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Competition law enforcement in Ukraine: challenges from online giants
Competition law

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Abstract

Competition law, economics and policy are facing regulatory metamorphosis due to the rise of digital economy. That induces the competition bodies to revise their approaches, both regulatory and enforcement, towards digital markets and the internet-giants i.e. online-platforms.

The US, China and EU jurisdictions have announced and partially introduced systemic changes to their competition legal frameworks to keep pace with technological developments. The Antimonopoly Committee of Ukraine is following the principle of “three monkeys”, it sees no online-platforms, hears no online-platforms, speaks no online-platforms, so nothing has been undertaken or even announced.

The paper is twofold. Firstly, it analyses the economic background and features of digital economy, the leverage of market power and establishment of new monopolies. The first part of the paper shows why the available instruments of competition enforcement are ineffective, why the economic nature of digital platforms necessitates the need for reform of the competition enforcement and policy.

The second part of the paper shows why the current Ukrainian competition legal framework is (in)capable for challenges from online giants. Regarding the need for recalibration of regulatory approaches in digital markets, Ukraine faces the dilemma of proper combination of *ex ante* and *ex post* measures.

Keywords:

Digitalization, online platform, market definition, gatekeeper, competition enforcement.

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I. Introduction

The digital revolution refers to a critical change of the technological and social environment under digitalization. Usually, entrepreneurs are the first, who adapt to changes, while the state bodies are much less flexible. In the competitive coordinates the current economies are situated within the gap between these two milestones: business actors have already readjusted their business processes in order not only to meet the digital challenges, but to make it profitable, while competition agencies at best have just realized the risks of unregulated digitalization. Antimonopoly Committee of Ukraine (hereinafter – AMCU) has not reached even this milestone yet. The AMCU's list of priorities for 2022 focuses on markets of electricity, natural gas, freight transportation, financial services, construction materials and no mention of digital challenges, while Ukraine is a regional leader of an offshore software development³, which exports of IT services increased more than 4 times for 2015-2021 and has reached \$ 6.8 billion⁴.

The paper consists of 5 sections, two of which provide introduction and conclusion. The second section describes the changes of competition environment under digitalization. The third one – downsides of conventional tools of antitrust analysis to meet the digital challenges to competition law enforcement both in Ukraine and worldwide. The fourth chapter provides a legal analysis of Ukrainian competition law and its capability to meet the challenges of tech giants. The article calls for the necessity to recalibrate regulatory provisions, adopt a new Methodology of market definition and choose a proper combination of of *ex ante* and *ex post* measures towards tech giants.

II. Digital coordinates of competition

In recent years, many socio-humanitarian studies have acquired a technical flavor. Such terms as fin-tech, leg-tech, etc. have become a part of the lexicon of both academics and practitioners due to digitalization that is taking seven-mile steps across the planet.

The Gartner Glossary defines digitalization as the use of digital technologies to change a business model and provide new revenue and value-producing opportunity⁵. It is not so much about the production of digital technologies or digital content, but mostly about the changes that are taking place in other fields of business due to the use of digital technologies. The list of top-10 digitally-disrupted sectors determined by the OECD is presented in the table 1.

Table 1
Top-10 digitally-disrupted sectors

SPA code	Name
49	Land transport services and transport services via pipelines
55	Accommodation services
56	Food and Beverage serving services
58	Publishing services
59	Motion picture, video and television programme production services, sound recording and music publishing
K	Financial and insurance services
73	Advertising and market research services

³ AMCU, ‘AMCU has approved the Priorities 2022’ (AMCU, 2 February 2022) <<https://amcu.gov.ua/news/amku-zatverdiv-prioriteti-na-2022-rik>> accessed 18 April 2022 [In Ukrainian]

⁴ Richard Geerligs, ‘Global Offshore Developer Rates by Country in 2021’ (DAXX, 2 July 2021) <<https://www.daxx.com/blog/development-trends/average-rates-offshore-developers>> accessed 18 April 2022

⁵ Gartner Glossary <<https://www.gartner.com/en/information-technology/glossary/digitalization>> accessed 18 April 2022.

SPA code	Name
79	Travel agency, tour operator and other reservation services
P	Education services
92	Gambling and betting services

Source: OECD Guidelines for Supply-Use Tables for the Digital Economy⁶

In the land transport services sector, the most remarkable changes have affected the taxi market, where the introduction of digital technologies has actually pushed conventional taxi companies out of the market, ensuring the dominance of taxi-apps' operators like Uber, Lyft, Bolt, Uklon and others. For example, the share of the whole set of conventional taxi services in the Ukrainian market takes 11%, while the market leader Uber controls 51% of the market⁷.

In the accommodation services sector, competition has changed significantly with the introduction of AirBnB. For the first 4 years it accumulated the same amount of supply, for which the Hilton hotel chain spent more than 90 years⁸. Distribution of other digital services like booking.com, tripadvisor, etc. is another way to increase competition in the sector. It is based on the effect of reducing information asymmetry on prices, assortment, quality characteristics of services (including consumer feedback). Now this information is available to consumers at one-stop shop, simplifying comparison of commercial offers and ensuring the rational choice. It is a guarantee of concentration of consumer demand at the relevant online platforms, granting them enough market power to win vertical competition with hotels or other accommodators.

Publishing services and advertising markets belong to different sectors of the economy, but nowadays they are intermediated by the same e-platforms – Google, Facebook, etc. These platforms are the digital core of multisided markets that attracts both publishers and advertisers through: a) an effective digital mechanism of intermediation that significantly reduces their transaction costs compared to direct contracting or non-digital intermediation, b) this service tying to free placement / access of informational content. The latter is a key resource of the platforms that generates a network effect and leads to the demand's lock-in and gatekeeping the value-chain.

The analysis of competition changes in digitally-disrupted sectors may go on and on, but we would like to mention at least one more – the retail sector. It is absent in the table 1, as it is digitally-benefited rather than digitally-disrupted. The retail sector was one of the first to start active modification under digitalization. As a result, today the share of e-commerce in the structure of the global retail sales is about 20%⁹, while geographical boundaries of retail markets have expanded from local till global. For example, in 2019, Ukrainians bought online goods worth \$3 billion, 600 million of which – from foreign retailers, primarily – Chinese e-platform AliExpress (about 60% of cross-border turnover)¹⁰. It looks like pure positive effect on competition, but this is not the case. Firstly, global competition in the e-retail is available only for a limited list of goods – consumer electronics, clothing, cosmetics and bijouterie, etc., while nondurable goods are not covered due to the relatively long lag and high transport costs. Secondly, e-commerce, like other types of digital intermediation, is under network effect, so the supply remains very concentrated. For example, in Ukraine, the national leader of online sales – Rozetka (the company owns several popular marketplaces in the country – Rozetka, Prom.ua, Bigl.ua, Crafta, Shafa) controls more than 70% of the B2C segment of domestic e-retail market. Consideration of this fact additionally to the rapid growth of digitalization in the global (according to Statista the share of online sales in the total retail sales

⁶OECD, *Guidelines for Supply-Use Tables for the Digital Economy* (SDD/CSSP/WPNA(2019)1/REV1) p.13

⁷'Bolt Company has assessed the volume of the shadow taxi market in Ukraine' (*Economichna Pravda*, 9 July 2019) <<https://www.epravda.com.ua/news/2019/07/9/649486/>> accessed 18 April 2022

⁸ James Pennington, 'The numbers that make China the world's largest sharing economy' (*World Economic Forum*, 25 June 2017) <<https://www.weforum.org/agenda/2017/06/china-sharing-economy-in-numbers/>> accessed 18 April 2022

⁹ Daniela Coppola, 'E-commerce as percentage of total retail sales worldwide from 2015 to 2025' (*Statista*, 3 February 2022) <<https://www.statista.com/statistics/534123/e-commerce-share-of-retail-sales-worldwide/>> accessed 21 April 2022

¹⁰ Svitlana Ugniva, 'Ukrainians buy online many cheap goods, starting with cosmetics and up to smartphones, becoming the second nation in terms of buying from the giant marketplace AliExpress' (*NV Business*, 28 December 2019) <<https://biz.nv.ua/ukr/tech/pokupki-na-aliexpress-ukrajinci-na-drugomu-misci-v-sviti-za-tempami-rostu-onlayn-zamovlen-novini-ukrajini-50061740.html>> accessed 21 April 2022. [In Ukrainian]

worldwide is expected to increase up to 24.5% in 2025¹¹) and Ukrainian retail (the share of online sales in the total retail sales in Ukraine increased from 3.3% to 8.8% in 2017- 2020, and in 2025 it is expected at 11%¹²) makes the risks to competition obvious.

Thus, the above mentioned shows that digitalization has made an ambiguous effect on competition in the markets. In some markets it has intensified competition, in others it has weakened the latter by blocking the most profitable (in terms of transaction costs) value chains and creating within them latent monopolists. The latter are known as gatekeepers. They effectively exploit their market power, while remaining invisible to competition agencies due to inefficiency of conventional tools of competition policy.

III. Digital challenges to competition law enforcement

Why the market power of gatekeepers is invisible to current competition law? The fact is that conventional competition policy and the relevant competition law are based on the ‘Structure-Conduct-Performance’ paradigm (hereinafter – SCP paradigm). Only a small range of competitive practices may be a priori qualified as a violation of competition law. Most of them have a competitive or an anti-competitive effect, depending on the initial market position of the economic entity (group of economic entities) that conduct them. If a small firm (3% of a market) overcharges, it hits itself faster than consumers. The same done by a big firm (50% or 90% of a market) brings it a profit. If small firms (total market share is less than 10%) agree to jointly purchase or sell of goods, such concerted practice is likely to result in a level playing field in terms of vertical competition. The same done by dominants provides leverage of their market power on the adjacent markets and abuse of the increased market power. Therefore, before interpreting the competitive behaviour of firms in the market, it is necessary to define the boundaries of such markets, their capacity and structure. However, this is where the problem arises.

Conventional methods of market definition are based either on the analysis of consumer price reactions or on the assessment of substitutability of goods. The use of the former is limited toward transactional online platforms, where prices are often set differently (for some platforms as a complex function of turnover, for others as royalties for the use of trademarks, etc.), complicating not only their comparison, but also their perception by counterparties. For non-transactional online platforms, especially those that use the zero-price model, the application of price response analysis for market defining is impossible.

Assessment of substitutability of goods is the universal method, which can be very useful in investigating of the markets, where online platforms work. However, the devil is in the details. For example, the relevant methodology in Ukraine contains 5 criteria of goods substitutability: (1) similarity of functionality, consumer properties, way of consumption, etc.; (2) similarity of physical, technical, operational properties and characteristics, quality indicators, etc.; (3) common group of consumers; (4) no significant difference in prices; (5) the ability of producers to supply new goods in order to replace existing one¹³. This list does not include the criterion of difference in transaction costs that is a source of competitive advantage of online platforms over other intermediaries. Let us compare the intermediation of the dominant e-marketplace and non-digital trader. The methodology asks for comparison of margins of each type of intermediation to merge / split compared activities within a single / different markets. It does not compare transaction costs, which these intermediators occur trading via different channels to obtain the same effect. This is the same as comparing the price per 1 kg of goods with the price per 1 ton of its substitute. Thus, the AMCU does not see the differences between the channels, intermediated digitally and conventionally, which are obvious to their participants. Evidence of this is its decision from 2018 on the authorization of the merger of the two largest online retailers, which guaranteed the new entity control over more than 70% of e-commerce in Ukraine, while its share in the total retail sales was about 6%¹⁴.

No less difficult challenge to market definition is the need to consider network effects. If the difference in transaction costs creates a competitive advantage of online platforms, the network effect takes them root. Contracting through a popular online platform is a guarantee of access to a significant and growing scope of counterparties. This means that measuring the capacity of a multisided market just by the sales on the one side of

¹¹ Daniela Coppola, ‘E-commerce as percentage of total retail sales worldwide from 2015 to 2025’ (*Statista*, 3 February 2022) <<https://www.statista.com/statistics/534123/e-commerce-share-of-retail-sales-worldwide/>> accessed 21 April 2022

¹² ‘Last year e-commerce market reached \$4 billion’ (*Dnipropetrovsk Investment Agency*, 12 July 2021) <<http://dia.dp.gov.ua/minulogo-roku-rinok-e-commerce-dosyag-4-milyardiv/>> accessed 21 April 2022. [In Ukrainian]

¹³ Antimonopoly Committee of Ukraine (AMCU) Methodology Applied to Determine Monopoly (Dominant) Market Position of Economic Entities [2002], 49-r, art.5. [In Ukrainian]

¹⁴ Antimonopoly Committee of Ukraine (AMCU), Decision #446-p (2018)

the core platform is insufficient to assess its market power. The analysis should include the number of active users of the online platform on each side and the size of network effects multiplier. Unfortunately, economics has not developed the effective tool of latter's estimating yet. There is a lack of statistical data for its evaluation. However, it does not mean that competition agencies should abandon market definition, while this idea circulates in the antitrust community¹⁵. Today there is no adequate alternative to the SCP paradigm, so it is better to focus on developing methods of market definition in the coordinates of digitalization.

Nevertheless, it should be considered that not every network effect leads to a lock-in, as well as zero-pricing is not always a source of market power. Sometimes it is a way to overcome it. We could see the latter at the edge of 20th and 21st century in the case of leverage of the market power obtained by Microsoft Corporation in the market of operating systems to the market of Internet browsers¹⁶. The monopoly of Microsoft Explorer in the latter was overcome in the 2000-s thanks to free distribution of alternative Internet browsers.

There was another case in Ukrainian practice. The players of Ukrainian market of mobile communication introduced the tariff plan "0 in the network" (free communication of subscribers within one network). It provided the consumers' lock-in within the dominant networks, while the abandonment of the practice of zero-pricing (as a way of self-preferencing) has become a competitive advantage of the smallest of Ukrainian mobile operators and the prerequisite for its growth¹⁷. The introduction of free national roaming during the war in Ukraine in the spring of 2022, although being a necessary means to maintain communication in the war zone, was a testimony to the positive contribution of multihoming to effective competition and the growth of public welfare.

The practice of multihoming in competition law does not directly described, as it almost cannot be implemented in the markets of non-network goods dominated in the economy of the 20 century, where modern competition law comes from. Its antonym – exclusive dealing – is more common in competition law and practice. It refers to vertical restraint to competition, which may be prohibited just in case of application by the dominants¹⁸. Under Ukrainian competition law certain type of exclusive dealing is even a subject to block exemptions and is not a subject to notification to the AMCU¹⁹. It brings us back to the open challenge of market definition, making the exclusive dealing practices, which quite common in digital intermediation markets²⁰, unregulated.

Thus, no matter what competitive practice to undertake – from overcharge to market power leverage, we rely on various downsides of current instruments of competition enforcement, which significantly reduce the effectiveness of their application.

IV. Ukrainian competition law and online platforms

While the competition bodies across the world are intensively engaged in discussion and/or adoption of new competition rules within the area of digital economy, the Antimonopoly Committee of Ukraine (AMCU) - the primary state body responsible for the protection of economic competition²¹ - has remained silent on the need to recalibrate the national competition legal framework. The latest amendment to the basic Law of Ukraine «On competition» took place in June 2021 and had not embraced specific concepts or enforcement tools directly addressing the peculiarities of the business models of digital platforms.

¹⁵ Jacques Cremer and others, 'Competition policy for the digital era'. (European Commission Final Report), B-1049 Brussels, 2019, 3-4

¹⁶ US District Court for the District of Columbia *United States of America v. Microsoft Corporation* (1998) 98-1232

¹⁷ Yevheniia Pidhaina, "Big Three" in numbers: how mobile operators increase turnovers and dive in losses' (*Mind!*, 25 May 2020) <<https://mind.ua/publications/20211288-velika-trijka-v-cifrah-yak-mobilni-operatori-zbilshuyut-oborot-i-pimayut-uzbitki>> accessed 21 April 2022 [In Ukrainian]

¹⁸ Law of Ukraine on Protection of Economic Competition 2001, 2210-III, art. 13 [In Ukrainian]

¹⁹ Antimonopoly Committee of Ukraine (AMCU) Typical requirements for vertical concerted practices of economic entities in the field of supply and consumption of goods [2017]10-rp, art.2 [In Ukrainian]

²⁰ Cristian Chica, Kenneth Chuk, and Jorge Tamayo, *Exclusive Dealing and Entry by Competing Two-Sided Platforms* Harvard Business School Working Paper 21-092; Elias Carroni, Leonardo Madio and Shiva Shekhar, *Superstars in two-sided markets: exclusives or not?* CESifo Working Paper No. 7535; Jet Deng and Ken Dai, 'Antitrust Enforcement Against Digital Platforms in China: Anatomy of "Choose One from Two"' (*WWL*, 12 November 2020) <<https://whoswholegal.com/features/antitrust-enforcement-against-digital-platforms-in-china-anatomy-of-choose-one-from-two>> accessed 21 April 2022

²¹ Law of Ukraine on the Antimonopoly Committee of Ukraine 1992, 3659-XII [In Ukrainian]

In order to “tame the tech giants” foreign jurisdictions have taken different approaches, mostly implementing *ex ante* regulation and empowering competition authorities with additional functions. Enforcement of *ex post* rules are often too slow to sanction a wrongdoing and to avert the negative implications. Moreover, abuse of dominant position is preceded by market definition and the latter poses certain difficulties, caused by complicity of multisided markets and sluggishness of ‘old-school’ market definition terminology. At the same time, many data-related behavioral requirements need to be specified in advance and controlled *ex post*²².

One of the directions to recalibrate the competition law towards the challenges of digital economy is to apply an asymmetric approach for defining rights and obligations of market players, i.e. to designate a gatekeeper status. The ways of assessment to falling within a gatekeeper status vary across jurisdictions.

The Digital Markets Act applies both quantitative and qualitative criteria for a gatekeeper status designation. The latter (a significant impact in the internal market; an important gateway for business users to reach end users; an entrenched and durable position in its operations) are presumed if quantitative thresholds are met (annual Union turnover²³ of 57.5 billion in each of the last three financial years, at least 45 million monthly active end users and at least 10 000 yearly active business users established in the Union in the last financial year).

Andriychuk praises such mechanism as it ‘appears to be the most suitable for inter-platform competition, as it imposes a range of market limitations on the gatekeepers while allowing their potential competitors to scale up without being subject to DMA obligations’²⁴.

The DMA sets the obligation for a tech giant to notify the Commission that it ‘meets all the thresholds within two months after those thresholds are satisfied and provide it with the relevant information...’²⁵, failure to do so leads to an entitlement of a Commission ‘to designate that undertaking as a gatekeeper based on information available to the Commission’²⁶.

The discussion of the United Kingdom’s new pro-competition regime for digital markets²⁷ has focused on the need for a range of quantitative and qualitative evidence to support a designation assessment of Strategic Market Status by a competition authority.

The Germany’s Competition Act puts forward the rights of the Bundeskartellamt to issue a decision declaring that an undertaking which is active to a significant extent on multi-sided markets is of paramount significance for competition across markets²⁸. The next step the Bundeskartellamt may take is to prohibit specified conduct/practices listed in the Act²⁹. The decision to determine Google’s paramount significance for competition across markets³⁰ has been a milestone in a new era of competition law enforcement on digital markets and it poses research interest on the Bundeskartellamt reasoning of market power in general search engine services, search-based advertising, services with high user numbers, assessment of the various neighboring and vertically related digital activities.

The Law of Ukraine on Protection of Economic Competition embraces symmetric approach to undertakings, no further guidelines or methodology have been published regarding competition on digital markets. The only possible opportunity to ‘tame a tech giant’ is to determine the abuse of the dominant position.

²² Peter Georg Picht, Heiko Richter, *EU Digital Regulation 2022: Data Desiderata*, GRUR Int. 2022, 395

²³ As stated in a version of the Digital Markets Act dated 13 April 2022

²⁴ Andriychuk, Oles (2021) *Shaping the new modality of the digital markets : the impact of the DSA/DMA proposals on inter-platform competition*. World Competition: Law and Economic Review, 44 (3). 261–286

²⁵ Art. 3.3 As stated in a version of the Digital Markets Act dated 13 April 2022

²⁶ Art. 3.3 As stated in a version of the Digital Markets Act dated 13 April 2022

²⁷ A new pro-competition regime for digital markets - government response to consultation (Updated 6 May 2022) <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation#part-3-strategic-market-status>

²⁸ Art. 19a.1 Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p. 2506)

²⁹ Art. 19a.2 Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p. 2506)

³⁰ Fallbericht vom 5. Januar 2022: Google - Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 30.12.2021)

<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B7-61-21.html>

The latter imposes a standard economic analysis mechanism: the market share threshold of 35% is established as well as the criterion of absence of significant competition on the relevant market.

The law defines this criterion as: “does not experience significant competition due to limited access of other entities to purchase raw materials, commodities and sales of goods, the presence of barriers to market access for other entities, the availability of benefits or other circumstances”³¹.

The “barriers to market access for other entities, the availability of benefits or other circumstances’ imply defining a relevant market by the competition authority based on the relevant methodology. However, for the last decade there is a debate whether market definition was any longer required when assessing potentially anti-competitive conduct, and a market definition being a redundant step in the assessment process, given the availability of quantitative techniques capable of directly estimating the effects of such conduct³².

Nevertheless, under Ukrainian legislation there’s a requirement to define a relevant market, and it goes along the CJEU position that ‘the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined’³³.

Criteria for finding dominance are detailed in the Methodology on definition of monopoly (dominant) position of undertakings on the market³⁴ (the Dominance Methodology), approved by the Order of the AMC dated 5 March 2002 No. 49-p.

The AMCU has used this Methodology for digital markets only once to approve the merger of Rozetka group and EVO group in 2018.³⁵ The AMCU decision defined the relevant market as “the national market for the provision of services for the promotion of goods (works, services) on the Internet through online platforms (Internet platforms)”.³⁶ The AMCU decision stated that:

“this market is open to entry/exit of new entrants and there are no significant regulatory barriers to entry, in particular the ability to enter the market of new competitors depends mainly on their financial capabilities and the success of marketing strategy. Competitors do not have exclusive rights to innovation, intellectual property, logistical support, etc. In addition, there are no regulatory barriers to market entry, for example, new market participants do not need to obtain licenses, permits, etc.”³⁷

In 2017 a draft methodology on market definition was announced and has not yet been approved.³⁸ The draft methodology suggests *inter alia* an analysis of the substitutability of goods, application of the SSNIP and the method of indicators of price elasticity of demand. However, it lacks terminological consistency beyond its methodological deficiencies. The SSNIP and HMT application to digital undertakings has received different

³¹ Law of Ukraine on Protection of Economic Competition (PEC) 2001, 2210-III, art 12.

³² Rhonda L Smith, ‘Market Definition: Going, going, gone? Developments in the United States’ (2010) 18(2) Competition and Consumer Law Journal 110.

³³ Case T-62/98 - Volkswagen v Commission

³⁴ Antimonopoly Committee of Ukraine, Order 49-p of 5 March 2002 on approval Methodology Applied to Determine Monopoly (Dominant) Market Position of Economic Entities 2002.

³⁵ AMCU, Decision 446-p (2018).

As the result of concentration, a number of Ukrainian marketplaces came under one umbrella: Prom.ua, Bigl.ua (online platforms for retail trade in consumer goods), Kabanchik.ua (an online service for finding contractors for ordering household chores and services as well as small commercial tasks), Crafta.ua (an online platform for the sale of handmade products as well as collectible and rare products), Shafa.ua (an online platform for the sale of women’s and children’s goods, which are usually second-hand), Zakupki.prom.ua (an online platform for participation in public procurement, a participant in the public e-procurement system Prozorro.sales and the open system of commercial procurement RIALTO) and On time (an online service for exchanging, signing and storing any documents).

³⁶ Ibid part 67.

³⁷ Antimonopoly Committee of Ukraine, ‘Annual Report’ 2018.

³⁸ AMCU Methodology on Market Definition (Draft), Act 2017 URL: <https://amcu.gov.ua/news/proekt-metodiki-viznachennya-rinku>

opinions, while OECD has noted that the HMT could still be used when defining markets for transaction platform businesses and that the existence of a zero price on one side of the platform does not prevent the use of the HMT³⁹, Smith and Duke argue that application of the HMT to a transaction platform is less straightforward than for a traditional single sided business because of no single price to both sets of customers to which to apply a SSNIP and the effect of a SSNIP on the demand of one set of customers may be exacerbated by indirect network effects.⁴⁰

Mandrescu argues that the challenges posed by online platforms primarily concern changes to the practical application that do not exceed the boundaries of current practice.⁴¹ Smith and Duke conclude that there's no 'need to alter the traditional approach to market definition, that is, starting from the product of the business to which the conduct at issue relates. On the contrary, that approach seems likely to assist in "cutting through" the additional complexity which seems to arise when market definition is based on customer groups'⁴².

Nevertheless, the authors believe that neither the old and nor the new methodology accounts for the current market tendencies; for example, the accent remains on products, not services, and on the price dimensions of competition. The legal definition of "commodity" entails any object of economic turnover, including products, works, services, documents supporting obligations and rights (including securities). In fact, AMCU practice shows that instead of studying the commodity/product substitutability of services (in fuel, pharmacy retail) of intermediaries, the substitutability of commodities (gasoline and medicines respectively) has been examined.⁴³ Neither methodology has embraced limitations to substitution due to switching costs, though they are vital for competition enforcement in digital markets.

For determining the abuse of dominance, Ukrainian competition law takes both a formalistic approach (e.g. "setting prices or other conditions for the purchase or sale of goods that could not be set in the face of significant competition in the market", "creating barriers to market access (exit from the market) or elimination of sellers, buyers and other business entities from the market") and an effects-based approach (e.g. "restrictions on production, markets or technical development that have caused or may cause damage to other entities, buyers, sellers").⁴⁴

Based on foreign competition authorities' cases and academic research, the authors believe an effects-based approach should be a determinant in handling anti-competitive behavior in the digital economy.⁴⁵

However, practices constituting an abuse of dominance that are listed in Art. 13 of the Law of Ukraine on Protection of Economic Competition may be well suited to online platforms, for example:

"setting prices or other conditions for the purchase or sale of goods that could not be set in the face of significant competition in the market" - for self-preferencing of platform's products and services, imposing retail most-favored-nation clauses (dictating that the seller may not offer better terms and conditions on its own website or other platforms);

³⁹ Rethinking Antitrust Tools for Multi-Sided Platforms (OECD 2018) <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>

⁴⁰ Smith, R. L., & Duke, A. (2020). Platform businesses and market definition. *European Competition Journal*, 1–25. doi:10.1080/17441056.2020.1851

⁴¹ Daniel Mandrescu, 'Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)' (2018) 41 (3) *World Competition: Law and Economics Review*.

⁴² Smith, R. L., & Duke, A. (2020). Platform businesses and market definition. *European Competition Journal*, 1–25. doi:10.1080/17441056.2020.1851

⁴³ AMCU, Decision 680-p *AMCU v. Novo Nordisk A/C, Novo Nordisk Health Care AG, BaDM, BaDM-B, Apteka ZI, Ganza, Farmadix, Medfarm* (2020), 33–49; AMCU, Decision 329-p *AMCU v. WOG, OKKO-Retail, Socar Petroleum* (2019), 6–11.

⁴⁴ PEC, art 2.

⁴⁵ European Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses', 2005; OECD, 'Abuse of Dominance in Digital Markets', 2020, 42; Payal Malik and others, 'Legal Treatment of Abuse of Dominance in Indian Competition Law: Adopting an Effects-Based Approach' (2019) 54(2) *Review of Industrial Organization*.

“creating barriers to market access (exit from the market) or elimination of sellers, buyers and other business entities from the market” – for creating obstacles to users’ multihoming. Yet the cornerstone of adapting current legislation remains the same – market definition methodology.

Setting aside the difficulties of merger control and vertical competition due to the word count, the authors would raise an issue of equipping the AMCU with the enhanced capabilities in digital markets. The AMCU is awaited to recalibrate the regulatory approach to anticompetitive conduct of tech giants and to strengthen its investigative and enforcement functions, and both goals may be accomplished with the involvement of dedicated task-force. The foreign jurisdictions have mostly established additional departments for digital markets or hiring additional digital specialists (for example, the Japan Fair Trade Commission has been reinforced with the Office of Policy Planning and Research for Digital Markets⁴⁶, the UK authorities have established the Digital Markets Unit and are discussing its powers⁴⁷). Beyond this there’s a need for competition authority to cooperate with other public bodies to ensure a consistent approach on digital markets. The draft DMA text presupposes the establishment the High-Level Group for the DMA composed of: (a) body of European telecoms regulators, (b) European Data Protection Supervisor and European Data Protection Board, (c) European Competition Network, (d) Consumer Protection Cooperation Network, and (e) European Regulatory Group of Audiovisual Media Regulators⁴⁸

In Ukraine there’s the National Commission for the State Regulation of Communications and Informatization (NCSRC) that may effectively involve in constant monitoring of quantitative criteria once set by the AMCU.

However, the main question is still open whether the AMCU should initiate recalibration of competition legal framework towards *ex ante* or *ex post* measures, or both in combination. From the one point of view that is underpinned by the acknowledged ‘tendency of a ‘Europeanization’ of competition law with the spreading of commitments on implementation of competition *acquis* in the Ukrainian legal order⁴⁹, Ukraine should implement the DMA framework and start negotiations with the EU on the amendments to the EU-Ukraine association agreement to set the rules for data communication. From the other point of view, the AMCU may follow the track of procedure for notifying powerful operators of the digital economy of their dominant status, based on defining the boundaries of the markets of information and intermediary services, and then set the special obligations for intermediary, regulatory, and information-spreading functions of platforms, alongside the Code of conduct.

VI. Conclusion

The Ukrainian competition legal framework should undoubtedly be amended to either Europeanization direction, implementing DMA cornerstones, or reforming the *ex post* mechanism of economic competition protection. Both of these variants imply the necessity to develop a new methodology of market definition open to the challenges of multisided contracting, zero-pricing and network effects, as well as to other complications driven by the economy’s digitalization.

The digital arsenal of the AMCU should be enhanced and the involvement of the NCSRC seems to be a viable solution because of the latter’s expertise and experience in digital markets.

Due to the “Brussels effect” the DMA would provide its effect on Ukrainian legal competition framework and foster the need for the amendments to the EU-Ukraine Association agreement to enhance the cooperation in digital regulation and data exchange.

⁴⁶ Japan Fair Trade Commission Organization chart https://www.jftc.go.jp/en/about_jftc/JFTCOrganizationChart22.04.pdf (accessed 30th April 2022)

⁴⁷ Ibid 27

⁴⁸ Art. 31d as stated in a version of the Digital Markets Act dated 13 April 2022

⁴⁹ Kseniia Smyrnova, Natalia Fokina, The ‘Europeanization’ of Competition Law of Ukraine, *GRUR International*, Volume 71, Issue 1, January 2022