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ANTI-COMPETITIVE PRACTICES BETWEEN ONLINE PLATFORMS AND BUSINESSES: REMARKS IN THE LIGHT OF THE NEW P2B REGULATION

Introduction

Dynamic development of technology leads to a particular demand on legislative bodies. One of the most challenging sectors is the market of online intermediation services. In the recent times the Council of the European Union adopted the Regulation on promoting fairness and transparency for business users of online intermediation services¹ (Regulation). An increased interest of the EU authorities in the digital area is not accidental - anti-competitive practices of some service providers to business users impede a full realisation of the potential of online intermediation services. Such potential is significant, as, according to the analysis of Copenhagen Economics, 60% of private consumption of goods and services in the Internet economy go through online intermediaries².

The purpose of the article is to present the main issues connected with the anti-competitive practices of online brokers. The author will analyse the provisions of the Regulation and will attempt to answer whether, and to what extent, the anticipated changes may enable business users to benefit fully from online intermediation services and to protect the rights of business more effectively.

The European Commission (Commission) introduced a definition³ which indicates some key aspects of online platforms, such as intermediation between two or more interdependent users from supply (business users) and demand (i.a. consumers) sides. At least one of the groups of the users benefits from using online platform. The author, following the Regulation, will

¹ Regulation of the European Parliament and of the Council PE 56 2019 REV 1 on promoting fairness and transparency for business users of online intermediation services, 20 June 2019, source: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:PE_56_2019_REV_1 [access: 2.07.2019].

² Copenhagen Economics, *Online Intermediaries. Impact on the EU economy*, EDiMA 2015, source: <https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/2/342/1454501505/edima-online-intermediaries-eu-growth-engines.pdf> [access: 14.03.2019], p. 10.

³ European Commission, *Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy*, Consultation from 2015, p. 5.

focus on the significant part of online platforms, i.e. online intermediation services, which include marketplaces, search engines and social networks.

Intermediation services are highly important in the contemporary economy and their popularisation is constantly increasing. Consumers and also business users benefit from easily accessible information, a broad scope of accessible products and services, the possibility of rapid and efficient communication⁴. There is low or zero risk of lock-in effect⁵ on online platforms as consumers can easily switch between products offered by competitors who are just 'one click away'⁶. Intermediation services reduce the effects of geographic barriers and therefore enable business users to reach a wider scope of consumers on cross-border markets⁷. Online platforms also reduce costs of business structures⁸, so they help smaller undertakings in overcoming some of entry barriers and operating on the market.

1. Current problems concerning online intermediation services

Although online platforms have numerous advantages, business users cannot fully benefit from them. First of all, it is vital to indicate strong, both direct and indirect, network effects related to online intermediation services⁹. This means that such services become more valuable due to an increasing number of their users¹⁰. Network effects are not favourable for smaller undertakings, as they do not have possibility to reach a high amount of users that would enable them to compete with more popular platforms - in the literature the is referred to as 'chicken and egg problem'¹¹. For instance, it is visible on the social networks market, which is actually dominated by Facebook and its few, much less visible competitors. In addition, the analysis¹² of the competition authorities' decisions indicate that it is not clear whether Facebook and other

⁴ Synopsi, *The public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy*, Raport z 25 maja 2016, p. 6.

⁵ K. Kohutek, *Markets of internet search engines and charge of abuse of dominant position (against the background of EU case against Google)*, EPS 2014, p. 36.

⁶ F. Thépot, *Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets*, World Competition 2013, no. 36(2), p. 220.

⁷ Oxera Compelling Economics, *The benefits of online platforms*, Raport z października 2015, p. 10.

⁸ *Ibidem*.

⁹ Regulation of the European Parliament and of the..., *op. cit.*, p. 3.

¹⁰ A. Pandey, *The Implications of Network Effects for Competition Law*, IP Leaders Blog from 7 January 2019, source: <https://blog.ipleaders.in/implications-network-effects-competition-law/> [access: 16.03.2019].

¹¹ B. Caillaud and B. Jullien, *Chicken & egg: competition among intermediation service providers*, RAND Journal of Economics 2003, no. 34(2), p. 310.

¹² I. Małobęcka-Szwast, *Naruszenie prawa ochrony danych osobowych jako nadużycie pozycji dominującej? Postępowanie Bundeskartellamt przeciwko Facebookowi*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2018, no. 8(7), p. 144.

social networks (i.a. LinkedIn, Instagram) are competitors¹³ or rather complementary platforms which benefit from each other¹⁴. Network effects lead to business users' dependence on huge intermediation services (for example Google, Amazon), especially when the supply side is significantly fragmented into numerous undertakings.

It is also noticeable that various services are being integrated in one digital environment. For instance, consumers have the opportunity to find and directly purchase a product they are looking for through a social network, which then plays the role of a marketplace. This intensifies the dependence of business users on online brokers.

The Commission stated that the current legal framework did not address the problems indicated above. The directive concerning unfair commercial practices¹⁵ is limited to business-to-consumers ('B2C') relations. Article 102 TFEU prohibits the abuse of a dominant position, but its scope is too narrow. Such dominance is not necessarily held by online brokers.

The above paragraphs indicate that the initiative taken by the EU authorities is indispensable. The legislation has to respond to varying conditions of European and global economy which are significantly related to online platforms. For instance, since 2013 the percentage of e-buyers making cross-border purchases has increased from 26% to 36%¹⁶.

2. Increasing transparency

The *ratione personae* of the Regulation covers providers of intermediation services established in Member States and outside the European Union if their business users are in the EU and they offer goods or services to consumers located in the Union at least for part of the transaction¹⁷.

The Regulation identifies and addresses the main problems concerning business-to-business relations on online intermediation services market. According to the Commission, even 19% of the problems in online intermediation services sector stem from unclear policy

¹³ European Commission, Case COMP/M.7217, *Facebook/Whatsapp*, 3 October 2014.

¹⁴ Bundeskartellamt, Case B6-22/16, *Facebook*, 7 February 2019.

¹⁵ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 11 May 2005.

¹⁶ Eurostat, *Statistics Explained, E-commerce statistics for individuals*, source:

https://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals [access: 5.04.2019].

¹⁷ Regulation of the European Parliament and of the Council PE 56 2019 REV 1 on promoting..., *op. cit.*, p. 7.

concerning Terms and Conditions (T&C) of using a website¹⁸. The providers of online intermediation services are capable of instantly changing the T&C. Under the Regulation, the providers will be required to inform users of any modification of the content of the T&C which will have to be formulated in understandable language. What is more, the providers will be bound by at least a 15-day *vacatio operacionis*¹⁹ period between informing the user about the changes and the time the change takes legal effect. The provider will not be able to shorten this period without an explicit consent of the user. The notice period shall not apply to the situations of legal or regulatory obligation to change the T&C or if the change addresses an unforeseen and imminent danger.

11-15% of the problems are related to the lack of the information about suspending or deleting an account of a business user²⁰. Service providers will have to inform business users about the reasons for limiting or suspending their activity. In the case of a definitive termination of the account the interested user should receive a justification at least 30 days in advance. This provision does not apply in the case of a legal or regulatory obligation to terminate service, right of termination stemming from national law or repeated infringement of the T&C.

Even 1/3 of entrepreneurs who generate the majority of their turnover through the online intermediation services (,heavy users'²¹) associate their problems with unclear policies of personal data processing²². Service providers will be required to formulate and publish general rules on which kind of data can be made available and to whom and on what conditions they can be shared.

The market of general search engines is one of the largest online sectors. As the recent data indicate, Google still dominates the rankings of the world's most visited websites²³. Unclear positioning mechanisms are a vital problem related to the functioning of search engines. The order of goods and services in rankings can strongly influence consumers as, according to the Commission research, 95% of all clicks on the search result fall on the first page presented by Google²⁴. Service providers will be obliged to reveal the main factors that

¹⁸ European Commission, *Online platforms: new European rules to improve fairness of online platforms trading practices*, Digital Single Market Factsheet, p. 3.

¹⁹ Author's own term, being a paraphrase of a notion *vactio legis*, which refers to the period between the promulgation and the date of the entry into force of the law.

²⁰ European Commission, *Online...*, *op. cit.*, p. 3.

²¹ Ecorys, *Business-to-Business relations in the online platform environment*, Report from 22 May 2017, p. IX.

²² European Commission, *Online...*, *op. cit.*, p. 3.

²³ We are social, *Digital 2019: Global Internet Use Accelerates, World's Most Visited Websites*, source: <https://wearesocial.com/blog/2019/01/digital-2019-global-internet-use-accelerates> [access: 6.04.2019].

²⁴ European Commission, Case AT.39740, *Google Search (Shopping)*, 27 June 2017.

affect the positioning mechanisms. The Commission will develop guidelines to facilitate service providers to comply with the provision²⁵. What is more, the service providers will be obliged to maintain transparency as regards their own products.

3. Improving enforcement

Breakthrough changes provided by the Regulation concern the rights enforcement procedure. A limited access to settle disputes is one of the most vital problems for heavy users²⁶. Due to the ineffectiveness of the external mechanisms of preventing unfair commercial practices in B2B sector, the Regulation obliges online brokers to establish internal means of complaint²⁷. Service providers will also have to present the public with the data about the functioning and effectiveness of the complaint mechanism at least annually and to update the information in the case of changes,.

What is more, business users will have the possibility to out-of-court dispute resolution through easily accessible mediators. Underreporting of unfair practices in the online trade sector is a visible problem stemming from the fear of retaliation by service providers on whom business users, especially heavy users, are strongly dependent. According to the Regulation, organisations or associations will be able to represent entrepreneurs before courts in case of the suspicion of violation of the new legislation.

It is worth noticing that due to the Regulation the EU Observatory of the Online Platform Economy (Observatory) has been created. Its main task is to monitor the opportunities and challenges of digital economy for the European Union and, which is important, to analyse its compliance with the new rules.

4. A comprehensive solution or the first step?

Creating the Observatory was probably the reason why the Commission decided not to impose any obligation to establish internal authorities responsible for monitoring compliance issues in each Member State. Under the other recent legislation, i.a. the regulation concerning

²⁵ Regulation of the European Parliament and of the Council PE 56 2019 REV 1 on promoting..., *op. cit.*, p. 24.

²⁶ Ecorys, *Business...*, *op. cit.*, p. 34.

²⁷ Small undertakings employing less than 50 people and generating a turnover of less than EUR 1 million will be exempted from this obligation.

geoblocking²⁸ or the directive on whistleblowers protection²⁹, Member States are obliged to indicate such an organ³⁰. The author wonders whether the Observatory at the supranational level will be enough to ensure compliance with the Regulation.

It should be emphasised that the Regulation comprehensively addresses the most vital issues concerning B2B relations on the online markets. However, it does not *per se* prohibit the above-mentioned anti-competitive practices. This means that the service provider may, for instance, favour its own product, just as, according to the Commission, Google did³¹. The punishment of the mentioned practices in B2B sector will therefore continue to be limited to dominant undertakings.

What is more, one of the purposes of the Regulation was to avoid the fragmentation of law in the European Union. The Regulation in its current shape does not solve this problem. Some Member States extended the rules present in the unfair commercial practices directive³² ('UCPD') to B2B sector. For instance, Austria and Sweden transposed comprehensive solutions from the UCPD directive, including the black list of unfair commercial practices, to B2B relations³³. Other countries went partially beyond the scope of the UCPD directive - for example, France prohibited misleading practices in B2B sector³⁴. Analogically, the directive on unfair terms in consumer contracts³⁵ ('UTCD') was implemented to B2B relations i.a. in Germany, Hungary or Latvia³⁶. In Portugal and Estonia the provisions of the UTCD directive, including the list of unfair and prohibited contract terms, were fully introduced to B2B sector³⁷.

²⁸ Regulation of the European Parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, 28 February 2018.

²⁹ Proposal 2018/0106 for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 23 April 2018.

³⁰ P. Semeniuk, *Najważniejsze niewiadome rozporządzenia platformowego*, source: <https://www.linkedin.com/pulse/najważniejsze-niewiadome-rozporządzenia-platformowego-piotr/> [access: 10.03.2019].

³¹ European Commission, Case AT.39740, *Google Search (Shopping)*, 27 June 2017.

³² Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 11 May 2005.

³³ European Commission, *Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain*, Report from 26 February 2014. p. 64.

³⁴ *Ibidem*.

³⁵ Directive 93/13/EEC of the Council on unfair terms in consumer contracts, 5 April 1993.

³⁶ European Commission, *Study on contractual relationships between online platforms and their professional users*, Report from 23 April 2018, p. 16.

³⁷ *Ibidem*, p. 17.

Some Member States started to implement legislation directly aiming at improving fairness in intermediation services by imposing transparency obligations on online brokers³⁸.

The Commission is aware of the problems mentioned above. Margrethe Vestager announced in April 2019 that a specialised body will work on more detailed solutions in the next months³⁹. One of the purposes of the experts meetings will be creating stronger tools to counteract anti-competitive practices in B2B sector.

What would be the best possible result of the proceedings? First of all, the Commission could propose clear prohibitions concerning practices that are controversial, such as, for example, concerning favouring its own products by an undertaking. Such solution would facilitate law enforcement, as proving the violation would be much easier for both business users and authorities. Secondly, it is worth indicating that more courageous provisions would achieve one of the purposes of the Regulation, which is to avoid fragmentation of the legislation among Member States. The prudent approach of the Commission is understandable, as the Regulation is a breakthrough in the legislation concerning anti-competitive practices in B2B relations. The difficulty of the Regulation also results from the nature of online markets, which constitute a relatively new and highly demanding area.

Conclusions

The market of the online intermediation services has been one of the fastest growing fields in the recent years. The law has a crucial role in those changes, as it should keep up with the new technologies and facilitate their further development. A variety of ways of reaching markets and consumers is beneficial for maintaining a high level of competition. Unfortunately, the scope of anti-competitive practices of service providers is broad and the contemporary legislation is not capable of preventing them completely. In order to meet the needs of business users which are potentially exposed to harmful practices, it is vital to implement a new law. In the recent times the Council of the European Union has adopted the Regulation on promoting fairness and transparency, which seems to identify correctly and address the issues regarding the functioning of online intermediation services. Although the Regulation provides solutions -

³⁸ F. Bostoen, *The Commission proposes a Regulation on platform-to-business trading practices*, source: <https://www.law.kuleuven.be/citip/blog/the-commission-proposes-a-regulation-on-platform-to-business-trading-practices/> [access: 10.03.2019].

³⁹ Author's own material, meeting with Margrethe Vestager organised in Brussels by Res Publica Europa from 2 April 2019, source: <https://photos.google.com/share/AF1QipMFtaYNpuK6pdSfFniSUEvLxJS6E1TJOM8ygnRzqpHWR0gpDWQvPE9FSBA3kHnK9g?key=WVp6NFU5RDVTWkJXaU1xd2dnQUpPUW51ajlvdDVB> [access: 5.04.2019].

transparency obligations and improved enforcement procedures - that will contribute to a better realisation of the potential of Internet platforms, it should be perceived as the first step, rather than a comprehensive, final answer regarding the problem of anti-competitive practices in online intermediation services.

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Summary

The Digital Single Market ('DSM') is one of the fastest growing areas of the European Union' economy. The paper aims to present the challenges for legislative bodies stemming from the popularisation of online intermediation services which are a vital part of the DSM. The Council of the European Union, being aware of the problems related to anti-competitive practices in the field of Internet platforms, has recently adopted the Regulation on promoting fairness and transparency for business users of online intermediation services. In the article the most important features of the online intermediation services are described, which is helpful in understanding the new Regulation. Further on, the main aspects of the proposal are presented and analysed - these are *inter alia* information obligations and new mechanisms of the legal protection of business users. Finally, conclusions and the evaluation of the upcoming legal changes are provided.



Key words

Platforms to business, P2B, online platforms, intermediation services, online search engines, social networks, anti-competitive practices, competition law