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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

The Evolving Concept of Market Power in the Digital Economy – Note by Romania

22 June 2022

This document reproduces a written contribution from Romania submitted for Item 5 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm>

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1. 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 these new digital markets.
2. For Romanian Competition Council (RCC), 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 infringements.
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 considered it necessary to strengthen its expertise in this field.
4. At the end of 2017, RCC launched an investigation regarding a possible abuse of a dominant position on the market of online intermediation services in Romania via a marketplace platform (EMAG case). The case was opened ex officio.
5. Emag is the biggest marketplace in Romania. The administrator of the marketplace also sells its own products on the same site, similar to Amazon.
6. A difficulty was defining the relevant market. Various studies were taken into account to define the relevant product and geographic market.
7. The relevant product market was defined as being the market of intermediation services through online marketplace platforms. The relevant geographic market was defined at national level, respectively the territory of Romania.
8. Regarding the market position, between 2013 and 2019, Emag held a dominant position on the online intermediation services market through the online marketplace platform in Romania.

Investigation of the abuse of a dominant position

9. The report analyzed the way EMAG Marketplace was managed, the policies used by Emag, the decisions taken and the measures implemented by Emag in relation to the affiliated partners (third party companies that sell products on the marketplace) and in the light of the following elements:
 1. Main offer: The algorithm and other mechanisms for establishing the main offer in the product page;
 2. Product listing: The algorithm and other mechanisms for selecting and positioning products in the presentation pages;
 3. Promotional campaigns: The algorithm and other mechanisms for selecting and positioning products in the presentation pages of promotional offers;
 4. The commission policy used in relation to affiliated partners and the direct implications on the presentation and marketing of products on the EMAG Marketplace platform;
 5. The delivery policy used in relation to the affiliated partners and the direct implications on the presentation and marketing of the products on the EMAG Marketplace platform;

6. The utilization of commercial data belonging to the affiliated partners by Emag.
10. The policies used, the decisions adopted and the measures implemented between January 2013 and June 2019 led to a complex of factors that had a negative impact on the business activity of EMAG Marketplace's affiliated partners by affecting the real competition between offers.
11. The effects on the trading activity of the partners were to limit and, in some cases, to block the marketing of products from the partners' offer and led to:
- maximizing Emag's sales, against the background of preserving or increasing the commercial margins obtained from the sale of products;
 - affecting the sales of affiliated partners by affecting the visibility of offers on the entire platform;
 - the constant erosion of the trading margins of the affiliated partners in their attempt to increase the visibility of their offers on the platform;
 - preventing consumers from accessing the best product offer on the platform;
 - limiting the decisions on their own commercial activities and related to them, through the direct involvement of Emag in the organization of the delivery activity of the affiliated partners;
 - the use of a commission policy based on non-transparent and unpredictable criteria at the level of affiliated partners;
12. Emag was fined approx. 7mil Euro, taking into account the reduction that Emag received for admitting the infringement.
13. In addition to the fine, the competition authority imposed the adoption of a series of measures regarding the algorithms used by the platform, Emag having the obligation to fully and correctly inform the partner traders on how the algorithms work, such as listing, positioning products on the platform and limit manual interventions in the operation of algorithms.
14. At the same time, the company must develop changes in the organizational structure, create a system for managing the data collected and stored through the platform, so that access to this aggregate data is achieved in a non-discriminatory manner. At the same time, Emag needs to improve its complaints policy by creating a set of best practices in managing the relationship with the participants in the platform.
15. As new digital markets emerge and evolve, one of the top questions that must be answered is if the anticompetitive tools that the authorities used until now are enough to assess market power. The concept of market power is broadened with the introduction of new tools and regulations that complement the antitrust policy, when needed.
16. The European Commission and the national competition authorities are examining the implementation of new tools to prevent and sanction anticompetitive practices in the digital age.
17. Some of these tools will be entrusted to RCC, given the experience the authority has in this field, and the proximity of these new regulations with the antitrust law.
18. RCC created a specialized digital task force, composed of the staff of several Directorates of the Competition Council, to be able to cover the variety of traditional markets that also operate in the digital environment, with the specific competencies of each

department. Also, two new digital compartments were created in those specific Directorates.

19. The establishment of such a Unit facilitates interdepartmental cooperation and may reduce the time taken to resolve problems.

20. Moreover, following the entry into force of the Emergency Ordinance on measures to implement the EU Regulation 2019/1150 (P2B), as well as the designation of the Competition Council as the authority responsible for its implementation, a specialized Unit was required to exercise the powers established by this.

21. The main objectives of the task force are:

- Exercising the duties related to the application of the P2B Regulation and the P2B Ordinance (i.e. Receiving and analyzing notifications, conducting in-depth investigations, conducting preliminary analyzes if there are suspicions of violation of Regulation (EU) 2019/1150); RCC may impose sanctions, if it finds that the provisions of the Regulation have not been complied with. The competition authority may impose fines of up to 1% of the total turnover of the companies involved.
- Carrying out preliminary examinations / sector inquiries to determine the functioning and deficiencies of the Romanian digital markets;
- Collaborate with the responsible authorities in the Member States and with the European Commission in order to develop European legislation on the digital economy, in the context of the development at EU level of a mechanism that will focus on the following pillars:
 1. continue to enforce competition rules effectively;
 2. examining, in the context of the Digital Services Act package, of a set of ex-ante rules applicable to major online platforms to ensure that digital markets remain open to competition.
- Monitoring the impact of digital legislative initiatives (P2B Regulation, Digital Markets Act, Digital Services Act etc.) and assisting the European Commission during evaluations, in particular on specific cases;
- Elaboration of normative acts for transposition / implementation of the European regulations in the digital field mentioned above;
- Initiating and conducting investigations that may have as object markets from the digital field;
- Analyzing and monitoring the mergers targeting the enterprises present on the digital markets;
- Research and evaluation of new tools for the analysis of digital markets and cooperation with European Commission departments and other national competition authorities to ensure a uniform practice.

22. Continuous and rapid innovation in digital services benefits consumers, contributes to the development of the internal market, opens up new business opportunities and facilitates transactions at different levels (P2B, B2B, B2C, P2C).

23. This is part of the economic activity of every business (more and more with the main business model based on innovations in the digital system) and facilitates direct contact with each individual consumer.

24. The digital system has produced substantial imbalances in digital markets over the last 10 years, reaching a peak in the context of the COVID virus crisis: entire sectors have become dependent on "intermediation platform" technology systems to gain access to consumers.

25. Thus, it can be expected that the use of a digital system to support a business remains not only an advantage, but a necessity.

26. In this respect, platform operators can gain considerable bargaining power, which can lead to a substantial market share, raising competitive concerns.

27. Adoption of the P2B Regulation and publication of proposals from the European Commission on the legislative package for digital services, respectively the Regulation on questionable and fair markets in the digital sector (DMA) and the Regulation on a single market for digital services and amending Directive 2000/31 / EC (DSA) indicate the importance of ensuring an open and transparent digital environment.

28. At the same time, the Covid-19 pandemic underlined the need to conduct business online, a context in which restaurants, deeply affected by the sanitary measures imposed, chose to contract with online delivery intermediaries.

29. In addition to these, the hotel industry in Romania has also been deeply affected by the sanitary measures, which have had to face the platforms holding market power.

30. Possible irregularities were also found by the competition authority regarding the provision of services in the field of online advertising, respectively the online marketing of tourist products and / or packages of tourist services.

31. A first step in the new set of actions meant to monitor market power in digital markets, was identifying those market segments that present dysfunctions, major risks and / or competitive concerns.

32. In 2021, RCC launched 4 preliminary examinations in which it envisions to clarify the functioning of some of the most important digital markets in Romania, the deficiencies that stand in the way of effective competition.

33. The 4 preliminary examinations are opened on the following sectors:

- the sector of online accommodation services;
- the sector of online marketing services of tourist products and / or packages of tourist services;
- the online advertising sector;
- the online delivery services sector.

34. In order to evaluate the above aspects, the analysis that will be performed during the preliminary examination will aim to achieve the following objectives:

- the assessment of the characteristics of each segment of the sector analyzed, the structural and behavioral aspects, the identification of existing forms of cooperation, the conditions of competition, as well as the effect of certain practices that may lead to distortions of competition. To the extent that such characteristics are identified, recommendations and measures will be proposed in order to remedy, mitigate and prevent any negative effects on the competitive environment and, implicitly, on users;
- in-depth knowledge of the identified digital sectors in order to clarify the elements that suggest the possibility of restricting or distorting competition;

- obtaining information on recent and future developments in the sectors to be analyzed, as well as information on the evolution of innovative services offered by online platform operators. The information will be used to assess the conditions under which the evolution of the digital sector does not lead to structures that are harmful to users and the business environment.

35. These examinations are ongoing and RCC hopes to have preliminary results by the end of 2022.