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**Theories of Harm for Digital Mergers – Note by Romania**

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More documents related to this discussion can be found at  
<https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm>

Antonio CAPOBIANCO  
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

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## Romania

### 1. The Glovo-Foodpanda merger – an overview

1. In June of 2021, the RCC received the official merger notification through which Glovo would purchase Foodpanda, subject to approval by RCC. Glovo and Foodpanda were competing food delivery platforms active in Romania. Glovo sought, by acquiring sole control over Foodpanda, to improve the quality and efficiency of its food delivery services. At their core, both Glovo and Foodpanda were essentially technology platforms that facilitated transactions between restaurants, on the one hand, and customers, on the other. At the time, both parties also provided a service for the delivery of general goods from supermarkets, although that role was less significant and did not generate competition concerns.

2. For the purposes of the transaction, RCC held that there were two relevant product markets:

- The market for online food delivery platforms, and
- The market for online platforms for the delivery of general goods.

3. In regards to the second market, namely the market for online platforms for the delivery of general goods, the RCC considered that, due to its dependency on third-party supermarkets and the fact that it was a very limited part of the parties' economic activities, it did not generate competition concerns and therefore could be left open for any future analyses.

4. However, in regards to the first market, namely the market for online food delivery platforms, the RCC identified a competitive concern stemming from the overlap of Glovo and Foodpanda's activities, their cumulative market shares and the value of the Herfindahl-Hirschman index ('HHI'), which resulted in potential anticompetitive effects in the form of exclusivity clauses imposed upon partner restaurants in order to block both the restaurants and the final consumers from multi-homing, therefore impeding effective competition.

5. To this end, Glovo proposed a series of commitments that ensured that it would not be able to impose exclusivity clauses, which the RCC accepted.

6. The merger was approved with commitments via Decision nr. 86/22.11.2021, available at <https://www.consiliulconcurrentei.ro/wp-content/uploads/2022/02/Decizia-86-.pdf>.

### 2. The relevant market – traditional analysis in a digital context

7. As mentioned previously, out of the two relevant markets considered by the RCC, only one generated enough issues to be cause for concern. In this context, the RCC defined, for the first time, the market for online food delivery platforms. The definition of the market itself is particularly interesting because it combines traditional analysis with the digital context it was applied in. In this regard, while the definition of the relevant market was done in accordance with traditional antitrust tools, it also took into account the multi-sided nature of the platform model.

8. To illustrate RCC's analysis and exemplify where the digital approach had an impact on the analysis of the relevant market, the present section will be split into two parts: the relevant product market and demand-side substitutability and the relevant geographic market and supply-side substitutability.

9. The RCC defines the relevant markets in accordance to its *Guidelines*<sup>1</sup>.

### 3. The relevant product market and demand-side substitutability – food delivery platforms are multi-sided transaction markets

10. According to the *Guidelines*, the relevant product market contains all products and/or services considered interchangeable by the client, due to their characteristics, prices or functionalities. Although in the process of defining the relevant market usually the constraints resulting from demand-side substitutability will be taken into account, due to the nature of the market (digital, multi-sided and dynamic), the RCC also evaluated supply-side constraints. We will start with the demand-side evaluation and its relevance in establishing the relevant product market.

11. The first question that came up in the RCC's assessment was whether restaurants with delivery capabilities could be considered substitutable with the platforms, as the parties alleged. To this end, RCC identified all the participants involved in all the business models called into question.

- Vertically integrated restaurants: these are the restaurants which facilitate delivery of their food to a customer's address. Here, there are two participants to the market: the restaurant and the customer.
- First generation food delivery platforms: early versions of food delivery platforms only facilitated the transaction between the customer and the restaurant, in which the delivery was handled by the restaurant. Here, there are three participants to the market: the restaurant, the platform, and the customer.
- Second generation food delivery platforms: the modern food delivery platforms which also offer delivery services integrated with their platforms, wherein the delivery service is provided by a third party (usually an independent courier signed up to the platform). Here, there are three participants to the market: the restaurant, the platform, and the customer. RCC did not consider the couriers to be part of the food delivery market, as they are not directly involved in the buy-and-sell process that is taking part between the restaurant and the customer and is not facilitating the transaction itself. The courier is a third-party contractor that is hired by the platform.

12. In spite of the parties' allegation that vertically integrated restaurants are part of the same relevant market, the RCC was not in agreement. To this end, the RCC referred to the OECD study *Rethinking Antitrust Tools for Multi-Sided Platforms*<sup>2</sup> and held that Glovo and Foodpanda represented **multi-sided transaction markets** due to their role of facilitating observable transactions between two groups of users of the platform – the

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<sup>1</sup> Instrucțiuni din 2010 privind definirea pieței relevante.

<sup>2</sup> OECD (2018) *Rethinking Antitrust Tools for Multi-Sided Platforms*. <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>

clients and the restaurants. This is the first digital-oriented conclusion of the RCC's traditional analysis of the relevant product market.

13. The second question that RCC considered was in regard to the analysis of demand-side substitutability. Here, RCC analysed the possibility of applying a SSNIP test (Small but significant and non-transitory increase in price), however concluded that performing this analysis was an inefficient task due to, firstly, the dynamic nature of the prices and, secondly, the two different groups of users those prices were offered to. As a result, RCC considered that, instead of a SSNIP test, demand-side substitutability could be assessed from the perspective of the service that the platforms offered, respectively transaction matching. This led to RCC's conclusion that vertically integrated restaurants were, indeed, not part of the relevant product market.

14. **Brief conclusion:** Although demand-side substitutability was considered through the lens of more traditional tools, respectively the RCC's *Guidelines*, the conclusion regarding the substitutability was nevertheless impacted by modern notions regarding transaction markets, which ensured that the definition of the relevant market excluded indirect competition and emphasized the market power the parties' held.

#### 4. The relevant geographic market and supply-side substitutability

15. For the assessment of the relevant geographic market the RCC took into consideration both the demand-side of the market and the supply-side of the market. As the former has been described above, it's necessary to define what the RCC considered to be the supply side of the market.

16. To this end, RCC discussed with competitors of the parties to determine the degree to which other suppliers could reorient their services and provide them efficiently, without incurring significant costs or financial risks, in order to have a disciplinary effect upon the parties already on the market. As a result of those discussions, the RCC concluded that the only relevant undertakings who could, efficiently and immediately, substitute Glovo and Foodpanda's services, were platforms which could match transactions between clients and restaurants. Consequently, RCC held that the relevant product market contained Glovo, Foodpanda and its immediate competitors, respectively the other matching platforms which intermediated food delivery from restaurants to customers.

17. In regards to the relevant geographic market, the RCC was faced with the question of whether it was appropriate to define it locally or nationally. A local definition would be an appropriate definition should demand-side substitutability be concerned. However, when looking at the market through a supply-side lens, a national definition would be more accurate.

18. To determine whether competition was exerted at a local or national level, the RCC evaluated all the factors, whether they indicated a local or national dimension, as follows:

##### 4.1. Local

- The nature of demand: for all the parties present in the market (customers, restaurants and even the platforms) time and distance of delivery are sensitive factors that can determine the success of an order. The platforms impose contractual terms wherein an order must be fulfilled within 30 minutes of it being placed, in the case of the second generation service, and 45 minutes in the case of the first generation service. The platforms also offer different services to restaurants in different areas, fulfilling restaurant demand via local teams.

- **Competitive pressure:** during the RCC's fact-finding exercise, it became clear that some restaurants, specifically larger, household-name chains, with delivery capacities, were capable of competing against the platform's service. It was these same chains that also generated a significant part of the platform's income, implying there existed a degree of dependency of the platform on those specific restaurants. As such, should a platform raise its prices, customers could have the option of multi-homing away from it and opting to purchase directly from the restaurant. Similarly, so could the restaurant opt to remove itself from the platform and attract clients directly.

## 4.2. National

- **The nature of supply:** as mentioned, supply-side substitutability was held to be limited to platforms with matching capabilities. The analysis shifted towards determining whether these platforms were beholden to local areas or whether they could enter the market in other areas of the Romanian territory without incurring significant costs.
- **Price-setting across all competing food delivery platforms:** all platforms were questioned in regard to their price policy and it became clear that, across the board, prices were not set according to locally-established criteria. Rather, they were negotiated on a case-by-case basis and applied based on volumes sold and brand importance. Both for customers and restaurants (and couriers) there are no significant switching costs between platforms, facilitating multi-homing.
- **Market shares:** RCC calculated market shares of all platforms across Romania and found that it was a difficult exercise to undertake due to the lack of visibility the platforms had over their own market shares (and their competitors) at a local level. In its analysis, the RCC determined that market shares at a local level are dynamic and volatile and, even if there is a local monopoly, it does not act as a barrier to entry.
- **Technical standards:** all platforms indicated that there are no technical impediments between a platform and its entrance on a new local market.
- **Marketing campaigns:** RCC found that the platforms' marketing campaigns were done at a national level, not focusing on local restaurants.

19. The RCC found that there are valuable arguments for both a local and a national definition of the geographic market, and its analysis included both. However, the RCC considered the following two factors: defining a local market would imply the inclusion of vertically integrated restaurants into the market definition which would only downplay the parties' position on the market, however would reflect the competition constraints that some restaurants were able of imposing; defining a national market would more accurately take into account the competition between the platforms themselves and be in accordance with the definition of the relevant product market which only included platforms, however it eliminated any competition constraints imposed by some restaurants. To resolve this issue, the RCC settled on defining the dimension of the relevant geographic market as **national with important local elements**, with vertically integrated restaurants being taken into consideration in the effects analysis as representing **out-of-market** competitive pressure.

20. **Brief conclusion:** The trouble with intermediary markets is accurately measuring where competition is exerted. By their very nature, they intermediate an already existing demand-supply relationship, which brings up the question of whether they compete with

any of the already existing sides of the market. To this end, the out-of-market concept was used to bring together all possible competitive constraints, be they direct (other platforms/intermediaries) or indirect (restaurants).

## 5. Theory of harm – the merger

21. Multi-homing is a concept especially relevant for digital markets, wherein consumers can, at any time and without incurring additional costs, switch to competing offers. Throughout its analysis, the RCC found that the presence of multi-homing was an important factor to competition on the market for food delivery platforms, for both types of customers. In this regard, both the final consumers and the restaurants have the capacity to interact with multiple competing platforms, at the same time.

22. Following the transaction, Glovo would have obtained a dominant position on the market which would have potentially allowed it to impose exclusivity clauses upon restaurants, eliminating the driving competitive force on the market and, thus, eliminating effective competition. This was the RCC's theory of harm in the merger.

23. In itself, the analysis of potential harm was done in accordance with traditional tools. For instance, the RCC analysed the possibility of coordination between the remaining platforms according to the criteria set in *Airtours v Commission*<sup>3</sup> but found that, due to the presence of multi-homing, coordination was unlikely. In this regard, by using traditional tools the RCC determined that it was the digital-specific characteristic of multi-homing that ensured there would be no coordinated effects among competitors. As such, it was not that the theory of harm was specific to digital markets (exclusivity clauses are a tale as old as time) but, rather, that the digital market itself, if left to function naturally, would have a disciplining effect on the dominant party.

24. Therefore, at least in regards to food delivery platform markets, there was no need to develop a new theory of harm to fully capture the potential anticompetitive effect of the Glovo merger.

## 6. Theory of harm – a wider look

25. Even though the call for contributions this paper answers to is focused on merger analysis, we believe it is important to take a look at the wider context of the Glovo merger, which eventually resulted in the European Commission's Delivery Hero and Glovo antitrust investigation. For clarity, we mention that Foodpanda was Delivery Hero's Romanian subsidiary.

26. The parties' merger did not only take place in Romania. There was, in fact, a long history of mergers and acquisitions between the two, starting in 2018 and ending in 2021 with the RCC's clearance decision. At the end, the two parties were completely separate from each other on European territories, with each having their own national markets to operate on.

27. Following the RCC's decision which cleared Glovo's purchase of Foodpanda, Delivery Hero returned to the RCC to announce its intention of purchasing Glovo. Essentially, Delivery Hero was buying itself back, along with Glovo, and due to the financial thresholds in Romanian law that determined whether a merger should be analysed

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<sup>3</sup> Case T-342/99 *Airtours plc v Commission of the European Communities*, para. 62.

by the RCC or not, the RCC was unable to involve itself in the subsequent merger. However, a few months later, the European Commission targeted Delivery Hero and Glovo for EU antitrust inspections, citing concerns over a potential breach of EU competition rules against cartels. Specifically, the Commission's investigation concerned an alleged agreement or concerted practice to share national markets for the online ordering and delivery of food, groceries, and other consumer goods in the European Union.

28. In this light, the RCC considers that, perhaps, in regard to the subject of merger control in digital markets, analysis should take into consideration the history of the parties and develop new theories of harm that would be able to capture potential anticompetitive effects stemming from the parties' activities outside of the relevant territory.