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ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Romania

- Session II -

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More documentation related to this discussion can be found at: oe.cd/dmkt.

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Abuse of dominance in digital markets

- Contribution from Romania –

1. With the rapid advancement of technology in recent years, the online environment has become an essential sector in the economy, both at national, regional and global levels. Therefore, the competition authorities need to be aware of multiple competition risks in this new digital markets.
2. For any competition authority, the main objective is to prevent or limit possible negative effects of anti-competitive actions. That's why we have to understand how online businesses work, the competitive mechanisms in the digital market and to try to evaluate the risks of competition infringement.
3. Therefore, research and analysis of this area must be a priority and in the context of the strong development of the digitized economy and e-commerce in Romania, RCC considers necessary to strengthen the expertise in this field.
4. In 2017, Romanian Competition Council (RCC) conducted an internal study regarding online platforms in Romania and their impact on competition and markets. The study aimed to identify the main platforms active in Romanian markets and how they influence the economic development. At the same time, RCC tried to identify the risks and possible anticompetitive practices that can affect the online environment in Romania.
5. The conclusion of the study showed that online platforms improve consumers access to products and services and help new businesses enter into the market or develop existing ones. But, all of these are accomplished with different costs and risks both from platforms side and also from their business partners. The risks and rewards of the new digital economy involved a huge number of undertakings and therefore these markets must be closely monitored.
6. Following the study, at the end of 2017 RCC launched an ex officio investigation regarding a possible abuse of a dominant position on the market of online intermediation services in Romania via marketplace platforms. The investigation is still ongoing, which is why this contribution will present some conclusions resulted from investigation and not the exact infringement and facts.
7. The investigated company owns and manages a marketplace platform, through which it intermediates between retailers and their customers and is also specialized in the retail of consumer products.
8. The investigation focuses on a possible discriminatory behavior in relation with third party retailers of consumer products, who are direct competitors of the investigated undertaking, since it acts also as consumer commodity trader. The suspicion was the possible abuse of dominant position as a marketplace player against 3rd party sellers.
9. As mentioned before, the investigated undertaking has a double presence on the market: first, as a retailer offering goods online and in some showrooms across the country and secondly, as a marketplace owner. This marketplace is a non specialized goods platform and offers access to all 3rd party sellers who want to offer goods through a marketplace.

1. Main challenges of the investigation

10. The case presented a series of challenges as follows:

Defining the correct relevant product market and geographic market

11. The general definition of an online marketplace is “an online platform that intermediates sales of goods and services between customers and multiple retailers”.

12. From a geographical point of view, the definition needs to be related with every marketplace. While bigger online marketplaces act in more than one country and the 3rd party sellers are from different countries, smaller online marketplaces act in a specific country and the 3rd party sellers are more than 90% from that country. In RCC case, the market was defined as national in scope.

Defining the right competitors

13. Once the product market is established, competitors must be established as well. In order to do this properly, different situations / hypotheses must be analyzed.

14. Given the typology of the case, defining the dimension of the market from the consumers perspective is not so relevant. From 3rd party sellers’ perspective, the analysis showed that an online marketplace is in direct competition at least with other online stores, maybe even more than this, but also with its own online stores. A key aspect at this point is to analyze how many other online platforms can compete with a marketplace service. Although it is possible for other platforms to offer at least one service that a marketplace offers, this does not mean that the two types of platforms operate on the same market. To be part of the same market, platforms must offer the same types of services for 3rd party sellers.

15. In this case, the RCC considered that the main competitors of a marketplace are other marketplaces who offers the same services for 3rd party sellers.

16. One big question during the investigation was” how easy is to switch between EU marketplaces from a seller’s standpoint?”. The study made during the investigation among the 3rd party sellers showed that is not so easy to access a foreign marketplace if you are a small or very small player, whereas this is not the case for big sellers who have access to resources (money, labor etc.). This is the reason why, in particular for this investigation, the geographical market was defined at national level.

Determining market shares

17. Following the example of traditional markets, in order to establish the market position of the investigated marketplace, the revenues generated by the basic activity of the platform were calculated as the sum of the commissions collected from sellers. The market share was calculated as a percentage of the commission revenues obtained by the investigated platform compared to the sum of all commission revenues earned by all Romanian marketplaces in one year.

2. Main aspects of the investigation analysis

18. The analysis was centered on a set of main competitive aspects:

If the owner of the marketplace is in direct competition with 3rd party sellers

19. In this case, considering that the owner of the platform is also an important retailer, the answer is yes. Therefore, this double quality can generate a conflict of interests between the two activities, which poses a high risk of anticompetitive behavior.

If the owner of the marketplace platform can interfere with platform prices

20. Given that the owner of the platform has all the technical means at his disposal, especially in the situation where it competes directly with 3rd party sellers, the risk of getting involved in the pricing policy is very high.

How the products are listed on the platform

21. Marketplace platforms use algorithms for listing, sorting and filtering products on the platform. It is important to analyze the construction of these algorithms and how to use them.

22. There are premises for some algorithms to be built from the beginning so as to offer a superior position in displaying the products owned by the owner of the platform. If the platform is dominant, this is a violation of competition rules, the algorithms being built to favor their own product range. The most important remedy for these situations is the elimination of favoritism elements from algorithms and the construction of neutral algorithms.

23. Another important element in the functioning of the marketplace is the correct functioning and application of algorithms. Human intervention on algorithms or their improper application is a high risk when the platform owner has a double quality of seller and marketplace administrator.

Evaluate the contractual T&C (MFN included)

24. In order to ensure the best offer of products and prices from 3rd party sellers, the marketplace is possible to include in T&C a series of MFN type clauses. In Europe, the first case of MFN in the marketplace - 3rd party sellers' relationship was the case of Amazon, where the platform agreed to remove this type of clause.

Does the marketplace limit the products offered by 3rd party sellers (promo included)?

25. These limitations can occur especially when the owner of the marketplace is also a trader. This double quality can determine it to choose between its own products and the products of its partners. Many people believe that a marketplace platform has unlimited space to display products and so there is no point in limiting the product offer. Theoretically yes, the platform has unlimited space to list products, depending on the resources that the platform has available. However, in practice, studies have shown that there are strategic positions that products must occupy in order to generate sales.

26. These positions are therefore limited in number, either when talking about the platform in general, or when referring to the catalogs or promotional pages of the platform in particular. Thus, from case to case, it is necessary to evaluate the algorithms and criteria according to which the selection of products and their positioning takes place. One of the most common ways to limit the display of certain products (3rd party sellers' promotional offers) is to use display filters. The usage of such filters is very easy for end users and, once activated, will no longer display those products. Another method of limiting product offers is by using different criteria for products offered by 3rd party sellers, criteria that impose superior conditions to be met compared to the criteria applied to their own products.

Evaluate how 3rd party data is used

27. Through their business model, marketplace platforms have the ability to collect and manage a large amount of data from sellers and consumers. This data is essential to be able to provide consumers with the best shopping experience, including here the best and most varied range of products. The information collected and used refers to prices (minimum, maximum, recommended, future prices including future prices related to certain promotional offers, products that will be part of promotions etc.), availability (stocks), product sales (individually, at merchant level, at product level etc.), consumer preferences etc. The use of commercially sensitive information from affiliated partners creates a competitive advantage for the marketplace owner, reducing its business costs and risks, especially those related to identifying and launching new products. Based on the data collected, it can anticipate the movements of competitors and make decisions with an impact on the marketing of products in order to limit the competitive offer that applies pressure on its own products.

28. The incidence with the provisions of the competition law can be evaluated according to certain criteria, such as:

- the degree of involvement of the sales departments of the company who owns the marketplace in the commercial activity of the affiliated partners;
- the degree of involvement of the sales departments of the company who owns the marketplace in the activity of administration and operation of the infrastructure, respectively of the online marketplace type platform;
- the method of collection, the quality and quantity of the data collected and their storage;
- internal procedures regarding access to and use of data and information within the company;
- assessment of the access and use of competitively sensitive data and information of competitors, partners affiliated to the platform, by the entities that manage the marketing activity produced within the company;
- the level of general transparency of data and information within the marketplace platform.

The commission policy

29. Sales commission policy is a key element in making sales, having a direct impact on the selling price. The application of a commission policy on non-transparent criteria by a dominant undertaking in relation to trading partners may raise certain concerns in the light of competition rules. Also, the use of an unpredictable commission policy at the level of partners, the possibility to modify/ adjust the grids according to internal decisions, with the active involvement of the commercial departments of the company, can contribute to affecting the commercial policy of affiliated partners. The impossibility of the partners to estimate a period of validity of the commission grid induces an element of uncertainty. Moreover, a lack of transparency in the platform's fee policy may also contribute to increasing the uncertainty regarding the application of a unitary grid, based on transparent criteria at the level of partners.

30. Uncertainty can have the effect of restricting the quantity and quality of products listed on the platform by partners. On the other hand, given that the commission policy applied only to affiliated partners, the dominant undertaking obtained a clear competitive advantage and could offer more attractive prices in the market than its partners. The dominant company also has the possibility to implement a commission policy designed so that its products benefit from better sales conditions on the platform, by adjusting the commission policy according to the offers of the partners, discouraging other traders to list or continuing to list products in certain categories.

3. Conclusions

31. The elements presented above represent some indicators which, following an investigation, can demonstrate the level of competitive correctness of an undertaking with a double role of marketplace and trader.

32. In the case of these large digital platforms, if there is clear evidence of a breach of competition rules, a simple fine could be inefficient compared to the imposition of remedies, behavioral and/or structural measures, in order to restore the normal competitive environment and to prevent, as much as possible, the occurrence of similar phenomena.

33. In the investigation carried out by RCC, it is envisaged to impose a set of measures in order to restore the normal competitive environment and to prevent the occurrence of such facts. A general description of the set of measures considered is as follows:

- The algorithms should take into account only those elements that are available / accessible to all traders in the platform.
- Informing traders on how the algorithms work and on the elements that compose them.
- Limiting manual/human interventions in the operation of relevant algorithms and implementing a program of traceability and control over manual/human interventions in the operation of relevant algorithms.
- The changes of the algorithms should be made based on an objective procedure.
- Possible modification of the organizational structure and operation of the platform in order to aggregate the information collected by the platform and disseminate the aggregated information in an equivalent way to all traders in the platform.