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Enforcement of Competition Law on Digital Platforms – Responsive Modelling for Digitization Challenges under the EU Law

The law of the European Union (hereinafter the “EU”) is a complex legal system that builds supranational law on the basis of comparative studies.¹ For the EU the harmonization of law is one of the instruments that ensures the proper functioning of the EU internal market and achieves the idea of perfecting European integration, which has long gone beyond its current geographical boundaries to include the “Third World”.² Accordingly, the harmonization of competition law is not only an endeavor for EU member states to develop a unified system to ensure effective competition, but it is also a basic tool for countries on the path to EU membership.

This particular paper is focused on these important issues. It by directing its attention on the root of harmonization of EU competition law enforcement, presents the possibilities of competition enforcement mechanisms legal transfer for digital platforms from one jurisdiction to another based on a comparative method. Therefore, the first research object of the article is the normative and case law trends of the European Union, that ensure the enforcement of fair competition for digital platforms in the continuous process of digitization. On the other hand, the focus is shifted towards the prospects of harmonization of competition law enforcement tools for digital platforms in Georgia.

Keywords: *Competition, Europeanization, enforcement, digital platform, market power, European Union.*

1. Introduction

Comparative legal research has become an integral part of the modern legal agenda. Today, terms such as “transplantation of law”, “transposition of law”, “imitation”, “approximation”, “approximation”, “Europeanization” are often used to denote the accompanying processes of legal development. These and other definitions are seen as a cornerstone of the harmonization process and as a means of increasing interdependence at the regional or global level.³ Nonetheless, research or direct transfer of the normative base alone does not lead to successful legal harmonization. It is necessary to assess to what extent, limits and principles the process of legal “approximation” in the

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¹ *Vranken M.*, Fundamentals of European civil law. Blackstone Press, London, 1997, 14.

² The term is used to refer to a country that is not a member of the European Union. Citizens do not enjoy free movement within the EU according to Article 2(5) of EU Regulation 2016/399 (Schengen Code).

³ *Malinauskaitė J.*, Harmonisation of EU Competition Law Enforcement, Springer International Publishing AG, 2019, 11.

wake of European integration should be implemented, so that one normative context withstands the practical transformation of “travel” between jurisdictions.

The trends of recent years have aroused great interest in the direction of harmonization of competition enforcement mechanisms. The competition law enforcement model of the EU countries benefits from the largest export potential in the region. This has its own economic and legal explanation.

One of the factors is the need for globalization of competition law in the context of the transition to the digital age and platform economy.⁴ Today, business operates without any national borders. In this process, the society aspires to get full benefits from the digital era, for which it is important that the digital market is healthy, competitive, inclined to create innovative products and services. This aim can be assured through competition law and its enforcement mechanisms basing themselves on time-adjusted solutions for digitalization.

2. Digital Market Specifications and EU Competition Law Enforcement Challenges

The platform economy has revolutionized the behavioral patterns of consumer and business integration. Both the forms of communication and trade became different. Digitization has made many business activities viable in a short period of time, however, the idea that the Internet structure could eliminate market imperfections has been proven wrong.⁵ Moreover, technology has given the special market power to vendors such as Google, Apple, Facebook, Amazon,⁶ that based on the openings of the economics, leads to a violation of the allocative efficiency of the market, an increase in prices from monopolists, and results in less productivity and innovation.⁷

Notwithstanding the fact the European Commission and national agencies are quite actively engaged in the process of investigating digital platforms, the enforcement mechanisms cannot keep pace with the ever-changing technological markets for several reasons: 1. competition norms are characterized by “ex-post” action; 2. research and investigative activities are proceeding slowly; 3. the normative base is proscriptive, which emphasizes on its prohibitive nature and represents a short-term solution for the market; 4. the narrowness of the market and product definition makes it less possible to intervene in digital markets.⁸

⁴ The platform economy refers to trends in doing business related to digital platforms and development, and includes activities performed by “independent contractors”. See *Inozemtsev M.I., Sidorenko E.L., Khisamova Z.I.*, *The Platform Economy Designing a Supranational Legal Framework*, Palgrave Macmillan, 2022.

⁵ *Cavanagh E.*, *Antitrust Remedies Revisited*, *Oregon Law Review*, Vol. 84, 2015, 185, <<https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/4643/841cavanagh.pdf?sequence=1&isAllowed=y>> [09.02.2023].

⁶ *Geradina D., Katsifisd D.*, *Strengthening effective antitrust enforcement in digital platform markets*, *European Competition Journal* Vol. 18, No. 2, 2022, 357, <<https://doi.org/10.1080/17441056.2021.2002589>> [09.02.2023].

⁷ *Baker J.B.*, *The Antitrust Paradigm*, Harvard University Press, 2019, 26-31.

⁸ *Geradina D., Katsifisd D.*, *Strengthening Effective Antitrust Enforcement in Digital Platform Markets*, *European Competition Journal*, Vol. 18, No. 2, 2022, 359, <<https://doi.org/10.1080/17441056.2021.2002589>> [09.02.2023].

2.1. Digital Market Characteristics

To define the proper enforcement pattern for digital platforms, firstly, it is necessary to determine what distinguishes the digital market from the traditional market. According to the definition, a digital market is a market in which businesses are connected to end consumers through technology.⁹ It has several key economic characteristics, including economies of scale,¹⁰ network effect, economy of scope¹¹ and the versatility and magnitude of the data. Although other markets may have similar characteristics, their combination creates a unique and enduring market power.¹²

Economies of scale are a significant competitive advantage for an operating platform. If the fixed costs of developing the platform are high at the beginning, the cost of each subsequent new user of the digital product or service decreases.¹³ Upon building a certain customer base, digital businesses have the opportunity to eventually offer free services to the public. This makes it difficult for new market entrants to emerge and survive if the initial investment and services do not achieve identical or similar economies of scale.¹⁴

The network effect creates competition between different platforms, however, it is not competition in the market, it is competition for the market. When one platform reaches a threshold number of users and consolidates its position, only then will it give place to other platforms.¹⁵ The potential competitor in the market has to convince the customer of the advantages of migration. Loyal users are less willing to switch to another platform, except in cases of mass migration. In the absence of network effects, both innovation is lost, and the market becomes operated by dominants.¹⁶

Data is the driver of the digital platform. In seconds, the digital platform collects, analyzes, stores and transmits a lot of data that allows it to develop personalized offers. Ultimately this will be reflected in increased income. In digital markets access to a large and quality database is an advantage that makes it difficult for competitors to enter the market. Even if a newcomer manages to collect some data, the scope and quality will be much less.

⁹ Competition and Markets Authority, *The CMA's Digital Markets Strategy*, 2019, 5, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cm_digital_strategy_2019.pdf> [09.02.2023].

¹⁰ Economies of scale are achieved when more units of a good or service are produced at a lower input cost.

¹¹ Economies of scope allow companies to expand their product catalog.

¹² Stigler Committee on Digital Platforms, Policy brief summarising the main concerns of digital platforms and provides a viable path to address the identified concerns, Final Report, 2019, 34-35, <shorturl.at/gjsP0> [09.02.2023].

¹³ European Commission, Directorate-General for Competition, *Montjoye, Y., Schweitzer, H., Crémer, J.*, Competition policy for the digital era, Publications Office, 2019, 20 <<https://data.europa.eu/doi/10.2763/407537>> [09.02.2023].

¹⁴ Stigler Committee on Digital Platforms, Policy brief summarising the main concerns of digital platforms and provides a viable path to address the identified concerns, Final Report, 2019, 37 <shorturl.at/gjsP0> [09.02.2023].

¹⁵ *Ibid*, 39.

¹⁶ European Commission, Directorate-General for Competition, *Montjoye, Y., Schweitzer, H., Crémer, J.*, Competition policy for the digital era, Publications Office, 2019, 22-26 <<https://data.europa.eu/doi/10.2763/407537>> [09.02.2023].

The digital market is characterized by economies of scope, which increase efficiency by offering additional services based on their core business (collected data, trust, innovations based on various products).¹⁷ Thus it creates an invisible barrier to competitiveness for a new actor, as he has to offer customers not only a new product, but also an entire ecosystem around that product.¹⁸

The above-mentioned factors indicate that the digital market is highly prone to such distortions of competition as the acquisition of market power and high concentration. All this leads the market to “creative destruction”.¹⁹

2.2. Challenges of the European Commission in the direction of competition enforcement

2.2.1. ex-post or ex-ante?!

The biggest challenge for competition enforcement in the digital market is achieving the main goal of competition law, protecting and restoring competition for the benefit of consumers. Due to technological progression timely intervention in digitized markets is vital for the entry of new players into the market. According to EU law, the Commission only after the violation, i.e. “*ex-post*” appears on the scene, with rather long and tiring procedures. Consequently, it is easier for economic agents to gain market power and drive potential competitors out of the market.²⁰ As a result of using the economic characteristics listed in subsection 1.1 to its advantage, the operating platform avoids competitors and strengthens its positions in such a way that the implementation of anti-competitive actions at later stages loses its meaning.

Whether this is a legal defect is still a matter of discussion. As evidenced by the EU's relationship with Google and the immunity generated by powerful digital platforms, the fact stays that enforcement fines are no deterrent for digital platforms. Also, the Commission's Cease and desist type orders are ineffective, since they do not ensure the restoration of the competitor's violated rights, and it is very difficult to move in the direction of private enforcement in the conditions when the violation of competition is not established by public enforcement. Such order itself also allows the violator to keep the achieved benefit, i.e. it does not have a restitutive, i.e. “restorative” function in a broad sense.

Furthermore, if we look at Articles 101 and 102 of the “Treaty on the Functioning of the European Union” (hereinafter “TFEU”),²¹ EU law does not prohibit anti-competitive practices by non-dominant digital platforms. Therefore, if a digital platform in a non-dominant position engages in anti-competitive practices, thereby consolidating market power, the Commission is powerless with its mechanisms.²²

¹⁷ Ibid, 33.

¹⁸ Furman Report of the Digital Competition Expert Panel, Unlocking digital competition Report of the Digital Competition, 2019, Par. 1.106.

¹⁹ Panzar J.C., William J Baumol W.J., Willig R., Contestable markets: An Uprising in the Theory of Industry Structure, The American Economic View, Vol. 73, 1982, 491.

²⁰ Schweitzer H., Welker R., Competition Policy for the Digital Era, CPI Antitrust Chronicle, 2019, 3–4.

²¹ Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012, 0001 – 0390, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>> [09.02.2023].

²² Geradina D., Katsifisd D., Strengthening effective antitrust enforcement in digital platform markets, European Competition Journal, VoL. 18, No. 2, 2022, 370.

2.2.2. Narrow View of Enforcement

A major obstacle for competition agencies is the information asymmetry that exists between them and digital platforms. It is difficult to assess violations related to algorithm changes, especially in the absence of a technical team. This means that it is possible that a digital platform violates competition norms but fails to come under the watchful eye of the regulator due to inadequate knowledge or technical difficulties in obtaining evidence.

Noted scholars *Feldman* and *Lemli* have noted on US competition law enforcement for digital platforms that: regulators are “deliberately focusing on the trees, not the forests.”²³ According to them, the current structure of the competition law does not make it feasible to determine “alleged competitive harm” and “competitive harm in synergy”. They develop the idea that actions that may individually be legal compliant evaluated in a bundle may result in anticompetitive actions for a digital platform.²⁴

The above-mentioned challenge stems from the case law, setting a high burden of proof standard for the regulator, which is why they focus on one vertical, when cumulatively, the violation may exist in several different directions. Due to such a narrow view, the Commission's “Google Shopping” decision became the subject of intense criticism, since the Commission assessed only the direction of “Shopping”,²⁵ while the restriction of competition arising from Google's search engine also applied to other verticals. Due to the narrow vision, there was no restorative result for Google's competitors.

There are significant shortfalls in the perception of digital products/service. The decision of the European Court of Justice (hereinafter “CJEU”) of *Consten and Grunding* develops the idea that the more products are offered individually by producers, which are perceived differently in the eyes of the consumer, the more the effectiveness of competition law among such producers decreases.²⁶ If this statement is applied to the digital reality, technological advances, cost reductions and innovations related to differentiated goods can no longer ensure the ability of the consumer to substitute one product/service for a different one, since what matters is the external perception by the end-consumer, not the content of the product/service. Consumer perception is related to market power, which is a significant barrier to new market entrants.

In addition, enforcement patterns of the regulators, that heavily focus on price and volume become outdated for digital platforms, as most products in this industry may not have monetary value. In such market the competition outbursts more in the direction of innovation, since for a new entrant strengthening its market position is only feasible through an innovative product.²⁷

²³ *Lemley M. A., Feldman R.*, Atomistic Antitrust, William and Mary Law Review, Vol. 63, Issue 6, 2021, 1869.

²⁴ *Ibid*, 3.

²⁵ Case AT.39740, Google Search (Shopping), Commission Decision, [2017].

²⁶ Case C-56/64, *Consten and Grunding v Commission of the European Economic Community*, [1966], ECR 299, 343.

²⁷ *Shelanski H.A.*, Information, Innovation, and Competition Policy for the Internet, University of Pennsylvania Law Review 161, 2013, 1663.

2.2.3. Modernization of the Enforcement Mechanisms

Competition enforcement counts down the cases where the narrow view presented above has led the CJEU or the Commission by erroneously considering certain non-competitive actions as pro-competitive (false positive) or, on the contrary, as negative (false negative), especially when it comes to digitalization.²⁸ In such a case the market is forced to correct mistakes by enabling new competitors to enter because of excessive market power and increased prices. A well-known mechanism is to regulate similar issues with case law, however it proves to be ineffective to remove existing market conditions or barriers to entry.²⁹

Considering above, it is deemed more appropriate to equip EU competition law with more interventionist instruments. The framework for the practical application of “error-cost”³⁰ mechanism should be revised. This development also implies a review of the distribution of the burden of proof, especially in cases where a combination of several actions creates a violation of competition.³¹ According to *Schweitzer* and *Welker*, such actions rendering sufficient potential for harm should establish the restriction of competition by object until the platform meets its burden of proof.³²

2.2.4. Compliance with the Legal Setting

It is to be assessed whether the above-mentioned initiative complies with the TFEU and EU case law. Although, on the one hand, Articles 101 and 102 of the TFEU clearly outline presumption opportunities, the categorization of actions and placing the burden of proof entirely on the economic actor may dramatically change the current legal situation.³³

Pursuant to the Budapest Bank case, a violation by object of Article 101 of the TFEU may solely be established only if there is sufficient and reliable experience on its the restrictive effect of such actions on competition, otherwise an additional analysis is needed to assess the effects.³⁴ If categorization of non-competitive conduct by object is constituted for digital platforms and the burden of proof is shifted to them, both the practice and the legal norms need to be altered. The questions and implications of strict regulation must also be considered: 1. How foreseeable is the presumption of infringement by object and the reversal of the burden of proof? 2. To what extent will the principle of equality in entrepreneurial activity be ensured and how will the public legal dilemmas be overcome in

²⁸ Case C-230/16 *Coty Germany GmbH v Parfumerie Akzente GmbH* [2017] ECLI:EU:C:2017:941, See: *Kuenzler A.*, Competition law enforcement on digital markets—lessons from recent EU case law *Journal of Antitrust Enforcement*, 2019, 7, 249–278.

²⁹ *Baker J.B.*, *The Antitrust Paradigm*, Harvard University Press, 2019, 82-89.

³⁰ Error-cost analysis is a technique used to resolve ambiguous issues in competition law. With this method, the probability of error within the given information is reduced, the volume and type of the necessary information is determined.

³¹ *Geradina D., Katsifisd D.*, Strengthening effective antitrust enforcement in digital platform markets, *European Competition Journal*, Vol. 18, No. 2, 2022, 376.

³² *Schweitzer H., Welker R.*, Competition Policy for the Digital Era, *CPI Antitrust Chronicle*, 2019, 4

³³ *Colomo P.I.*, What Can Competition Law Achieve in Digital Markets? An Analysis of the Reforms Proposed, 2020, 12, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723188> [09.02.2023].

³⁴ Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, [2020], ECR, Par. 52.

the existing case laws? and 4. May similar legislative initiatives become a barrier to innovation and market development and what is the readiness index of national agencies and courts, in addition to the Commission, to properly harmonize and implement the aforementioned initiative in relation to digital platforms.

This skepticism exists despite the plausibility of the model proposed by *Geradina* and *Katsifisdis*.³⁵ However, the question stands to what extent the digital platform will be given the opportunity to defend against the presumption as well as how the evaluation and sharing of their arguments by the Commission on a practical level occurs. If we consider the active exporting areas of EU competition law to third countries, problems may arise in this context as well.

2.2.5. Restorative Measure – a Mechanism for Solving the Dilemma

The goal of modern competition law is to ensure effective competition.³⁶ Generally we face two types of competition enforcement measures: behavioral and structural. It is quite difficult to choose the correct punitive measures. Factually, the use of punitive injunctions and fines by the Commission and agencies against digital platforms, and antipathy to structural measures, does not ensure recovery for affected competitors.

Many authors recommend the introduction of restorative measures to safeguard the status quo existing before the violation.³⁷ For instance Vestager's report points to such restitution elements as granting access to data to competitors or compensating for informational asymmetry otherwise.³⁸ Stigler's report also considers it permissible to introduce an obligation to share data.³⁹

In fact, this direction may lead to the need for the creation of a new regulation, since there is an opinion that the current legal framework does not contain guidelines for the imposition, implementation or monitoring of restorative measures. However, Article 7(1) of Regulation 2003/1⁴⁰ is an important entry to overcome such a barrier. The broad interpretation of a norm makes it feasible to assert that effective enforcement also includes the possibility of eliminating anticompetitive effects in the digital market. However, the practice also goes beyond mere prohibitory orders. Practice also speaks for marching beyond mere prohibitory orders. For instance, the measure used by the

³⁵ *Geradina D., Katsifisd D.*, Strengthening effective antitrust enforcement in digital platform markets, *European Competition Journal* Vol. 18, No. 2, 2022, 380-381.

³⁶ *Adamia G.*, Constitutional Aspects of Economic Competition, *Journal of Constitutional Law* 2, 2020, 99 (in Georgian).

³⁷ *Ritter C.*, How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? *Journal of European Competition Law & Practice* 3, 2016, 12.

³⁸ European Commission, Directorate-General for Competition, *Montjoye, Y., Schweitzer, H., Crémer, J.*, Competition policy for the digital era, Publications Office, 2019, 67 <<https://data.europa.eu/doi/10.2763/407537>> [09.02.2023].

³⁹ Stigler Committee on Digital Platforms, Policy brief summarising the main concerns of digital platforms and provides a viable path to address the identified concerns, Final Report, 2019, 117-118, <shorturl.at/gjsP0> [09.02.2023].

⁴⁰ Council Regulation (EC) No 1/2003 on The Implementation of The Rules on Competition Laid Down in Articles 81 And 82 of the Treaty, 16/12/2002.

Commission in one predatory pricing decision, requiring the elimination of the consequences and the restoration of the original situation, was not considered by the court to be a violation, despite its restorative nature.⁴¹

Neither the fundamental principles of competition nor private law of the European Union prohibit the imposition of restorative measures in public enforcement. It is important to establish a test on the basis of which restitution mechanisms will be applied. The necessary components of this test are adequacy, effectiveness, and the need to eliminate the anti-competitive act and its consequences. Failure of any of the elements creates significant shortfalls both legally and in terms of market development.⁴² In doing so, attention should also be directed towards the regulatory norms for monitoring the assigned measures. It is reasonable to share the UK's model of monitoring carried out by sectoral regulators.⁴³

3. Exporting Potential of Competition Enforcement Policy Related to Digital Platforms in Georgia

It is no longer a fresh word that the EU's aspiration to build a common area of shared democracy, prosperity and stability has long gone beyond its formal borders.⁴⁴ In the aftermath of the agreement on Partnership and Cooperation between Georgia and the European Union concluded in 1996,⁴⁵ the Georgia-EU Association Agreement⁴⁶ set much more ambitious and concrete plans in the direction of competition law harmonization. Both parties undertook to encourage each other in achieving mutual benefits and increasing the level of integration, including the promotion of a single digital market in Eastern Partnership countries. Chapter 10 of the same agreement exerted special significance to free and unrestricted competition in trade relations.

Under the Article 204 (1) of the Association Agreement, Georgia undertook to develop comprehensive competition law framework with stated objectives. According to the second part of the same article, a reference was made to the body responsible for the effective enforcement of competition laws, equipped with relevant powers.

⁴¹ Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, [1991] ECR 286, Par. 155-157.

⁴² E.g., In the Google-Android case, Google was required to cease and desist from future anti-competitive actions with respect to its search engine, and as a restorative measure, Google undertook to display alternative search engines on their new devices, however, the old smartphones continued to operate with the same structure – a classic example of inefficiency. *Genai P.*, An update on Android for search providers in Europe, *The Keyword*, 2019.

⁴³ In the United Kingdom, the Competition and Markets Agency actively liaises with the Digital Markets Unit under the Data Protection Authority.

⁴⁴ *Margvelashvili T.*, Fostering E-commerce in the light of the Deep and Comprehensive Free Trade Area (DCFTA): A Case Study of Georgia, *Law Journal No. 1*, 2020, 148 (in Georgian).

⁴⁵ Agreement on Partnership and Cooperation, 22 April 1996.

⁴⁶ The European Union External Action, 'Eastern Partnership (EaP)', <https://eeas.europa.eu/diplomatic-network/eastern-partnership/419/eastern-partnership_en-> [09.02.2023], Article 28 and 29.

The harmonization of the enforcement mechanisms also stems from this obligation and aims at the transposition of the EU's competition legal agenda to Georgia.⁴⁷ Although the competition approximation process is evaluated positively, there are still some gaps in the direction of competition enforcement before full harmonization with the European Union.

3.1. Georgia's Digital Environment

Considering Georgia's soviet legacy, achievements in the field of information technologies (ICT), such as full internetization, the establishment of the Electronic Trade Facilitation System (TFS), are very welcome from the digital economy development point of view.

Digital platforms are considered one of the priority areas of economic growth. For instance, on March 16, 2018, the idea of the "Digital Silk Road" was presented and the country's aspiration to become "a regional leader and major player in e-commerce technologies" was highlighted.⁴⁸

In addition to the emergence of domestic major players in the digital economy, the society gained access to major international digital platforms as well.⁴⁹ Echoing the experience of the EU, anti-competitive actions on the part of international and local digital economic actors are not rare, which is why the National Competition Agency has a significant role, on the one hand, to actively monitor the market, to identify the facts of violations on the territory of Georgia, and, on the other hand, to develop effective mechanisms for responding to anti-competitive actions of digital platforms.

3.2. Role of the Competition Agency

Publicly available documentation of the Competition Agency of Georgia offers scant practice in terms of monitoring digital markets and detecting violations by the players. Nonetheless a very interesting market monitoring report is there for a review covering hotel-booking digital platforms.⁵⁰

The triggering point to launch monitoring in the mentioned market was the statement submitted on November 15, 2016, according to which "Booking.com B.V." may have established a violation of Article 7 of the Law of Georgia on Competition.⁵¹ According to the statement the violation was manifested in the so-called application of broad MFN.⁵² On January 9, 2017, the agency terminated the proceedings on the afore-mentioned statement provided that "Booking.com B.V." and its

⁴⁷ *Loladze T.*, International obligations and cooperation in the field of competition, the first international scientific-practical conference, Competition policy: modern trends and challenges, Collection of Works, 2017, 134 (in Georgian).

⁴⁸ Ministry of Finance, <<https://mof.ge/News/8357>> [02.09.2023].

⁴⁹ For instance: Vendoo.ge, Veli.ge, Extra.ge, Area.ge, edX-like ESx etc. They operate in different directions and create completely unique digital markets. Digital work platforms (Glovo, Wolt, Bolt, etc.) are also an interesting to be zoomed in on.

⁵⁰ Report of the Competition Agency of Georgia, 2019, <<https://admin.competition.ge/uploads/ba93e69448d1440f806dd21c5a19edd9.pdf>> [09.02.2023].

⁵¹ Law of Georgia "On Competition", Legislative Gazette, 08/05/2012

⁵² Report of the Competition Agency of Georgia, 2019, 5 <<https://admin.competition.ge/uploads/ba93e69448d1440f806dd21c5a19edd9.pdf>> [09.02.2023]. Most Favored Nation or parity principles.

subsidiary company would offer MFN conditions similar to EU countries to counterparties operating on the Georgian market.⁵³ This decision is interesting in several ways.

Firstly, the mentioned case is a pioneering case of investigating the possible facts of violation of competition on the part of digital platforms, which is why for the Competition Agency it should have been a platform for determining the criteria and basic enforcement measures specific to digital markets. It is to be welcomed that despite the termination of the case investigation, the market was still monitored, however, with incomplete results and at an interval of 3 years, which is quite a long time in the technological progress setting. Unanswered questions are whether the digital economic agent is perceived as a special case for Georgian competition law and whether more effort is needed in this direction.

The Competition Agency's decision contains extensive citations of Georgian and EU substantive law, as well as French and German practice in relation to Booking.com.⁵⁴ It is worth noting that the Agency refrains from giving further explanations. It relies on the EU case-law framework and, without examining the restrictive effects of competition, takes the position that a possible infringement does not meet the legal standard of reasonable doubt. It also states that the limitation is insignificant. Among the respondents, there are no direct competitors in the market for whom the restrictive effect might be more problematic.⁵⁵ In response to this criticism, it is stated that “the agency did not receive a complaint against Booking.com; Also, the agency was not applied by the existing and/or potential competitors of the said economic agent.”⁵⁶

Undoubtedly, this decision establishes an interesting practice in determining the narrow application of the MFN condition, but difficulties arise in justification the decision. Moreover, the monitoring report completed in 2019 actually contains a similar vision. In both instances, the effects that could have been caused by wide use in the period before 2017 remained outside the Agency's focus. It is also worth noting that the Agency is to a certain degree limited by the scope and evidence of the application/complaint, though, this does not limit it from sharing its own strong positions and information necessary to promote competition enforcement patterns to the public in their decisions.

3.3. Transposition of Competition Policy attributed to the Digital Platforms in Georgia

It is a positive obligation of the state to “create a normative environment that encourages and does not drive viable entities out of the market.”⁵⁷ The obligation to develop free competition is also

⁵³ The decision of the National Competition Agency on “Refusal to start an investigation based on the application of the Competition Law and Consumer Protection Center N01/1090 of November 15, 2016” 09/01/2017. <<https://admin.competition.ge/uploads/bab070eafe7a4cfb824dddeaaa0d1b81.pdf>> [09.02.2023].

⁵⁴ Ibid, 11-14.

⁵⁵ Ibid, 16.

⁵⁶ Ibid.

⁵⁷ Decision of the Constitutional Court of Georgia on case No. 1/1/655, LLC “SKS” against the Parliament of Georgia, April 18, 2019, paragraph 5.

among the constitutional obligations. The obligation to develop free competition is also among the constitutional obligations.⁵⁸

The Georgian Competition Agency actively applies EU law norms and precedent decisions in its justifications. Despite the fact that the definitions of the Commission or the CJEU do not have binding effect in Georgia, they need to be considered as a soft law as a subsequent factor of the competition law harmonization process.

Assessment should be directed to the extent to which the enforcement of the competition law in Georgia is at the stage where the emphasis should be placed on the new discussions and processes taking place in the EU. The answer is simple, but multifaceted. In order for Georgia to move forward on the path to the EU accession, it is essential for the country to absorb new trends and directions. Technological progress makes the move towards digital platforms irreversible, which is why Georgia is faced with the challenge to quickly go through the evolutionary steps of competition enforcement policy and meet prepared to the challenges of the digital economy.

Herewith, it should be noted that the discussions on enforcement of competition for digital platforms in Georgia must pass the economic and legal test. If Georgia takes the initiative to reverse the burden of proof in relation to digital platforms, or introduces ex-ante regulations, it is worth analyzing to what extent this is consistent with its economic development aspirations in terms of doing digital business. While the agency is still not restricted from requiring the other party to proactively plead their innocence,⁵⁹ balancing exercise is strongly advised in such legislative initiatives.

It also becomes completely logical to transfer part of the restorative measures for the digital platforms discussed above to the Georgian legal space, based on the fact that the Georgian competition law is nourished with the normative and precedential basis of the competition of the EU. Nevertheless, it is recommended to evaluate the economic and political importance of the application of such measures.

Last but not least, it should be said the most active role for such legal transplants “transplants” to succeed in Georgia is assigned to the Competition Agency. It has the power to set limits, frameworks, and precedents to prevent anti-competitive practices in the digital marketplace. Accordingly, more courage and a higher degree of reasoning in the decisions, instructions and orders are desirable. While Courts also have a significant function, since the appeal of the result of public enforcement or the precedents of private enforcement are not so common in Georgia,⁶⁰ they have less opportunity to contribute to the deployment competition enforcement processes within digital platforms.

⁵⁸ Decision of the Constitutional Court of Georgia in case #2/11/747, “Giant Security” LLC and “Security Company Tigonis” LLC against the Parliament of Georgia and the Minister of Internal Affairs of Georgia, December 14, 2018, paragraph 2.

⁵⁹ Order of the Chairman of the Competition Agency No. 40 of October 28, 2020 “On approval of the procedure and procedure for investigating the case,” 04/11/2020.

⁶⁰ *Adamia G.*, Prospects of private enforcement of competition law on the example of abuse of a dominant position in Georgia, *Georgian-German Journal of Comparative Law*, No. 10, 2020, 22-42 (in Georgian).

4. Conclusion

There is a growing consensus in the public that current EU competition law requires revision to address the challenges of competition enforcement arising from the digital economy. Despite several important decisions and results achieved through fines and bans, such mechanisms are perceived as less effective in the fight against the elimination of market power and the restoration of competition.

In this article, several proposals have been made from the EU's perspective aiming at tackling the dilemmas related to digital platforms. The first initiative is ex-ante legislative proposals. This analysis made it clear that solving the main problematic issues through this mechanism is not easy. There is a great risk that digital platforms will exploit legal loopholes to their advantage. The rationale behind the second proposal consisted in presumption of restricting competition by object for certain violations. Despite the great support from researchers, the compatibility of such a mechanism with the EU legislation induces questions and does not exclude the possibility of inaccuracies in regulation in the conditions of technological development. There is a tangible initiative on the part of the execution in the direction of introducing restorative measures. Following this, it is worth noting that there is no need to implement fundamental legislative changes, since the utilization of such a mechanism in its broad sense and according to recent practice is consistent with the EU's normative and case-law framework.

An important part of the paper was devoted to the analysis of readiness and existing practices in the field of enforcement of competition on digital markets in Georgia. The position was strengthened that it is necessary for the country, in the conditions of the growing digital economy, to abide with the ongoing discussions and legislative initiatives in the EU. Despite the fact that every new normative act or definition of the European Union does not automatically becomes effective on the territory of Georgia, the obligations of harmonization such processes are unavoidable by virtue of accession pathway.

To prepare Georgia's competition enforcement policy for tackling with the anti-competitive actions of powerful international or local digital economic agents, it is important to outline the problems to be solved and next possible steps. In doing so, the legal transportation of the EU law shall be carried out considering national characteristics. The initiatives proposed by this article are largely consistent with the Georgian legislative framework, which means that there is no need for fundamental normative changes. Nonetheless, as already mentioned, the competition agency and the court have an active role in the proper management of the processes. Bold steps on their part, clarifications made in accordance with the EU law are the main factors in the implementation of the healthy competition policy.

Bibliography:

1. Law of Georgia "On Competition", Legislative Gazette, 08/05/2012.
2. Order of the Chairman of the Competition Agency No. 40 of October 28, 2020 "On approval of the procedure and procedure for investigating the case," 04/11/2020.
3. The decision of the Constitutional Court of Georgia in the case No. 1/1/655, "SKS" LLC against the Parliament of Georgia, April 18, 2019;

4. Decision of the Constitutional Court of Georgia in case N2/11/747, LLC “Giganti Security” and LLC “Security Company Tigonis” against the Parliament of Georgia and the Minister of Internal Affairs of Georgia, December 14, 2018;
5. *Adamia G.*, Constitutional Aspects of Economic Competition, *Journal of Constitutional Law* 2, 2020, 99 (in Georgian).
6. *Adamia G.*, Prospects of private enforcement of competition law on the example of abuse of a dominant position in Georgia, *Georgian-German Journal of Comparative Law*, No. 10, 2020, 22-42 (in Georgian).
7. *Baker J.B.*, *The Antitrust Paradigm*, Harvard University Press, 2019, 26-31, 82-89.
8. *Cavanagh E.*, Antitrust Remedies Revisited, *Oregon Law Review* 84, 2015, 185, <<https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/4643/841cavanagh.pdf?sequence=1&isAllowed=y>> [09.02.2023].
9. *Colomo P.I.*, What Can Competition Law Achieve in Digital Markets? An Analysis of the Reforms Proposed, 2020, 12, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723188> [09.02.2023].
10. Competition and Markets Authority, *The CMA’s Digital Markets Strategy*, 2019, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf> [09.02.2023].
11. European Commission, Directorate-General for Competition, *Montjoye Y., Schweitzer H., Crémer J.*, *Competition Policy for the Digital Era*, Publications Office, 2019, 20, 22-26, 33, 67 <<https://data.europa.eu/doi/10.2763/407537>> [09.02.2023].
12. Furman Report of the Digital Competition Expert Panel, *Unlocking digital competition Report of the Digital Competition*, 2019, paragraph 1.106.
13. *Genai P.*, An update on Android for search providers in Europe, *The Keyword*, 2019.
14. *Geradina D., Katsifisd D.*, Strengthening effective antitrust enforcement in digital platform markets, *European Competition Journal*, Vol. 18, No. 2, 2022, 370, 376, 380-381, 357, 359.
15. *Inozemtsev M. I., Sidorenko E.L Khisamova Z. I.*, *The Platform Economy Designing a Supranational Legal Framework*, Palgrave Macmillan, 2022.
16. *Kuenzler A.*, Competition Law Enforcement on Digital Markets – Lessons from Recent EU Case Law *Journal of Antitrust Enforcement*, 2019, Vol. 7, 249–278.
17. *Lemley M. A., Feldman R.*, Atomistic Antitrust, *William and Mary Law Review*, Vol. 63, Issue 6, 2021, 1869.
18. *Loladze T.*, International Commitments and Cooperation in the Field of Competition, *First International Scientific-Practical Conference, Competition Policy: Modern Trends and Challenges, Proceedings*, 2017, 148 (in Georgian).
19. *Malinauskaitė J.*, *Harmonisation of EU Competition Law Enforcement*, Springer International Publishing AG, 2019, 11.
20. *Margvelashvili T.*, Fostering E-commerce in the light of the Deep and Comprehensive Free Trade Area (DCFTA): A Case Study of Georgia, *Law Journal* No. 1, 2020, 148 (in Georgian).
21. *Panzar J.C., William J Baumol W.J., Willig R.*, Contestable markets: An Uprising in the Theory of Industry Structure, *The American Economic View* 73, 1982, 491.
22. Report of the Competition Agency of Georgia, 2019, <<https://admin.competition.ge/uploads/ba93e69448d1440f806dd21c5a19edd9.pdf>> [09.02.2023].

23. *Ritter C.*, How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? *Journal of European Competition Law & Practice* 3, 2016, 12.
24. *Schweitzer H., Welker R.*, Competition Policy for the Digital Era, *CPI Antitrust Chronicle*, 2019, 3-4.
25. *Shelanski H.A.*, Information, Innovation, and Competition Policy for the Internet, *University of Pennsylvania Law Review* 161, 2013, 1663.
26. Stigler Committee on Digital Platforms, Policy brief summarising the main concerns of digital platforms and provides a viable path to address the identified concerns, Final Report, 2019, 34-35, 37 <shorturl.at/gjsP0> [09.02.2023].
27. The decision of the State Competition Agency “Refusal to start an investigation based on the application of the Competition Authority and Consumer Protection Center N01/1090 of November 15, 2016” 09/01/2017. <<https://admin.competition.ge/uploads/bab070eafe7a4cfb824dddeaaa0d1b81.pdf>> [09.02.2023].
28. Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390, <<https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=celex%3A12012E%2FTXT>> [09.02.2023].
29. *Vranken M.*, Fundamentals of European civil law. Blackstone Press, London, 1997, 14.
30. Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 20/04/2010.
31. Council Regulation (EC) No 1/2003 on The Implementation of The Rules on Competition Laid Down in Articles 81 And 82 of the Treaty, 16/12/2002;
32. Case C-56/64, *Consten and Grundig v Commission of the European Economic Community*, [1966], ECR 299.
33. Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, [1991], ECR 286.
34. Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941).
35. Case AT.39740, *Google Search (Shopping)*, Commission Decision, [2017].
36. Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, [2020].