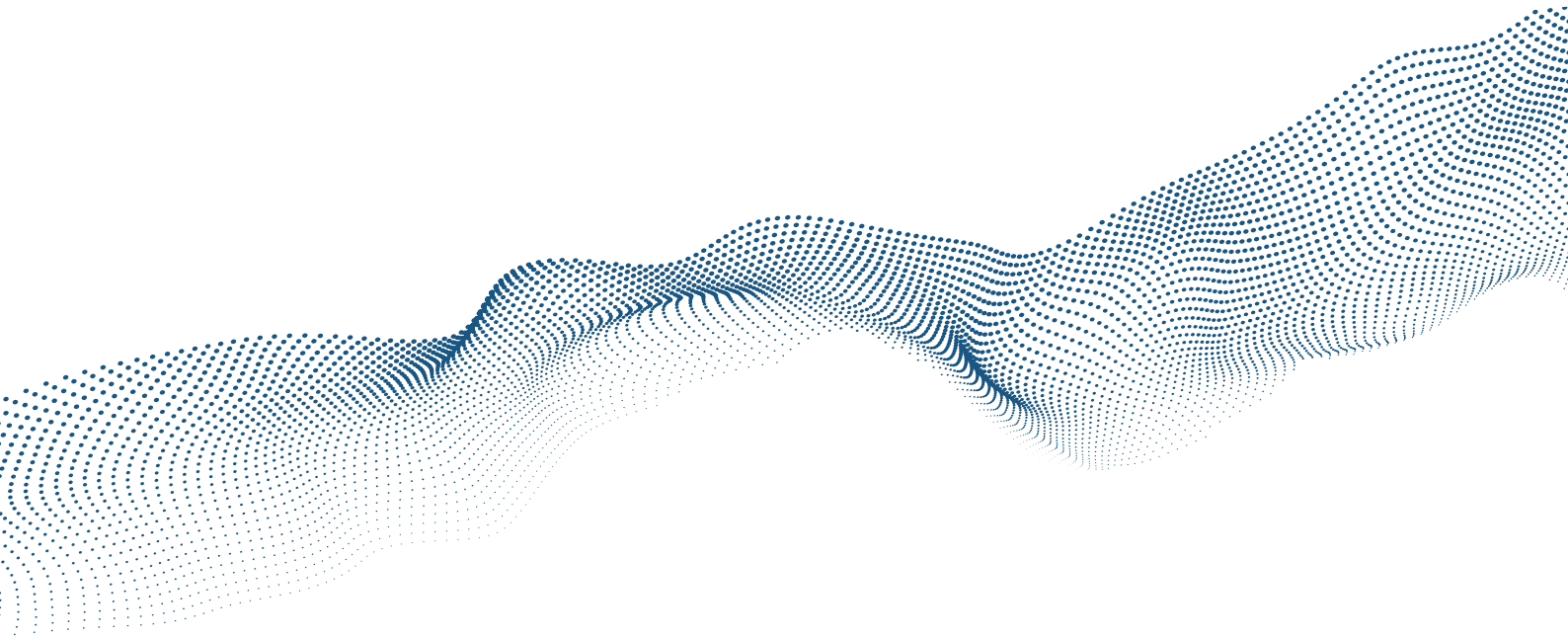
The participation of Kazakhstan in the events of the OECD Competition Committee and the OECD Global Competition Forum enables it to benefit from the latest experience in the area of competition and to adopt the best competitive practices, while also strengthening its integration with the most developed countries of the world.

In the framework of the Agency’s cooperation with the OECD Competition Committee, the first review of competition law and policy in the Republic of Kazakhstan was carried out, on the basis of which new norms were gradually introduced into the legislation of Kazakhstan in the field of the protection of competition, providing for a change in the general concept of work of the anti-monopoly body to correspond closer to the OECD standards. As a result, in 2016 the OECD Council decided to invite the Republic of Kazakhstan to join the OECD Competition Committee as a participant.

It should be noted that at present, in order to improve the status of Kazakhstan in the OECD Competition Committee, the possibility of carrying out a second Review of Competition Law and Policy of the Republic of Kazakhstan is being considered.

We hope that further implementation of the OECD recommendations and standards will make it possible for the Agency to join the OECD Competition Committee as an associate member.

In general, the Agency will continue to work towards the further development of cooperation within the framework of international and regional organisations. This work is aimed at strengthening international cooperation, as well as improving the reputation and public image of the antimonopoly body of the Republic of Kazakhstan.



Maxim Shaskolsky has been appointed Head of the Federal Antimonopoly Service



Federal Antimonopoly Service of the Russian Federation



In accordance with the order of the Chairman of the Government of the Russian Federation Mikhail Mishustin dated 11 November 2020 No. 2935-r, Maxim Shaskolsky was appointed Head of the Federal Antimonopoly Service.

Maxim Shaskolsky was born on 5 January 1975 in the city of St. Petersburg. In 1997, he graduated from the Faculty of Economics of St. Petersburg State University with a degree in Economics – Teacher of economic disciplines.

In 2019, Maxim Shaskolsky was appointed to the post of Vice Governor of the city of St. Petersburg, where he was responsible for energy and tariff regulation issues and for coordinating the work of the Committee on Tariffs of St. Petersburg and the Committee on Energy and Engineering Support.

Prior to his appointment as Vice Governor of St. Petersburg, he worked for various companies in the energy sector.

As Head of the FAS Russia, Maxim Shaskolsky will continue to pursue the main goals of state policy for the development of competition in order to ensure the growth of the country's economy and improve the living standards of citizens.

The recent amendments to the Georgian Law on Competition



Georgian National
Competition Agency

“With the support of EU funded projects, significant amendments to the Law of Georgia on Competition were drafted and entered into force on November 4, which are *fully in line with European best practice and reflect the basic principles of EU Competition Law*. Consequently, in 2020, one of the main challenges facing the Agency - to have effective and comprehensive legislation that is in line with DCFTA requirements – has been successfully implemented. According to the approved amendments define, amongst others, the structure and functioning of the authority, procedural issues, enforcement policy in competition regulated sectors, effective merger control mechanisms, the obligations of undertakings, deadlines for reviewing notified mergers notification and the process for undertaking on-site inspections.

The adopted legislative amendments were implemented based on a number of shortcomings that were identified in practice and on the recommendations put forward by European experts. Various target groups were involved in the drafting of the amendments. Working meetings were attended by local experts, representatives of competition consulting companies, academics, law firms, business and media, regulators and non-governmental organisations.

We would like to express our gratitude to all stakeholders, the team leader of the EU project – Aurelio La Torre, the involved Italian, French and Serbian experts, the Chairman of the Lithuanian Competition Council – Sharunas Keserauskas, the Head of the OECD Competition Committee – Frederic Jenny, and the Head of the Competition and Consumer Policies Branch – Teresa Moreira.

In Georgia, a completely different period begins with the enforcement of competition policy. Therefore, the sharing of international practice and knowledge and participation in joint activities are of crucial importance for our agency. I sincerely thank the OECD-GVH RCC for its cooperation and wish a successful 2021 to all of them who work in the field of competition” - Irakli Lekvinadze, Chairman of the Georgian National Competition Agency.



The amendments approved to the Georgian Law on Competition:

Procedural Norms

- **Existed** – In the event that it was established that undertakings had engaged in unfair competition, the law did not provide for the imposition of a sanction on the infringing undertakings. The agency was only able to investigate whether a violation had taken place and was not empowered to eliminate the breach or prevent its repetition.

Following the amendments - According to Article 11 of the Law on Competition, a sanction of up to 1% of the turnover of the infringing undertaking may be imposed for an infringement of competition law.

- **Existed** – Undertakings were not under any obligation to provide the Agency with requested information during its review of notified mergers.

Following the amendments – In the process of investigating the case, conducting monitoring and evaluating the merger notification, undertakings must provide the Agency with the requested information. In the event of a failure to comply with a request for information, a fine will be imposed – 1000 GEL in case of a natural person and 3000 GEL in case of a legal entity. For a repeated failure to comply with this obligation, a fine of 3000 GEL will be imposed on a natural person and a fine of 5000 GEL

will be imposed on a legal entity. The imposition of a fine does not release the economic agent from the obligation to provide information.

- **Existed** – The maximum term for investigating a case was 10 months, despite the fact that it can take longer to carry out an extensive assessment of a complex case.

Following the amendments – The maximum period for undertaking an extensive investigation in a case concerning an abuse of a dominant position or an anti-competitive agreement on a market has increased from 10 months to 18 months.

- **Existed** – Counter-productive requirement concerning on-site inspections. A judge was required to notify undertakings in advance about a planned inspection by the Agency.

Following the amendments - The court will no longer inform undertakings in advance about planned inspections. On-site inspections are one of the most important tools in cartel investigations, with most EU countries

adopting an approach that does not involve the provision of an advanced warning.

Setting out the Agency's competencies and relationship with other regulatory bodies

- **Existed** - The Agency did not possess competence to enforce compliance with competition law in regulated areas of the economy. Due to a lack of legislative norms, it was not possible to enforce competition law in certain regulated areas. While legislation regulating the financial and communications sector partially provides for the enforcement of competition law, the Law of Georgia on Electricity and Natural Gas does not contain any competition law provisions. Cross-border operations between regulated and unregulated entities also remained unregulated.

Following the amendments - A unified legal framework has been created for the separation of competencies between the Georgian National Competition Agency and regulatory bodies. Accordingly, the authorities act unitedly on basic issues of competition.

Regulators remain committed to enforcing competition in their own sectors and only investigate issues that concern regulated entities. In all other cases, the competent authority is the Competition Agency.

Effective mechanisms for merger control

- **Existed** - The Agency had a short deadline for evaluating merger notifications and there was no mechanism for responding to concentrations that had been implemented without the Agency's approval.
- **Following the amendments** - An EU proven, two-phase concentration control system has been established. In Phase I of the investigation the Agency has 25 calendar days to assess whether or not the concentration is compatible with a competitive environment and to issue a decision. If, after 25 calendar days, the Agency decides that the concentration requires a more in-depth investigation, it may initiate a Phase II investigation. In such a case, the Agency has 90 calendar days to make a final decision on the compatibility of the proposed concentration with a

competitive environment. An undertaking will receive a fine of up to 5% of its annual turnover if it implements a concentration (i) without seeking the Agency's approval in the case of a notifiable merger, (ii) before the Agency has issued its final decision in relation to the notified merger, or (iii) despite the fact that the Agency has refused to authorise the merger. For each merger notification reviewed by the Georgian Competition Agency, a fee of GEL 5,000 applies.

Office structure

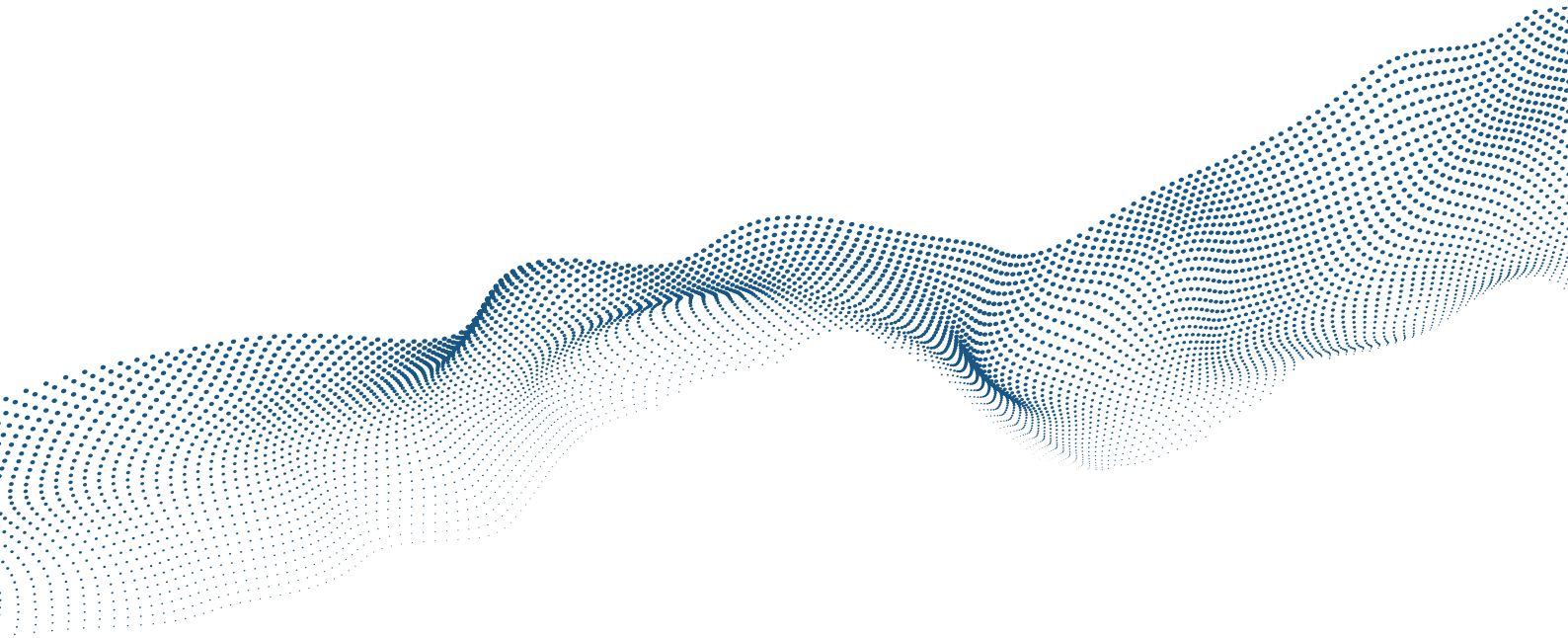
- **Existing** - The Chairman of the Agency was authorised as to act as the sole decision-maker within the Agency.
- **Following the amendments** - The Agency now employs a collegial style of management that is typical of most EU competition authorities. In accordance with this approach, the governing body of the Agency will be a five-member board. Candidates seeking to join the board, or as it is officially known – the Council, are nominated by the Prime Minister and elected by the Parliament of Georgia for a term of 5 years.

According to the approved amendments, the following issues were also specified:

- The Agency is authorised to issue binding recommendations to undertakings to prevent breaches of the law.
- The issuer of an insignificant amount of individual state aid is obliged to provide information to the Agency on an annual basis by 1 February of the following reporting year.
- Decisions issued by the Agency are controlled by the court. The court is empowered to fully review the agency's decisions, including the amounts of the fines it has imposed.
- The name of the agency has been changed and it is called - Georgian National Competition Agency.

The drafting of the amendments to the law "on Competition" began in 2017 with the support of the EU and lasted for three years. The Competition Agency was the author of the draft law, which was submitted to the Parliament of Georgia by the Sector Economy and Economic Policy Committee.

News from the OECD



Insights from the OECD Competition Week of December 2020 and the 2020 Global Forum on Competition



Claudia Gemmel

Communication Officer, OECD

‘Competition policy has a paramount role to play in the COVID-19 recovery’ says Angel Gurría, Secretary-General of the Organisation for Economic Co-operation and Development (OECD), during the OECD Competition Week.⁶⁵ How relevant are competition enforcement tools? How well is competition policy prepared to meet the newly arising technological and public policy challenges? What changes do we need to adopt in order to respond effectively and to rebuild the economy? All of these questions were addressed during the OECD’s virtual annual *Competition Week*, which took place between 30 November and 10 December 2020. The *OECD Competition Week* provides an excellent opportunity for the national competition agencies of the OECD member countries to come together, reflect on the current competition policy landscape and pave the way towards effective competition enforcement and advocacy. As usual, the event was complemented by the annual *Global Forum of Competition*, which is also open to competition authorities from non-OECD members, international organisations, the private sector and academia.

During the *Competition Week*, the competition authorities of the OECD member countries gathered to reflect on the broader competition enforcement landscape, and its preparedness to address new technological and public policy challenges. This included four substantive discussions around *competition digital advertising markets*, *competition and sustainability*, *competition economics in digital ecosystems*, and *the role of competition policy in promoting economic recovery*.

The first roundtable addressed *Competition in Digital Advertising Markets*. ‘Digital advertising has become the leading form of advertising in most, if not all, OECD countries, and offers businesses the ability to reach individual consumers in ways that could only have been imagined previously.’⁶⁶ However, competition agencies have expressed their concern about possible competition issues in recent market studies, most notably in relation to the ‘increasing market concentration, and its consolidation and integration across many levels of the supply chain’⁶⁷. The roundtable looked at how digital advertising

markets work, the potential competition issues arising in these markets as well as at the potential competition and other policy remedies. Roundtable stakeholders agreed that there are various issues relating to market power, a lack of transparency, and potentially a range of exclusionary and exploitative practices in these markets. It appears that competition enforcement is underway in a range of jurisdictions and that competition law offers some solutions, even if there are complexities involved in such issues as market definition, amongst others.

The second roundtable reflected on *Sustainability and Competition*. As the commitments towards achieving the UN Sustainable Development Goals are being promoted – which include, amongst others, the tackling of poverty and inequality, promoting sustainable agriculture, supporting affordable and clean energy, protection of labor rights and fighting climate change – the question arises whether there might be some friction between these goals and competition.⁶⁸ The roundtable highlighted that in many cases there is no conflict between competition and sustainability goals and that one supports the other. Some speakers considered that one important way to adequately preserve sustainability goals, in addition to regulation, is by ensuring that competition law does not unduly prevent firms from co-operating on sustainable initiatives. In contrast, others felt that competition is always superior to co-operation when it comes to achieving sustainability goals.

Another discussion in the *Competition Week* roundtable series looked at *Competition Economics in Digital Ecosystems*. Delegates from the Competition Committee reflected on digital ecosystems as business models that complement the core service they offer with a line of additional products and services based on the same technology. Business models adopted by ecosystems may be different from those of traditional firms; thus, competition between ecosystems may also differ from competition between traditional firms. The integration of a wide range of products and services can deliver efficiency savings, potentially reducing prices and improve the consumer experience by offering demand-side synergies. However, there may also be potential competition concerns such as market power leveraging and entry barriers by big gatekeeper platforms.

The pandemic was also a central topic during the *Competition Week* roundtables. In the seminar *The role of Competition Policy in Promoting Economic Recovery*, delegates agreed that competition authorities should redouble their efforts to advocate with policy makers when they are designing recovery packages. It was also highlighted that competition authorities should also pursue opportunities for pro-competitive reforms. Finally, there was consensus that competition enforcement can play a key role

65 OECD (2020), *The 19th OECD Global Forum on Competition “Competition Policy: Time for a Reset?”*, <https://www.oecd.org/about/secretary-general/oecd-sg-remarks-global-forum-on-competition-2020.htm>

66 OECD (2020), *Background note by the Secretariat on Digital advertising markets*, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2\(2020\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2(2020)3&docLanguage=En)

67 *Ibid*

68 See <http://www.oecd.org/daf/competition/sustainability-and-competition.htm>

to ensure that markets remain contestable and competitive – a theme that will be further elaborated upon below.

The reflections on the role of competition policy in the global economic setting also continued during the *Global Forum on Competition*, given the widespread implications that the COVID-19 crisis has had on individuals, society and the economy. When opening the *Forum*, Angel Gurría reminded participants that even if the OECD projects a rebound in global GDP by around 4.2% in 2021, we still expect it to be USD 6 trillion lower by the end of 2022, compared to our pre-COVID projections⁶⁹. Based on OECD research, the Secretary-General also drew attention to an expected decline in business dynamics post-COVID-19 and reflected on a lower number of new firms. In his speech, Gurría described a range of challenges and debates in the competition policy community, including anticompetitive conduct in digital markets, policies that undermine a level playing field, and the need to consider new tools to promote competition. So how exactly can competition policy then help to rebuild the economy?

Not only does competition policy drive productivity, but it also ensures that markets remain dynamic and that competitive neutrality is warranted. Margrethe Vestager, Executive Vice President of the European Commission, highlighted in her keynote speech during the Forum's first roundtable on *Competition policy: time for a reset?* that 'as our economies face the challenge of recovering from the pandemic, competition can help them grow'⁷⁰.

*[Competition policy] can help us make the most of our ability to innovate, by driving companies to invest in new ideas. It can give the best companies room to succeed, without being held back by entrenched monopolies. And it can help our economies respond to change, and to redirect their energies towards the industries of the future.*⁷¹

It is therefore not time for a reset but rather for a “reboot” of competition policy, according to Vestager, as it remains as relevant as ever. In other words, it is ‘not to change what our policy is about – but to make sure that the tools we have to achieve these goals are up to date.’⁷² A panel of experts then continued to discuss a variety of topics in this roundtable, ranging from whether industrial policy should complement competition policy to whether our economy is ready for the challenge of digitalisation.

Other highlights from the *Global Forum on Competition* were a roundtable on *Abuse of Dominance in Digital Markets* and a session on *Economic Analysis in Merger Investigations*. Experts focused on the risks of competition harm in digital markets and the need to act before these harms become further entrenched. The last roundtable on *Using Market Studies to Tackle Emerging Competition Issues* allowed for reflection on the importance of market study tools to help understand dynamic environments and new competition issues. Experts looked at how these studies can trigger dialogue with new business communities and promote the development of non-restrictive government regulation, which could ultimately complement other advocacy and enforcement tools.

All together, the 2020 *OECD Competition Week* and the *Global Forum on Competition* brought together views and insights from prestigious competition experts and attracted a large audience of policy makers, regulators, academics, and practitioners. The roundtables provided a platform for dialogue and reminded participants that competition policy builds dynamic and competitive markets, and, most importantly, that it should be seen as an ally in the global economic recovery.

Read more about the 2020 *OECD Competition Week*⁷³ and the *Global Forum on Competition*⁷⁴, and access information about future *OECD Competition*⁷⁵ events.

69 *Ibid*

70 European Commission (2020), *Speech by EVP Margrethe Vestager at the OECD Global Forum on Competition: “Competition policy: time for a reset?”*, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-margrethe-vestager-oecd-global-forum-competition-competition-policy-time-reset_en

71 *Ibid*

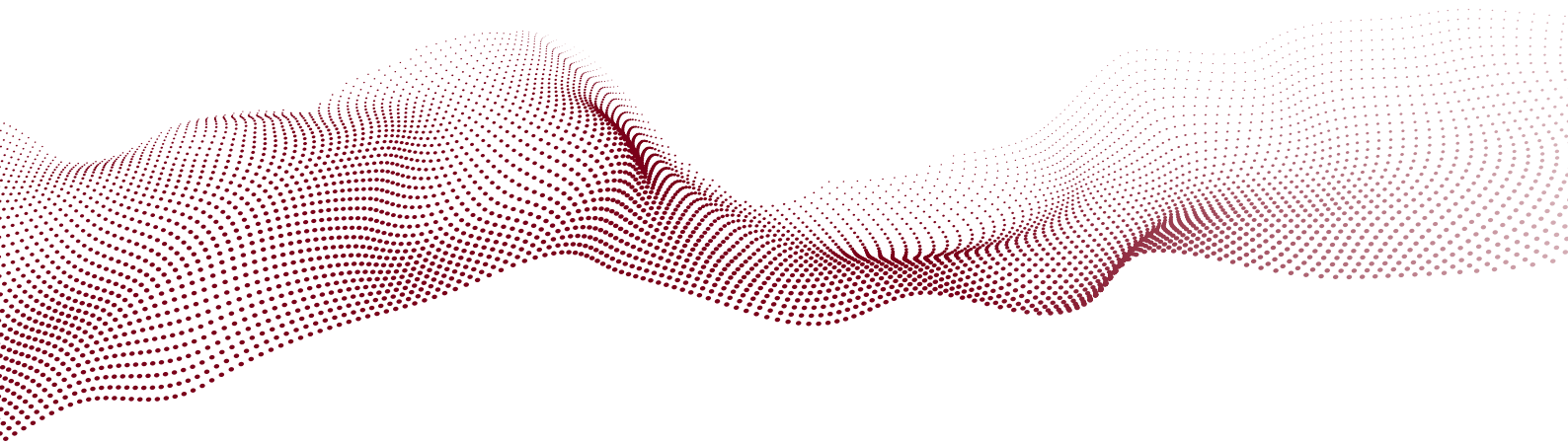
72 *Ibid*

73 <http://www.oecd.org/daf/competition/roundtables.htm>

74 <https://www.oecd.org/competition/globalforum/>

75 <http://www.oecd.org/daf/competition/oecdcompetitionfuturemeetings.htm>

Inside a Competition Authority: Albania



The Albanian Competition Authority and its recent activity

The Institution

The Chairperson

Juliana LATIFI, *Chairwoman of the Commission of the Competition Authority.*

The members of the Board

Ledia MATJA, *Vice Chairman of the Commission of the Competition Authority.*

Eduart YPI, *Member of the Commission of the Competition Authority.*

Adriana BERBERI, *Member of the Commission of the Competition Authority.*

Helidon BUSHATI, *Member of the Commission of the Competition Authority.*

The head of the Civil Servant Employees

Diana DERVISHI, *General Secretary of the Competition Authority.*

Appointment system for the Chairperson and other key roles

According to Law no. 9121 of 28.07.2003 “On Competition Protection”, as amended, the Authority is a public entity, independent in the performance of its tasks. The Authority is composed of the Commission and the Secretariat. The Commission is the decision-making body of the Authority and is composed of five members: the Chairman of the Commission, Vice Chairman and 3 Commission Members. It acts as a permanent collegial body.

The Parliament selects the Chair of the Commission. The Deputy- Chair is elected by a majority of the votes cast by all members in the first meeting of the Commission. Commission members are appointed by a majority of the votes cast, in the presence of more than half of all the members of the Parliament of Albania, for a period of five years, with the right to a second mandate.

According to Art. 25 of Law no. 9121/2003 “On Competition Protection”, the Chair of the Commission shall have these duties:

- a) To prepare, call and lead Commission meetings;
- b) To co-ordinate work amongst Commission members;
- c) To sign Commission acts, with the exception of decisions that must be signed by all the members present at the meeting;
- d) To represent the Authority in relations with third parties.

Commission members are appointed by the Parliament, between several candidates, on the basis of the following proposals:

- a) One member is proposed by the President of the Republic of Albania;
- b) Two members are proposed by the Council of Ministers;
- c) Two members are proposed by the Parliament of Albania.

Three months prior to the expiry of a Commission member’s term in office (Art. 21), the Authority shall notify the Parliament

in writing, and the Parliament shall initiate the procedure for appointing a new member. When a Commission member’s term in office has already expired and a new member has not yet been appointed, the incumbent member shall continue to be in office until she/he is replaced.

The General Secretary is in charge of the day-to-day work of the Secretariat. He/she, has the status of a civil servant.

According to Art. 29 of Law no. 9121/2003 “On Competition Protection”, the General Secretary is responsible for:

- a) applying the provisions of this Law to deal with the cases;
- b) drafting and submitting the final report of the investigation to the Commission for decision taking;
- c) co-ordinating the work of the Secretariat Departments;
- d) preparing the annual report of the Authority;
- e) co-operating with other institutions, within and abroad the country for resolving the cases;
- f) signing Secretariat written correspondence.

Decision-making in competition cases

Commission meetings for decision-making are valid when at least four members are present, from which one must be either the Chair or the Deputy- Chair, with the exception of the case stipulated in Art. 23 of Law no. 9121 of 28.07.2003 “On Competition Protection”, as amended, according to which no member of the Commission, including the Chair and Deputy Chair, may take part in a case in which he/she has an interest, or if he/she has represented one of the concerned parties. In such instances, the Commission shall take a decision in the absence of the Chairman, Deputy- Chair or the member concerned.

Decisions are taken with a simply majority vote of the present members. If there is a tie, the vote of the meeting leader is decisive. Abstention from voting is not permitted.

Authority’s competences in competition

Three main pillars according the Law no. 9121 of 28.07.2003 “On Competition Protection”, as amended, are:

- Abuse of Dominant Position;
- Prohibited Agreements;
- Concentrations/Mergers and Acquisitions.

Relevant competition legislation

The Competition Authority acts as an independent public authority when carrying out its tasks. The activity of the Competition Authority is based on Law no. 9121 of 28.07.2003 “On Competition Protection”, as amended. The law aims to protect free and effective competition in the market, in the public interest. The main purpose of the law is to prevent and eliminate anticompetitive practices and unfair competition, the authorization of concentrations (mergers and acquisitions); furthermore, the scope of the activity is applying sanctions for competition law infringements and violations of the provision of the law.

Other competences

1) According to Art. 69 of Law no. 9121/2003 “On Competition Protection”, central and local administration structures
Central and local administration bodies require the Authority estimation for any draft normative act which, in particular, includes:

- a) quantitative restrictions concerning trading and market access;
 - b) the establishment of exclusive rights or special rights in certain zones, for certain undertakings or products;
 - c) the imposition of uniform practices in relation to prices and selling conditions.
- 2) According to Art. 70 of Law no. 9121/2003 “On Competition Protection”, the Authority has the following roles when it comes to regulation and regulatory reform:

- a) When carrying out its assigned tasks related to the regulation of economic activity within the Republic of Albania, insofar as central and local administration bodies, regulatory entities shall ensure fair and effective competition.
- b) In particular, the Authority shall assess the regulatory barriers to competition incorporated in economic and administrative regulations with the aim of protecting a general economic interest. In this case, the Authority shall issue appropriate recommendations.
- c) The Authority, in applying this law to regulated sectors, shall co-operate with regulatory entities and other regulatory institutions.

Number of staff of the authority

In 2019, the Albanian Competition Authority (hereafter also ACA) aimed to strengthen its capacity and adopt an institutional structure that was similar to the model employed by counterpart institutions of EU countries. The structure approved by the decision of the Parliament no. 128/2018 mainly aimed to increase the number of employees in the technical directorates by three in order to cover the increased activity of the Authority on all markets in the territory of the Republic of Albania, the purpose of which is to ensure free and effective competition in the production and non-production markets. This increased number of employees will enable the ACA’s analyses, studies, inspections and all investigative procedures to be carried out more quickly and within the stipulated legal deadlines.

Number of staff working on competition

ACA’s activity has been carried out through these directorates according to the organization structure:

- Production Markets Surveillance Directorate;
- Non-Production/Services Markets Surveillance Directorate;
- Market Analysis and Methodologies Directorate;
- Legal and Judicial Affairs Directorate;
- Integration and Communication Directorate;
- Support Services Directorate.

Structure of the Authority	Number of civil servants
General Secretary	1
Production Markets Surveillance Directorate	7
Non-Production/Services Markets Surveillance Directorate	7
Market Analysis and Methodologies Directorate	7
Legal and Judicial Affairs Directorate	7
Integration and Communication Directorate	5
Support Services Directorate	5
TOTAL	39

Accountability

The duty and competence of the Commission, According Art. 24 of Law no. 9121/2003 “On Competition Protection”, the Commission is obliged to submit an annual report of the Authority to the Parliament within the first three months of the consequent year.

The activity of the annual report shall contain:

- 1) Implementation of the annual Resolution of the Parliament of the Republic of Albania “On the evaluation of the activity of the ACA”;
- 2) Secondary legislation adopted in the framework of the National Plan for European Integration, as well as other secondary legislation;
- 3) Monitoring of markets;
- 4) Investigative procedures (Prohibited agreements; Abuse of dominant position)
- 5) Merger control;
- 6) Court proceedings;
- 7) Competition advocacy,
- 8) European Integration Process;
- 9) International Cooperation;
- 10) Human resources;
- 11) Important priorities for the following year.

Antitrust enforcement over the last 24 months

Number of cases

	2019	November 2020
Prohibited agreements	4	9
Abuse of dominance	11	4
Merger control	24	14
Conditions and obligations	3	4
Temporary measures	2	3
Recommendations to public institutions	26	6
Regulations and guidelines	4	4
Fines	-	2
Other (specify)	19	7
TOTAL	93	53

Prohibited Agreements

Total sum of fines in last 24 months was around 34 million Albanian Lek.

Dawn raids

The Authority has carried out 13 dawn raids over the last 24 months.

Main cases

Due to the Covid-19 Pandemic, the Competition Commission (hereafter also CC) has carried out these decisions:

- The CC, through its decision no. 684 of 18.03.2020, opened a preliminary investigation in the market of retail and wholesale of pre-medical pharmaceutical products (mask, disinfectant gel, alcohol-based hand sanitiser)".
- The CC, through its decision no. 685 of 18.03.2020, decided to take temporary interim measures due to the risk of serious and irreparable damage to competition in the market of retail and wholesale of non-medical pharmaceutical products (mask, disinfectant gel, alcohol-based hand sanitiser).
- The CC, through its decision no. 717 of dated 15.10.2020, decided to impose fines and certain obligations on a number of undertakings that operate in the wholesale market of non-medical pharmaceutical products for their failure to implement the temporary measures imposed by the CC in its decision no. 685 of dated 18.03.2020.

Wheat import market and flour production

- 1) The CC, through its decision no.643 of 25.07.2019, decided to open an in-depth investigative procedure in the wheat import and flour production market in order to assess the behaviour of the undertakings "AgroBlend", "Tirana Flour", "Bloja" and "Atlas".
- 2) The CC, through its decision no. 700 of 24.07.2020, decided to close its investigation into the behaviour of the mentioned firms in the wheat import and flour production market, with the imposition of conditions and obligations on the concerned undertakings and, furthermore, by issuing a number of recommendations to the Ministry of Finance and Economy, the Ministry of Agriculture and Rural Development and the National Authority of Food. In its investigation, the CC determined that the undertakings had co-ordinated their behaviour when it came to the setting of prices and production control in the flour market through vertical integration.

Retail market of mobile services

- 1) The CC, through its decision no. 679 of 14.02.2020, decided to open a preliminary investigation procedure into the retail market of mobile services in order to see if there were any signs of competition restriction.
- 2) The CC, through its decision no. 680 of 14.02.2020, decided to take a temporary measures in order to restore competition in the retail market of mobile services.
- 3) The CC, through its decision no. 703 of 06.08.2020, decided to close the preliminary investigation procedure

into the retail market of mobile services and accepted the commitments proposed by the undertakings "Vodafone Albania", "Telekom Albania" and "Albtelecom", according to which the concerned undertakings must fulfil a number of conditions and obligations.

Abuses of dominance

Fines

Total sum of fines in last 24 months was around 5,052,370 Lek

Main cases

The CC imposed a fine on the undertaking "Durrës Container Terminal" Ltd. for its abuse of a dominant position in the market of container filling and emptying services in the Container Terminal of Durrës" and, furthermore, it issued a number of recommendations to the Ministry of Infrastructure and Energy (MIE) and Ministry of Finance and Economy (MFE).

The CC, through its decision no. 696 of 11.06.2020, imposed a fine on "Durrës Container Terminal" Ltd. for abusing its dominant position in the market of container filling and emptying services in the Container Terminal of Durrës. and issued a number of recommendations to the MIE and MFE. As a result of the undertaking's serious violation of competition law and, more specifically, of Article 9, point 2, letter a), of law no. 9121/2003, the CC imposed a fine of 5,052,370 ALL on the undertaking, which amounted to 0.43% of its turnover from the previous financial year.

Judicial review over the last 24 months

Outcome of judicial review by the first instance Courts

Entirely favourable judgments (decision entirely upheld):	
– Favourable judgments but for fines	1
– Favourable judgments but for conditions and obligations	2
Partially favourable judgments	0
Negative judgments (decision overturned)	0
TOTAL	3

Main sentences

During 2019, the judicial processes of ACA have continued as follows:

1. Cases adjudicated in the Administrative Court of First Instance

Litigation with Claimant: Conad Albania Ltd.

Defendant: Competition Authority

Object: Repeal of decision no. 560 of 15.10.2018 by which the CC issued a number of recommendations concerning Conad Albania Ltd's in the trading of its products with the "Conad" trademark in the market of trading food products in the Republic of Albania.

The Administrative Court of First Instance dismissed the claim of Conad.

Claimant: Durrës Container Terminal Ltd.

Defendant: Competition Authority

Object: Repeal of the CC’s decision no. 696 of 11.06.2020 imposing a fine on the undertaking Durres Container Terminal Ltd. for abusing its dominant position in the market of container filling and emptying services in the Container Terminal of Durrës and issuing recommendations to the MIE and MFE.

The Administrative Court of First Instance dismissed the claim of Durres Container Terminal Ltd.

Claimant: Albanian Football Federation

Defendant: Competition Authority

Object: Repeal of the CC’s decision no. 693 of 14.05.2020 aimed at investigating the economic activity of the Albanian Football Federation and its potential abuse of its dominant position, and also imposing a number of conditions and obligations on the concerned Federation.

The Administrative Court of First Instance dismissed the claim of the Albanian Football Federation.

2. Cases before the Administrative Court of Appeal

One case has been examined in the Administrative Court of Appeal.

Claimant: EKMA Albania Ltd.

Object:

- Repeal of the CC’s decision no. 572 of 22.11.2018 imposing fines and obligations on EKMA Albania Ltd., which operates in the leasing market for the storage and trading of Agro-Food Products in the city of Tirana.
- To secure the suspension of the Competition Authority’s decision no. 572 of 22.11.2018, according to which fines and obligations were to be imposed on EKMA Albania Ltd., which operates in the leasing market for the storage and trading of Agro-Food products in the city of Tirana. The claim sought to prevent the fine from being imposed on the undertaking until the decision on the merits of the suit had been rendered.

On 18.06.2019, the Administrative Court of Appeal dismissed the claim of EKMA Albania Ltd. and accepted the Competition Authority’s complaint, thereby enabling the concerned fine and regulatory measures to be implemented.

Merger review over the last 24 months

Number of cases

Blocked merger filings	0
Mergers resolved with remedies	2
Mergers abandoned by the parties	2
Unconditionally cleared mergers	38
Other (specify)	5
TOTAL CHALLENGED MERGERS	47

During 2019, the Albanian Competition Authority poured 12,583,318 Lek into the state budget, which derives from merger review (notification and authorisation of concentrations), and accounts for 17% of the Authority’s budget.

Main cases

• Balfin Ltd./Komericialjalna Banka AD Skopje/ Tirana Bank JSC

The CC, through its decision no. 580 of 17.01.2019 approved the acquisition of control of Balfin Ltd. and Komericialjalna Banka AD Skopje over Tirana Bank JSC, a subsidiary of Piraeus Bank SA, through which it bought 98.83% of Tirana Bank JSC’s shares. The transaction was approved subject to the imposition of a number of conditions and recommendations on the Bank of Albania.

• Besniku Ltd./Atlas Mills Ltd.

The CC, through its decision no. 622 of 13.05.2019 authorised Besniku Ltd.’s acquisition of control over Atlas Mills Ltd through the purchase of 100% of the shares of the latter. The CC authorised the acquisition after determining that the transaction would not cause meaningful changes in the Albanian market. he combined market share after the concentration would not result in competition concerns in the market.

• Telekom Albania/Albania Telecom Invest AD

The CC, through its decision no. 610 of 10.04.2019 authorised Albania Telecom Invest AD’s acquisition of control over Telekom Albania after determining that the transaction would not result in the creation or strengthening of a dominant position in the market on which Telekom Albania operates.

• Albanian Telecommunications Union/Digicom

The CC, through its decision no. 621 of 13.05.2019 authorised Albanian Telecommunications Union’s acquisition of control over Digicom after determining that the transaction would not restrict competition in the market or in one of its segments, in particular as a result of the creation or strengthening of a dominant position.

• ABCom Ltd./Vodafone Albania

The CC, through its decision no. 676 of 07.02.2020 authorised Vodafone Albania’s acquisition of control over ABCom. The transaction was authorised subject to the imposition of a number of conditions and obligations on Vodafone Albania.

Advocacy over the last 24 months

Main initiatives

Over the last 24 months, the ACA has carried out a number of activities in the field of competition advocacy

The ACA, as a beneficiary of the EBRD Project “Promoting Advocacy of Competition and Strengthening the Institutional Capacities of the Albanian Competition Authority”, which focuses on competition advocacy and capacity building, also embraces all non-enforcement mechanisms that may be adopted by a competition authority to promote a competitive environment for economic activities. Such mechanisms include cooperation with other governmental entities and increasing public awareness of the benefits of competition. Within the framework of the aforementioned project, a seminar-based training programme has been tailored and delivered to the case handlers and officials of the ACA. This training programme was structured around the following three modules, which were delivered online due to the Covid-19 pandemic:

- 1) Econometrics theory and the use of the software STATA;

- 2) ECJ Jurisprudence: application of Articles 101 and 102 of the TFEU;
- 3) Merger Analysis.

The ultimate goal of the trainings was to provide the staff of the ACA with the economic, technical and legal tools they need to effectively carry out their tasks in accordance with the best international practices.

The staff of the ACA also attended seminars and meetings with regulatory entities, various market actors, in different sectors of the economy, in the framework of a IPA twinning project funded by the European Union and managed by the Spanish National Commission for Markets and Competition (CNMC). Due to the Covid-19 Pandemic, half of the trainings were delivered virtually.

Conferences and Round Tables

In the period October-December 2019, the following activities were carried out:

- Conference on the occasion of the 15th anniversary of Law no. 9121/2003 “On the Protection of Competition” as amended, entitled “Competition and Entrepreneurship” on November 14, 2019. The event was attended by the Deputy Speaker of the Assembly of the Republic of Albania, the Minister of State for Entrepreneurship Protection, as well as the First Secretary of the Section for Economic and Social Development of the European Union Delegation to Albania. It was also attended by representatives of regulatory bodies and organisations, both domestic and foreign, such as the Water Regulatory Authority, the Financial Supervisory Authority, the Chamber of Commerce and Industry, and the Ibero-American and International Foundation for Administration and Public Works. At this conference, the mentioned IPA twinning project, entitled “ACA’s Capacity Building in order to protect free and effective competition in the market”, was also launched.
- Round table in the city of Vlora on 25.11.2019 at the University “Ismail Qemali”, on the topic of “Knowing competition and its challenges”.
- Round table in the city of Shkodra on 11.11.2019 at the University “Luigj Gurakuqi”, on the topic of “Knowing competition and its challenges”.

From 2019 to the beginning of 2020, 36 trainings were conducted abroad and 10 were conducted domestically. 55 members of staff of the Authority benefitted from these trainings, with a number of employees benefitting from more than one training

session. Since the beginning of the Global Pandemic all other trainings have been delivered online through different online platforms.

All of the trainings were conducted within the framework of the cooperation mechanisms that the ACA has established with various institutions, namely within the international cooperation frameworks existing between the ACA and the OECD GVH/RCC, CRESSE, TAIEX, and, domestically, between the ACA and the School of Public Administration, and at the premises of the ACA under the framework of the IPA Twinning Project with the Spanish National Commission for Markets and Competition and EBRD.

In order to mark World Competition Day on 5 December 2020, the Authority will organise an event on this day entitled “Public promotion of Competition” in the form of a video projection in the University of Tirana Building.

Market studies over the last 24 months

Main initiatives

The ACA, pursuant to Article 28 of Law no. 9121/2003, has carried out monitoring, analyses and market studies aimed at ensuring the development of free and effective competition.

When carrying out its competitive analysis of markets, the ACA has monitored and analysed a number of competitive elements such as: market structures and market dynamics, the behaviour of market players in relation to their competitors and consumers, as well as legal and economic barriers to market entry.

The monitored markets have been:

- Financial market (insurance and banking);
- Loading-unloading market in the East Terminal of Port of Durrës;
- Hydrocarbon transport market (air, sea and land);
- Hospital services;
- Procurement;
- Mobile telephony services;
- Energy Sector;
- Water sector;
- Flour market;
- Energy deposit market;
- Liquefied natural gas market;
- Agro-food market;
- Higher Education Sector;
- Non-medical pharmaceutical products, etc.

Interview with the Chairperson: Prof. Dr. Juliana Latifi



Juliana Latifi

*Chairwoman of the Commission of the
Competition Authority*

What are the main challenges that your authority is facing? What are your priorities for the near future?

As the year 2020 is coming to an end, the whole world is facing the second wave of a once-in-a-lifetime pandemic. Albania has been notably affected as well. This challenging environment, besides creating significant social uncertainties, has critically impacted markets, public finances and economic activity. Its consequences are manifested in a sharp contraction of economic activity, a reduction in employment and a fall in inflation.

Under such puzzling conditions, the Albanian Competition Authority (ACA) has continued to carry out its daily operational activity. Our main focus has been twofold.

First, our goal has been to meet all the targets and commitments which were part of our 2020 institutional agenda.

Second, substantial efforts have been made to alleviate the effects of the pandemic, particularly in terms of price speculations and markets abuse.

During this period, the main two challenges faced by the ACA are the following:

- The first challenge concerns the implementation of the Competition Advocacy and Communication Strategy, which is a new 5-year strategy compiled through the support of the EBRD's project "Promoting Advocacy of Competition and Strengthening the Institutional Capacities of the Albanian Competition Authority" that will be implemented during 2021. The strategy is a comprehensive document that details the objectives and instruments that will be used by the ACA to fulfil its advocacy mandate. It includes the following components: a detailed description of how to build as well as deliver advocacy and communication programmes; the identification of contact points within government bodies; an explanation of how to engage with academia, institutions of higher education and the Consumer Protection Commission; the training of national judges; and advocacy and communication instruments.
- Another challenge will be the implementation of the "ECN + Directive", which has been approved by the Competition Commission in its decision no. 697 of 30.06.2020, according to which it approved the Guideline aimed at making the Competition Authority a more effective enforcer of Law no. 9121/2003 "On Competition Protection", as amended, with the ultimate purpose of ensuring the proper functioning

of markets. The Guideline is based on the provisions of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 "To empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market".

- The Guideline aims to address many important aspects of the activity of the Albanian Competition Authority related to the right to conduct investigations, to impose administrative sanctions, to ensure legal certainty and guarantees for undertakings under investigation, to guarantee the applicability of the leniency programme, etc. Law no. 9121/2003 "On Competition Protection", as amended, is in line with Articles 101 and 102 of the TFEU, as well as the EC Merger Regulation, and provides the ACA all appropriate tools to set proportional and pre-emptive sanctions for breaches of competition rules. The Competition Council, in its decision no. 697 of 30.06.2020, expressly stated that two chapters of the ECN+ Directive, respectively: Chapter VII "Mutual Assistance" and Chapter VIII "Limitation Periods", shall *enter into force* and will be implemented when Albania becomes a full member state of the European Union.

Our main priorities for the near future are:

- 1) The enforcement of competition law on sensitive markets and sectors of the economy that *have high impact on consumers during this pandemic period*, such as the pharmaceutical market (medication and medical supplies), the market of hospital services and the market of agro-food products:
 - i. through the CC's decision no.70 of 23.09.2020, a preliminary investigation has been initiated into the pharmaceutical market aiming at evaluating the exclusive rights that have been granted, and whether or not any barriers to entry exist on the market as a result of either legal acts or the behaviour of the undertakings operating in this market;
 - ii. through the CC's decision no. 552 of 04.10.2018, a general investigation into hospital services is close to being concluded, which has involved an evaluation of the structures in the concerned market, an analysis of the service fees, quality and performance, and
 - iii. the monitoring of the implementation of the CC's decision no.572 of 22.11.2018 regarding the market of agro-food products in the city of Tirana, which due to the impact and the monopolistic nature that it has, it directly or indirectly affect prices in the retail market and the well-being of consumers.
- 2) Amending Law no. 9121/2003 "On Competition Protection" as it was reviewed with the support of the European Union project, IPA Twinning "ACA's Capacity Building in order to protect free and effective competition in the market", which exists between the Albanian Competition Authority and the Spanish National Commission on Markets and Competition. The recommendations

aim to help the ACA to address the issues it is likely to face in the coming years when bringing its law into line with EU legislation.

What are the points of strength and of weakness of your authority?

Two main points of strength can be mentioned for the ACA:

- *Institutional Independence:* With a well-established legal mandate, the Competition Authority has the status of an independent public institution, the composition of which reflects the principle of the balance of powers between its two structures, namely the Secretariat of the Authority (operational body) and the Competition Commission (decision-making body), the latter of which is composed of 5 members that are appointed by the Albanian Parliament. The institutional independence of the ACA is expressed in various ways, from among the most important we can highlight the following: (i) the decision making of the CC is independent from politics; (ii) the CC has the right to approve the secondary legal framework of the activity of the ACA based on the competences granted to it by Law no. 9121/2003 “On Competition Protection”, as amended.
- *The CC makes an assessment based in evidence and law when arriving at its decisions, which are informed by the competent and professional work carried out by the technical staff at the ACA in their investigations into cases.* The CC’s decisions are subject to judicial review and may be overturned by the court, which is an important mechanism for ensuring that the CC does not exceed the limits of its power. During the period 2018-2020, 4 (four) cases have been appealed in the Administrative Court of First Instance, all of which have been upheld.

As regards to the ACA’s points of weakness, the following can be mentioned:

- *Lack of financial independence.* The ACA has a relatively small budget. This budget is part of the state budget, which is approved every year by the Parliament of the Republic of Albania. Funds collected as a result of the ACA’s activities, for example through its authorisation of concentrations, do not go to the budget of the ACA.
- *A relatively small number of staff.* The Albanian Competition Authority must oversee activity and address challenges arising on all markets of the Albanian economy, despite having a relatively small number of staff.

Which decisions adopted by the authority over the last two years make you particularly proud, and which cases do you feel could have been conducted better?

We are particularly proud about how the following three cases were successfully conducted:

- The case of the general investigation in the higher education sector as one of the sectors with a very important role in the overall socio-economic sustainable development with its effects on the entire society. In its decision no. 573 of

26.11.2018 the Competition Commission initiated a general investigation in order to assess the level of competition in the higher education market and to collect know-how from a market that the ACA had not (at that time) dealt with in any of its cases. The case ended with decision no.706 of 10.09.2020, by which the Competition Commission issued some recommendations to the Ministry of Education, Sport and Youth, the National Institute for Statistics, public HEIs and private HEIs, as well as various obligations on private HEIs.

- The second case worth mentioning involves the ACA’s investigation into the economic activities conducted by the Albanian Football Federation (AFF). Through decision no. 693 of 14.05.2020, the Competition Commission issued the AFF with a number of obligations and recommendations aimed at improving the functioning of the markets subject to the investigation. These recommendations and obligations concerned, among others, such matters as the sale of audio-visual rights, the price of tickets and sponsor selection. The decision was appealed at the Administrative Court of First Instance by the AFF but was upheld by the court, as the court determined that the decision had been based in evidence and facts.
- The final case involved an assessment of the conduct of the concessionary undertaking “EMS-Albanian Port Operator” Ltd., which has been awarded the exclusive right to operate solely for 30 years in the stevedoring market for bulk cargo in the Eastern Terminal of the port of Durrës. The CC, through its decision no. 567 of 07.11.2018, decided to close its in-depth investigative procedure into the conduct of “EMS-Albanian Port Operator” Ltd. with the imposition of conditions and obligations and, furthermore, by issuing a number of recommendations to the Ministry of Infrastructure and Energy and the Durrës Port Authority aimed at promoting competition in this market. The ACA monitored the implementation of the obligations it imposed on the undertaking for a period of one year and observed a correction on the market on which the undertaking operates as a result of their fulfilment. This correction has enabled other stevedoring operators to access the market.

The cases that could have been conducted better

- The ACA has conducted numerous investigations into the mobile retail market over the years. The large number of recommendations, obligations and fines that have been issued in cases involving this market highlights the market players’ continued failure to observe competition rules. This failure is also due to inadequate regulation on the part of the responsible regulatory body, namely– the Authority of Electronic and Postal Communications (AEPC). By the end of February 2020, the three mobile operators active in the market applied immediate and significant price increases regarding prepaid packages. The ACA is of the opinion that the outcome of the CC’s decision in this case would have been more favourable if the AEPC had conducted an evaluative and comparative analysis of the increased tariffs in accordance with the secondary legislation that regulates the activity of mobile operators in the market. If such an assessment had been

undertaken focusing on the simultaneous increase of the notified, the CC's intervention would have been more efficient and would have directly addressed the conduct of the operators, without allowing them to react through commitments.

The CC, through its decision no. 703 of dated 06.08.2020, decided to close the preliminary investigation into the retail mobile market and accepted the commitments proposed by Vodafone Albania, Telekom Albania and Albtelecom, according to which the concerned operators must fulfil a number of conditions and obligations.

Considering the impact that this market has on consumers, this case remains challenging due concerns related to the actual fulfilment of the commitments by the concerned companies.

- The ongoing pandemic is resulting in a number of price increases in several markets, most notably related to non-medical pharmaceutical products (like face mask, disinfectant gel, alcohol-based sanitiser). Consequently, the ACA has initiated an investigative procedure in the aforementioned market aimed at examining and, if necessary, restoring competition in the market. Given the ongoing nature of the investigation, several interim measures have been taken due to the risk of serious and irreparable damage to competition:
 - i. The CC, through its decision no. 684 of 18.03.2020, opened a preliminary investigation in the market of wholesale and retail of non-medical pharmaceutical products.
 - ii. The CC, through its decision no. 684 of 18.03.2020, imposed interim measures on undertakings which operate in the market of retail or wholesale of non-medical pharmaceutical products (mask, disinfectant gel, alcohol).

We are of the opinion that we should have been faster and more active in the handling of this case. The investigation is in process, and through decision no. 717 of 15.10.2020, issued fines and obligations on a number of undertakings that operate in this market for not complying with the temporary measures.

What is the level of competition awareness in your country? Do policymakers consider competition issues? Is competition compliance a significant concern for businesses?

Over the last few years the competition awareness of the business community has increased.

This increased awareness has been observed via the following:

- An increased number of complaints lodged by businesses and/or consumers to the ACA. Thus during the last 2 years, 95 complaints have been filed to the ACA (55 complaints for 2019 and 40 complaints for 2020). Based on them, the ACA has initiated investigatory procedures in sensitive markets

of the Albanian economy, such as the telecommunications market, hospital services, pharmaceutical market, banking sector, public procurement, etc.

- Businesses have demonstrated an increased awareness of their obligation to notify their transactions within the time period of 30 days provided by the law, such as in the case when a transaction fulfils the criteria provided by Law no. 9121/2003 and is authorized as such by the CC for its implementation. Most firms have also awareness of the cases in which transactions do not qualify as concentrations.
- Businesses have begun to become increasingly aware of primary and secondary legislation that sets exclusive rights, or causes qualitative or quantitative restrictions on entering a market and trading, and are therefore asking the ACA for a legal evaluation of the extent to which such acts restrict or obstruct competition.

There is increasing cooperation between the ACA and policymakers. This can be observed in the annual Resolutions of the Parliament of the Republic of Albania "For the evaluation of the activity of the ACA", which requires executive bodies of all levels to cooperate with the ACA by:

- Implementing the obligation to request a preliminary legal assessment from the ACA for any draft normative act which has as its object or consequence giving exclusive rights or qualitative or quantitative restrictions of competition in different markets or sectors of the economy and, particularly for concessionary contracts.
- Permanent consultations in the process of preparation and the approval of primary and secondary legislation in order to ensure free and effective competition in the market.

In 2018 an "Inter-institutional mechanism for the implementation of the recommendations of independent institutions" was established. This mechanism allows the Parliament to exert its controlling function on governmental institutions and supervise the degree of implementation of the recommendations issued by independent institutions, including the ACA. In 2017, in order to help businesses to comply with competition rules, the ACA drafted and published a "Programme of compliance with competition rules" in the form of a brochure. This programme has been shared with the business community through different forums and workshops throughout the entire territory of the Republic of Albania.

Nowadays, businesses' compliance with competition rules has improved, partly as a result of the fact that they are more aware of what is considered appropriate market behaviour. This increased compliance has been observed by the ACA in the monitoring, analyses and studies that it has conducted during the years in different markets.

Despite the above, there is still significant room for improvement when it comes to raising the awareness and compliance of businesses with competition rules, encouraging consumers to report suspicious behaviour to the ACA and last, but definitely not least, when it comes to the important role that policymakers must play in supporting the work of the ACA, particularly as regards to the assessment of concessionary contracts and the implementation of proposed recommendations.

If you could make one major change in your national competition law tomorrow, what would you choose?

One potential major change to Law no. 9121/2003 “On Competition Protection”, as amended, could be a proposal that allows the ACA to keep a percentage of the income it generates (according to the rules of the state budget), for example withholding a percentage on the incomes created by the clearance procedures of concentrations, so that it is more equipped to carry out its mission of ensuring free and effective competition in the market.

Do you find that international and regional cooperation is helpful? Is it working well?

Over the last 15 years the ACA has developed relationships with a number of National Competition Authorities and International Organisations. The ACA considers such cooperation to be highly important and places great emphasis on its continuation and development.

We engage in cooperation in a number of ways, most notably in the form of bilateral cooperation – we have signed Memorandums of Understanding with the Competition Authorities of Italy, Hungary, Austria, Turkey, Croatia, Malta, Spain – and through Multilateral Agreements within the framework of the “Sofia Competition Forum”.

Bilateral Agreements have been focused on the training of our staff, particularly within the framework of various EU projects, such as those of TAIEX. Concretely, during the last years, our inspectors have been trained by the Austrian, Italian, Maltese and Spanish Competition Authorities.

Furthermore, a communication network has been created through various activities organised by the OECD/RCC, UNC-TAD and ICN.

Thus, competition authorities of South-eastern Europe cooperate among each other, within the framework of the RCC, which enables them to exchange information via the Request For Information Instrument (RFI).

Likewise, participation in the annual meetings of the Intergovernmental Group of Experts of Competition Law and Policy, which takes place within the framework of the UNCTAD, is a good way to exchange experiences as well as gaining experience.

As regards to the Authority’s cooperation with the ICN, this has been formalised via the signing of the ICN Framework for Competition Agency Procedures (CAP), which was approved with the CC’s decision no. 636 of 04.07.2019.

What is your opinion about the OECD-GVH Regional Centre for Competition? Do you have suggestions for improvement?

Since 2005, the Albanian Competition Authority (ACA) has continuously followed its cooperation with the OECD-GVH/RCC through participation in trainings that the Centre offers to Central, Eastern and South-Eastern European countries, by making use of its RFI instrument to communicate with other beneficiary authorities and by publishing numerous articles in the RCC Newsletters.

The ACA’s organisation of the seminar “Merger Control”, which took place on 19-21 June 2018 in Tirana, and which was attended by representatives from 27 comparable competition authorities from Europe and Asia, ranks among one of the greatest achievements of the ACA so far in its collaboration with the OECD-GVH/RCC.

As regards to the trainings offered by the Centre from 2005-2019, the ACA has participated in 59 events, in the framework of which 130 persons have been trained over the course of 402 training days. Annually, on average there have been 9 persons trained around 27 days of training per person and 4 events participated per person.

The staff has been trained on different topics related to competition policy and on the issues that arise in enforcement cases, for example, abuse of a dominant position, prohibited agreements and merger assessment; furthermore, it has received specific training on competition advocacy. The staff has received training on important sectors of the economy, such as telecommunication, banking, energy, pharmaceutical, public procurement, retail markets and also challenging markets like the digital economy.

The knowledge gained by both junior staff and senior experts through their participation in these trainings has proven to be extremely relevant and beneficial in their everyday work. Participating staff members have been able to develop their skills related to the legal and economic assessment of cases, which they have been actively applying in ongoing cases at the ACA. In addition to the knowledge gained through participation in the concerned trainings, these events have helped to establish and maintain international cooperation among colleagues, thereby contributing to the sharing of experiences between experts.

We have found the RFI instrument to be a very effective communication tool for allowing authorities to exchange experiences with one another. The tool enables new perspectives and solutions to be provided for given problems, thereby helping authorities to solve the issues they face. We believe that the tool will play an increasingly important role in the communication between authorities that are part of the RCC network.

Literature Digest



Pedro Caro de Sousa
Competition Expert, OECD

This issue of the Literature Digest for the RCC Newsletter looks at three papers on abuse of dominance in digital markets. In addition, I highly recommend that you read the OECD's Background Paper on the same topic for the Global Forum on Competition (you can find it at <http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets.htm>).

More detailed reviews of the papers discussed below – together with those of other papers – can be found at www.antitrustdigest.net.

Friso Bostoen 'Online Platforms and Pricing: Adapting abuse of dominance assessments to the economic reality of free products' (2019) Computer Law and Security Review 35 263'

What sets platforms apart is their ability to cross-subsidise between different user groups and to simultaneously leverage some user groups (usually the subsidised ones) to increase their attractiveness to other users (usually the paying ones). In other words, platforms often treat one side of the market as a profit centre and the other side as a loss leader, or, at best, as financially neutral. As a result, platforms must choose not only a price level, but also a price structure for their service.

This article explores how competition law can assess potentially abusive behaviour involving free products (both goods and services). In particular, it provides a good overview of the literature on the application of predatory pricing to multisided markets. The paper also contains descriptions of predatory pricing cases in multisided markets in Europe, as well as of situations to which the principles governing excessive pricing could be applied by analogy. While not containing any groundbreaking insights, this paper provides a very nice overview of how one might identify abusive practices concerning free products.

Peter Alexiadis and Alexandre de Streel on 'Designing an EU Intervention Standard for Digital Gatekeepers' (2020)

A series of studies and reports on digital platforms have suggested that antitrust policy requires an overhaul. This view is driven by the belief that, as regards digital markets, the risk of making "Type 2" errors (i.e., under-enforcement) is greater than the risk of making "Type 1" errors (i.e., over-enforcement) and that, in addition to competition enforcement, there may be a role for regulation as well.

While the authors take the view that the imperative for radical change is less pressing in the European Union than elsewhere, they nonetheless develop a blueprint for intervention against digital platforms – both *ex post* and *ex ante*. According to the authors, EU law already contains most of the rules and principles necessary to address undesirable behaviour by digital platforms. On the competition side, this includes utilising concepts such as 'special responsibility' and 'unavoidable trading partner', and the theories of harm developed in the *Google* cases, in margin squeeze cases, or in Article 106 (1) TFEU cases relating to potential leveraging and conflicts of interest arising from special or exclusive rights. On the regulatory side, EU law can build on well-established approaches to 'bottlenecks', 'gatekeepers', 'significant market power', 'interoperability' and 'economic dependency', and expand on the rules already governing electronic communications.

This is an extremely ambitious paper. Its overview of how regulatory and competition enforcement approaches could combine to address the challenges posed by digital platforms is particularly good. It also develops an interesting argument to the effect that the dynamics of digital platforms are consistent with the exploration of theories of harm, the roots of which lie in the theory of conglomerate effects. The principal antitrust concern in conglomerate markets is that an undertaking will be able to foreclose competitors through the leveraging of its market power from one market ("the leveraging market") into another market ("the leveraged market"). This inevitably involves an analysis of the connections between two markets, a determination of whether a sufficient degree of market power exists in one of these markets, and the likely negative effects on consumers brought about by the resulting foreclosure of competitors. All these elements are typically present in abusive practices by dominant digital platforms.

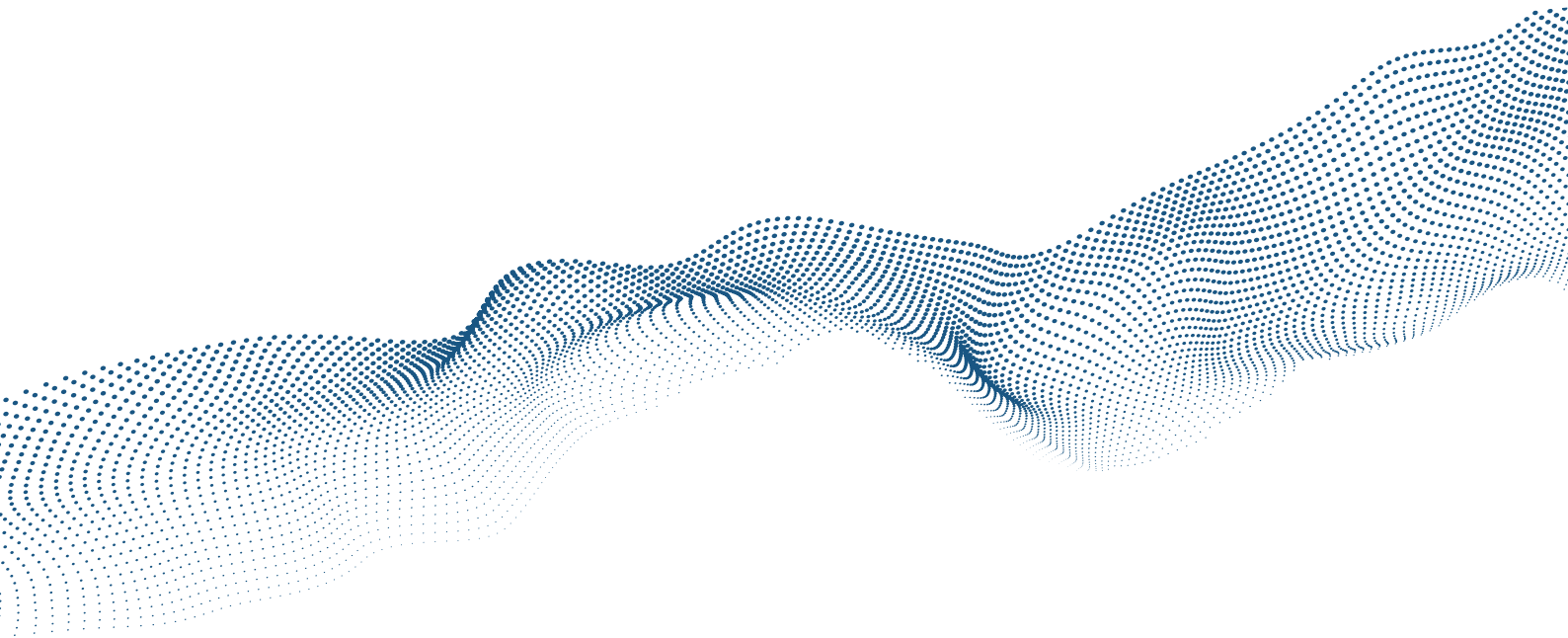
Viktoria Robertson on 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' (2020) Common Market Law Review 57 161

It is debatable whether competition law should be concerned with third party tracking of personal user data on the web. Focusing on data gathering, the paper assesses two scenarios under which EU competition law may deem the vast amounts of data gathered by certain digital platforms excessive: excessive data "prices" and unfair data policies. In both scenarios, the competition law assessment is autonomous from other areas of the law, particularly data protection rules. For example, while a breach of data protection rules does not automatically amount to a breach of competition law, neither does the fact that a company adheres to data protection rules preclude a finding of infringement of competition law. Ultimately, the paper finds that EU competition law already possesses the necessary tools to address excessive data collection on its own, even if data protection rules provide much-needed context for this type of exploitative abuse.

This insightful, thoughtful paper could be read as an attempt to develop competition-specific theories of harm based on the breach of privacy rights. Such theories build on and go beyond those adopted in the German *Facebook* case, while transposing aspects of the German approach to competition law and privacy to the European sphere.

However, the proposed theories of harm are likely to prove controversial, inasmuch as they ultimately depend on ‘excessive’ data collection and the ‘unfairness’ of a commercial practice

providing a basis for antitrust liability. In both cases, identifying which ‘excessive’ and ‘unfair’ practices are unlawful under competition law requires the use of limiting principles related to consumer welfare, which the paper could better elaborate. Further, the choice of what is the best regulatory approach to these practices – and what are the limitations of competition law in this realm – are important questions that would benefit from more detailed discussion.



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