УДК 330.341.1:339.923: 338.242.2: 346.5

IMPACT OF DIGITALIZATION ON THE LEGAL REGIMES OF THE PROTECTION OF COMPETITION ON THE MARKET

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Innovative means may affect the competition in different way. The digital market has the tendency to become multi sided. Thus the companies which have important market power may, by object or by fact, conduct market practices which infringe the competition regulations. Dominant companies today cannot escape from scrutinizing of competition authority. Since the 90's many cases and investigations have involved digital companies.

A precise definition of digital markets is difficult, given that most industries today are to a larger or smaller extent digitalized, and practically all firms make at least some use of digital tools to carry out their business.

Digitalisation has initiated profound structural changes that affect virtually all areas of life. Companies, consumers, politics, and society as a whole face new challenges in light of the ever growing use of digital services.

National competition authorities should pay increasing attention to finding appropriate remedies for fair market & consumer protection. The legal debate on the best regulatory approach has often been framed in terms of different forms of regulation expressed by the dichotomies of regulatory diversity versus regulatory harmonisation or regulatory competition versus regulatory cooperation.

Online trade in goods and services (referred as e-commerce) can be divided into three basic fields. A distinction needs to be made in terms of trade between companies (business-to-business – B2B), between companies and consumers (business-to-consumer– B2C), and between consumers (consumer-to-consumer – C2C). The trading "places" are named "online trading platforms" or "online market places".

There are several legal regimes that can be used in competition cases, which depends on the shares on relevant market – whether abuse of dominant position or anticompetitive agreements & restraints can be applied.

Today, it hardly comes into question that competition in the field of e-commerce is specific as compared to 'ordinary' competition. Both various competition authorities and the weight of scholarly publications recognise that

the spread of electronic commerce has influenced the way in which competition law had normally operated.

However, along with positive aspects, several issues of concern have also arisen in connection with the development of e-commerce. In the EU, perhaps the major of such issues is the applicability of the EU rules on competition to anticompetitive conduct of e-undertakings.

In the EU, no large-scale amendments of competition law are currently underway in connection with e-commerce. In fact, e-commerce has only recently become a matter of interest for the European Commission. On 6 May 2015 the Commission, pursuant to Article 17 of the Regulation No. 1/2003, has launched a sector inquiry into e-commerce [1].

In accordance with the regulation, a sector inquiry is basically a broad request for specific information to be provided by the undertakings operated within the relevant market. Usually, more than a thousand companies receive specific questionnaires to facilitate the provision of information. Once submitted, this information is studied and analysed by the Commission, which then comes up with a final report on the matter.

As per the present e-commerce sector inquiry, the stated aim of this sector inquiry is to allow the Commission to gather data on the functioning of e-commerce markets so as to identify possible restrictions or distortions of competition, in particular in relation to cross-border online trade [1].

Similarly to previous sector inquiries (e.g. in the pharmaceutical and energy sectors), the e-commerce sector inquiry could lead to the opening of investigations into competition law infringements by individual companies acting in the field of e-commerce. According to Bird & Bird's estimate, however, it seems unlikely that the findings of this inquiry will prompt legislative changes in short term. The Commission is rather expected to first try to test whether the current rules, which have so far stood the challenge of time, are right for the fast-moving digital society [2]. Thus the eventual final report of the Commission on e-commerce is more likely to set out a roadmap for adaptation of the existing law to the e-competition conditions rather than proposing something radically new.

The e-commerce sector inquiry is carried out within the framework of the Digital Single Market Strategy of the Commission. Broadly, the Digital Single Market Strategy has three main objectives. These are, first, to achieve better access for consumers and businesses to digital goods and services across Europe, second, to create the right conditions and a level playing field for digital networks and innovative services to flourish, and, finally, to maximise the growth potential of the digital economy [3].

Thus, e-commerce is presently at the top of the European Commission's agenda, and recent developments suggest it will remain a priority. In addition to

that, in several EU Member States the domestic competition authorities have already taken an active interest in the issue [4]. Internally, there have been launched ongoing investigations, most notably, in the field of electronic retail (Amazon.com) and booking (booking.com).

The issue in both cases (in fact, there are several cases for each being carried out in several Member States in once) is the so called most favoured nation clauses in the contracts between Amazon and its suppliers and Booking and hotels. These clauses oblige the supplier or, as applicable, the hotels to offer to Amazon/Booking at least the same favourable competitive conditions, as to other their contractors. At the very least, however not particularly less competition restrictive, is the obligation to inform Amazon of any contracts having offering more favourable condition to the supplier's contractor that are currently offered to the Amazon.

Nevertheless, in both Amazon and booking.com investigations the Commission only generally coordinates the relevant activities of the internal competition authorities, without involving itself directly in the matter. Therefore, it is unlikely these investigations will have a significant immediate bearing upon the further development of the EU competition law. Although, undoubtedly, the investigations of the domestic competition authorities will supply the Commission with the initial practical information on the application of existing competition law rules to e-commerce undertaking.

After the first attempts on precise investigation of the market Commission adopted its first decision concerning on-line platforms.

On 17 December 2018, the European Commission fined Guess €39.8 million for anti-competitive practices in its European selective distribution system [5]. The Commission found that Guess had imposed various restrictions, including restrictions on cross-border sales and online advertising, which enabled the US clothing company to maintain artificially high retail prices, particularly in Central and Eastern Europe. By cooperating with the investigation and acknowledging that its conduct was anti-competitive, Guess obtained a 50% reduction in the fine.

The Commission initiated proceedings against Guess in June 2017, following the e-commerce sector inquiry. It found that Guess's distribution agreements unlawfully prevented authorised retailers from:

1. selling to customers outside the authorised retailers' allocated territories;
2. cross-selling among authorised wholesalers and retailers;
3. independently determining the retail prices of Guess products;
4. selling online without a prior specific authorisation from Guess. Guess retained full discretion for this authorisation, which was not based on any specified quality criteria; and

5. using Guess brand names and trademarks for online search advertising (particularly in Google AdWords).

The decision also represents a new stage in the Commission's thinking on online search advertising restrictions. In categorising Guess's AdWords restriction as restrictive of competition 'by object', the decision suggests that it may be difficult for brand owners to justify such restrictions under the EU competition rules. The procedural aspects of the decision are also significant.

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