American Journal of Interdisciplinary Research and Development
ISSN Online: 2771-8948
Website: www.ajird.journalspark.org
Volume 28, May - 2024

DEVELOPMENT AND CHANGES IN COMPETITION LAW IN THE DIGITAL WORLD: SHIFTS IN THE LEGISLATIONS OF UZBEKISTAN AND THE EUROPEAN UNION

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Abstract
Competition law metrics generally understand a market as a specific good or service provided by a supplier and received by a customer/consumer. This understanding was based on the economic rules of supply and demand and could be found classical in all market economy jurisdictions. This understanding changed with the advent of digital products and the digital economy. The digital economy is now commonly understood as a new quality of economic life driven by the massive growth of digitalization and other technologies. And in this new economic reality, the need to apply new competition rules is questioned. Thus, the economic indicators relied upon by legal and economics science so far have lost their meaning in assessing the boundaries of the digital market.

Keywords: competition law, digitalization, online platforms (marketplaces), market aggregators, market boundary, free goods and services etc.

Introduction

Competition law metrics generally understand a market as a particular good or service provided by a supplier and received by a customer/consumer. This understanding was based on the economic rules of supply and demand and could be found classical in all market economy jurisdictions. This understanding changed with the advent of digital products and the digital economy as such. The digital economy is now commonly understood as a new quality of economic life driven by the massive growth of digitalization and other technologies. In this new economic reality, the need to apply new rules of competition is questioned. Thus, the economic indicators that have been relied upon by legal and economic science so far have lost their meaning in assessing the digital market boundaries.

In this article, I will discuss digitalization issues ranging from the transition of economic focus to competition law issues. The main thesis of the article is devoted to discussing competition law from the perspective of the global economy and digital market concept and its challenges respectively. In addition, it will assess how the current competition law braces risks in digital markets, taking into account the changes in Uzbek and European Union legislation.

CHALLENGES THAT DIGITAL MARKETS POSE TO COMPETITION AUTHORITIES

Providing free products or services is a common business practice in the digital economy (market). For example, Internet search, social networks, messengers, and many other applications are provided to users for free. From competition law perspective, when services are provided for free, it means there does not exist a market ("where there is no price, there is no market as well"). The reason is because practically impossible to identify interchangeable or substitutable goods in markets where there are not prices for the products or services, as such using economic standards and methods (such as analysis of pricing and price dynamics, calculation of the cross-elasticity of demand for price), without taking into account the price is meaningless in the determination of relevant product market and their substitutes. The price based "hypothetical monopolist test" also cannot be performed at prices close to or at zero prices. In other words, the practice of the multisided platform business model in digital markets shows that price based/economic standards and methods (AEC test, SSNIP test etc.) developed for one-sided markets cannot be applied to describe the interdependence of prices in the markets served by multisided Internet platforms.

However, the free services and goods in the digital marketplace does not mean they are free at all. The argument that where there is no price is arguable, since consumers can pay the price in other forms. For example, in the form of agreeing to the constant media ads, or waiving privacy, or through providing your data, i.e., which all means that platforms charge customers not by quantitative measures like money but using the data as a kind of currency for payment and monetizing this data. This usual practice is also named as a freemium monetization strategy, the essence of which is to offer to use a digital product in its basic version (software, service, apps) for free, while charging for the same product, but with additional features or for additional services and products that are interconnected with the basic product.

Thus, the presence or absence of price means the choice of a certain business model, but does not necessarily serve as a criterion for evaluating competition between different products. If the product or service is substitutable, business models are likely to compete with each other. But even if the content or service is less substitutable in the eyes of consumers, the companies providing it can still be considered as competitors. However, the problems occur where the economic standards and measures became avoidable in the determination of relevant market and hereby dominant undertakings in the market. Below we will discuss some fundamental challenges that competition authorities face in applying competition rules in digital markets.

DETERMINATION OF THE RELEVANT MARKET BOUNDARIES

B. Khodjaev, H. Rajapov noted market definition as a key problem in the digital economy "the problem of defining a digital market is to avoid exclusive focus on price as a dimension

of competition. In digital markets, price may not be the only or even the most important aspect of competition. This is most pronounced when consumers can access digital platforms at zero cost."

As noted by the authors, the definition of product market boundaries is an important and indispensable element of market analysis from the perspective of competition law. Currently, it is impossible to define a commodity market and analyze the state of competition on it without defining the commodity and geographical boundaries of the market. Subsequently, the quality of the competitive analysis study and the objectivity of establishing the dominant position of an economic entity directly depends on the definition of market boundaries.

In order to analyze the competitiveness in the commodity market, first of all it is necessary to establish the product boundaries of the market, because it is necessary to determine the product itself or a group of products which are substitutable. It is impossible to correctly determine the geographical boundaries of the market, the composition of its participants and their shares without determining the product boundaries. Traditional analysis of the boundaries of the commodity market involves a procedure to identify:

a) A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use (product boundaries) ;

b) The boundaries of the territory in which buyers acquire or have the economic, technical or other opportunity to acquire a product and have no such opportunity outside of it (geographical boundaries) .

At the same time, in the phase of economic transformation, competition authorities and market participants are faced with the issue of assessing the specifics of the development of new technologies and their impact on the boundaries of the commodity market. Moreover, regarding the geographical boundaries of the market, it is worth noting that with the development of online services and digital platforms, it is difficult or even almost impossible to delineate the boundaries of the market by any territory due to price estimations since the services are at zero or extremely low cost.

ANALYSIS OF THE NATIONAL LEGISLATION

As a result of the development of Uzbekistan's economy and the reduction of state intervention in the economy, competition law, which is considered the driver of the economy, is improving. A good example of such progress in Uzbekistan can be seen in the recently adopted new version of the Competition Law and the Decree of the President of the Republic of Uzbekistan, "On Measures for the Effective Organization of State Management in the Sphere of Competition Development and Consumer Protection within the Framework of Administrative Reforms." The updated law and the Presidential Decree defined the priority areas of the Competition Committee's activities to ensure a competitive environment in the commodity, financial, and digital markets. Following the Law of the

Republic of Uzbekistan, "On Competition," the Committee developed the Regulation draft that defines the procedure and conditions for determining and recognizing a digital platform operator's dominant position and superior bargaining power. The draft also defines the procedure for determining the actions of a digital platform operator that lead to the restriction of competition. According to paragraph 2 of the draft Regulation, the set of the following basic platform services provided by the digital platform operator:

- Internet trading platforms (marketplaces),
- aggregators of the use of third party services,
- online search engine,
- online maps,
- news aggregators,
- online transmission or exchange of video (including TV shows and movies) and music content,
- platforms for the use or sharing of files in various formats,
- online social networking sites,
- aggregators of online services of the self-employed (freelancers),
- online collective funding (crowdfunding) platforms,
- online payment systems,
- cryptoasset exchange platforms,
- online interpersonal communication without the use of telephone or cell phone numbers, including video calling services,
- cloud computing services,
- operating systems,
- mobile application stores,
- online advertising services,
- web browsers,
- virtual assistants, one of the platform's services based on artificial intelligence.

The draft Regulation sets the following steps to analyze the competitive situation in the basic digital platform services market:

a) determining the timeframe of the market research;
b) determining the product boundaries of the market;
d) determining the structure of market participants;
e) determining the dominant position and dominant bargaining power of the digital platform operator;
g) determining actions leading to restriction of competition of the digital platform operator recognized as having a dominant position and superior bargaining power.

The sequence of this research starts with determining timeframe of the market research: ex-post or ex-ante. The Committee specifies timeframe of the research depending on market characteristics and data availability.

Supposedly, the research is limited to the study of the features of the market of the main digital platform services under consideration, formed by the time of the research. In that case, a retrospective (ex-post) analysis of the state of competition in the market of digital platforms shall be carried out. If the research requires considering future market conditions for the core digital platform services under review, a prospective (ex-ante) analysis of the competition in the core digital platform market is conducted. This analysis aims to assess the state of competition in the market before any changes occur, taking into account potential changes in the future.

The Regulator sets fixed thresholds for determining the digital market's dominant position, excluding doubts about zero-price services. According to the Regulation, a dominant position in the digital market is determined if "an operator with one and/or more of the following indicators shall be deemed to have a dominant position as a result of providing essential digital platform services with network efficiency:

- the ability to have a significant impact on the domestic market;
- the ability to meet business users and end-users on the digital platform;
- to have a strong position or may have such a position in the near future.

Numerically the upper-mentioned dominance is determined:

- if for the last calendar year the operator's income from the main digital platform services provided (used) on the territory of the Republic of Uzbekistan exceeds more than one hundred thousand times of the basic calculation amount;
- if the number of active end-users of the operator for the last calendar year exceeds 50 thousand people;
- if the average monthly number of active end-users of the operator is more than 50 thousand in each of the last three calendar years.

The mentioned criteria exhale the Committee’s fear on determining dominance, thus providing set of prohibitions for market operators:

☐ disallowing end users to easily remove pre-installed applications or change default settings in operating systems, virtual assistants or web browsers that point to the digital platform's own products and services, nor provide basic service selection screens;

☐ restricting end users from installing third-party applications or app stores that utilize or interact with the digital platform;

☐ limiting the ability of end users to easily unsubscribe from basic digital platform services;

☐ unreasonably diminishing the quality and level of privacy and security of data, advertising content, ease of switching providers or any other measure that determines the customer value of the digital platform;

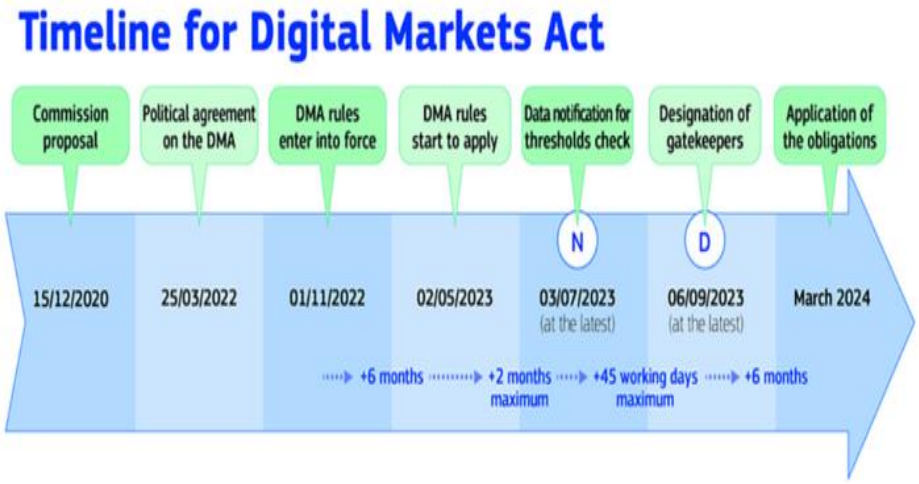
☐ limiting the ability of third parties to interact with the digital platform's proprietary services;

☐ disallowing companies that advertise on the digital platform to freely utilize the digital platform's performance measurement tools and use the information necessary to independently monitor the advertising they place;

☐ limiting the access to their data when competing with their business users on their platforms;

☐ limiting the ability of business users to promote their offers and contract with customers outside the digital platform and many other prohibitions.

CHANGES IN THE EU LEGISLATION



https://digital-markets-act.ec.europa.eu/about-dma_en

The concern about the growing power of digital companies has led the EU to the idea of expanding regulation in digital markets. To achieve this, the TFEU has broadened digital markets, which led to the adoption of the Digital Markets Act (DMA). So, what is the Digital Markets Act and why is it important? The Digital Markets Act is one of the first comprehensive regulatory tools to control the gatekeeper power of the largest digital companies. This law aims to increase competition and fairness in digital markets. To achieve it, the DMA identifies "gatekeepers," which are large digital platforms offering core platform services such as online search engines, app stores, or messenger services, and defines specific criteria for them. These gatekeepers must comply with the obligations and prohibitions listed in the DMA. It complements EU competition rules, which still apply in full. The DMA contends the following obligations on gatekeepers:

The new rules will establish obligations for gatekeepers, "do's" and "don'ts" they must comply with in their daily operations.	
Examples of the "do's": gatekeepers will for example have to: • allow third parties to inter-operate with the gatekeeper's own services in certain specific situations; • allow their business users to access the data that they generate in their use of the gatekeeper's platform; • provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper; • allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform.	**Example of the "don'ts": gatekeepers will for example no longer:** • treat services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform; • prevent consumers from linking up to businesses outside their platforms; • prevent users from un-installing any pre-installed software or app if they wish so; • track end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted.

The Commission will carry out market inquiries to guarantee that the evolving digital markets agree with the new gatekeeper regulations. This approach allows the Commission to categorize businesses as gatekeepers, adjust the responsibilities of gatekeepers in real-time as needed, and formulate solutions to tackle widespread breaches of the rules outlined in the DMA.

What are the consequences of not complying with the regulations? Companies may face fines of up to 10% of their total worldwide annual turnover or up to 20% in case of repeated violations. Additionally, they may have to pay periodic penalty payments of up to 5% of their average daily turnover. If gatekeepers systematically violate the DMA obligations, they may face additional remedies after a market investigation. These remedies will be proportionate to the offense committed. Non-financial remedies such as behavioral and structural remedies, e.g., the divestiture of (parts of) a business, may be imposed if necessary and as a last-resort option.

ECJ RULINGS

EU Commission considering the problematic and ambiguous nature of the definition of market boundaries in the digital markets, in majority of its cases has been taking a broad definition of the market as global markets. This kind of judgement can be seen in the 2014 decision of the Commission in the Facebook/ WhatsApp merger case. Although the Commission has parted the approach on identifying the 'Consumer communications services' from 'social networking services' in current case. In the Judgement, the Commission asserted the nature and the intended use of services under the subject and left open the market definition since there are blurred delineation between the serviced. The Commission opined: "Respondents to the market investigation generally consider a social networking service which is offered on several platforms or on several operating systems to be a single service. From a supply side perspective, while the development of a social networking service for a particular platform or operating system requires time and resources, these do not appear to be significant enough to support the existence of separate markets."

The Commission concluded:

"For the purposes of the present case, the exact boundaries of the market for social networking services, in particular whether consumer communications apps such as Facebook Messenger and WhatsApp fall within the scope of such a potential market can be left open, since the Transaction would not give rise to serious doubts as to its compatibility with the internal market under any alternative market definition."

From the judgment of the Commission, it is conclusive that the Commission was not able to apply any economic based tests on defining digital market. Rather from the conclusion of the Commission, the attention has been paid to functionalities and intended use of the platforms regarding the demand side substitutability. This reaffirms that competition authorities should shift from economic tests for qualitative and functional aspects of the digital services in digital markets.

CONCLUSION

The examination of competition law in digital markets is a complex and evolving subject, especially in the context of rapid technological advancements and the global nature of digital commerce. The EU and Uzbekistan have made significant strides in adopting regulations tailored to address the unique challenges posed by digital markets. These regulations aim to ensure fair competition, prevent monopolistic practices, and protect consumer interests in an increasingly digital economy.

However, while the adoption of these regulations marks a significant step towards better governance of digital markets, it is crucial to acknowledge that the practical effectiveness of such regulations remains to be fully observed and assessed. The dynamic nature of digital markets, characterized by rapid innovation and evolving business models, poses unique

challenges to regulators. As such, the implementation and enforcement of these regulations require continuous adaptation and vigilance.

Moreover, the effectiveness of competition law in digital markets depends not only on the robustness of the regulations themselves but also on the ability of regulatory authorities to enforce them effectively. This involves staying abreast of technological advancements, understanding the digital business ecosystem, and being able to identify and address new forms of anti-competitive behavior that may arise.

In conclusion, while the EU and Uzbekistan have taken commendable steps in adopting regulations to address competition in digital markets, the real test lies in the practical application and enforcement of these laws. The effectiveness of these regulations will become more evident over time, with ongoing practice and observation. It is essential for regulators to remain flexible and responsive to the rapidly changing digital landscape, ensuring that competition law remains relevant and effective in promoting fair and open digital markets.

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