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## Global Forum on Competition

### ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Serbia

- Session II -

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This contribution is submitted by Serbia under Session II of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: [oe.cd/dmkt](https://oe.cd/dmkt).

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## *Abuse of dominance in digital markets*

### **- Contribution from Serbia<sup>1</sup> –**

#### **1. Introduction**

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

2. It is thus important that Commission for Protection of Competition of the Republic of Serbia (hereafter, Commission) take into account the growing significance of digital economy as an ongoing concern for competition policy and generally be flexible enough to address the challenges posed by digital markets. It is considered that Serbian competition law is already equipped to adapt such challenges and to apply a consumer welfare standard, without extensive changes to its guiding principles and goals.

#### **2. Digital markets in Serbia**

3. The rapid rise of global digital induced digital transformation of the national economy and put it high on agenda of the Republic of Serbia. Being heavily prioritized by the government over the past 10 years, digitisation is considered as very important for sustainable and dynamic economic development and improvement of domestic macro competitiveness. As an EU candidate country, Serbia has a key goal of joining the EU and its single (digital) market and introducing the national law in line with EU framework.

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

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<sup>1</sup> Prepared by Ivana Rakić, PhD (Commission for Protection of Competition of the Republic of Serbia, Institute of Comparative Law in Belgrade, Serbia). The usual disclaimer applies.

### 3. Abuses in the digital age

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

6. Still, competition between firms in digital markets occurs on several dimensions – it is not solely about low prices. Therefore, market power assessment in this context requires analysing different criteria which need sometimes to go beyond prices, i.e. non-price effects that contribute to consumer detriment. Based on the EU legal legacy in the field of protection of competition, the Law on Protection of Competition<sup>2</sup> stipulates that market power of undertakings shall be determined in relation to the numerous relevant economic and other indicators (Art. 15).

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

### 4. Case Eki Transfers/Tenfore

8. The Commission has dealt with only one case of abuses in digital markets in the last 10 years. It is the case Eki Transfers/Tenfore, concerning the issue of collective dominance and abuse on the market of cross-border fast money transfers.<sup>3</sup> It is expected that these cases become one of the priorities in future years.

9. In this case, the Commission found that Eki Transfers and Tenfore, companies that were Western Union’s agents in Serbia, have abused their joint dominant position on the market of cross-border fast money transfer between natural persons, without opening an account, in the territory of the Republic of Serbia, by contracting restrictions in agreements on cooperation concluded with 24 out of 32 commercial banks in Serbia, with the possibility of automatic renewal, which form a network of resellers contracts, as follows:

- provisions on the obligations in terms of "loyalty" and "exclusivity", as during and after the expiry or in the event of termination of the contract concluded by the two companies and

<sup>2</sup> Law on Protection of Competition (“Official Gazette of the RS”, 51/09, 95/13, hereafter, the Law), <http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/07/Law-on-Protection-of-Competition2.pdf>.

<sup>3</sup> See decision of 12 January 2010, number 5/0-02-10/10-1, <http://www.kzk.gov.rs/kzk/wp-content/uploads/2012/03/Resenje-EKI-Transfers-12.01.2010.pdf>.

- provisions which establish the obligation to pay a sum of money for violations of the "obligation in terms of loyalty" in the course of duration or after the event of termination of the contract, in contracts concluded with "Eki Transfers".

10. By these restrictive provisions, the Western Union representatives prevented and restricted competition, that is, limited the market and the technical development to the detriment of consumers. The consequence was complete closure of the market for Western Union competitors because these provisions created significant additional entry barriers in the Serbian market for fast international money transfers, thus restricting the choice available to users of this service. The Commission found that contracts had a network effect which prevented access to potential competitors. The market of fast money transfers had already considerable regulatory and other barriers, including the lack of possibility for economies of scope for the new entrants.

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

12. At the time of this decision, but before the amendments to the Law in 2013, the Law stipulated that two or more undertakings were deemed to have a dominant position on the market if no significant competition exists between them, and if their aggregate market share attains or exceeds 50 per cent (collective dominance). In 2013, this rule is removed from the Law. In assessing collective dominance in this concrete case, the Commission took into account market share of undertakings whose dominant position was being determined, obstacles to entering the relevant market, the power of their potential competitors, and the possible dominant position of the buyer. The Commission concluded that because, in case of collective dominance, undertakings act as one participant, dominant position is determined in a manner analogous to the determination of the dominant position of one undertaking.

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