

# Competition law enforcement in Ukraine: challenges from on-line giants

by

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## *Abstract*

Competition law, economics and policy are facing a regulatory metamorphosis due to the rise of the digital economy. US, China and EU jurisdictions have announced and partially introduced systemic changes to their competition law frameworks to keep pace with technological developments. The Antimonopoly Committee of Ukraine is following the principle of ‘three monkeys’, it *sees* no on-line platforms, *hears* no on-line platforms, *speaks* of no on-line platforms, so nothing has been undertaken or even announced.

The paper is twofold. Firstly, it analyses the economic background and features of the digital economy and shows why the available instruments of competition

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enforcement are ineffective. The second part of the paper shows why the current Ukrainian competition law framework is (in)capable of dealing with challenges posed by on-line giants. Regarding the need for a recalibration of regulatory approaches in digital markets, Ukraine faces the dilemma of a proper combination of *ex ante* and *ex post* measures.

### *Résumé*

Le droit de la concurrence, l'économie et la politique sont confrontés à une métamorphose réglementaire due à l'essor de l'économie numérique. Les juridictions des États-Unis, de la Chine et de l'UE ont annoncé et introduit partiellement des changements systémiques dans leurs cadres juridiques de la concurrence pour suivre le rythme des développements technologiques. Le Comité anti-monopole de l'Ukraine suit le principe des 'trois singes', il ne voit aucune plate-forme en ligne, n'entend aucune plate-forme en ligne, ne parle d'aucune plate-forme en ligne. En conséquence, rien n'a été entrepris, ni même annoncé.

La structure du papier est double. Premièrement, il analyse le contexte économique et les caractéristiques de l'économie numérique et montre pourquoi les instruments disponibles d'application de la concurrence sont inefficaces. La deuxième partie de l'article montre pourquoi le cadre juridique ukrainien actuel de la concurrence est (in)capable de faire face aux défis des géants en ligne. En ce qui concerne la nécessité de recalibrer les approches réglementaires sur les marchés numériques, l'Ukraine est confrontée au dilemme de la bonne combinaison *ex ante* et *ex post*.

**Key words:** digitalisation; on-line platform; market definition; gatekeeper; competition enforcement.

**JEL:** K21, L14, L40, L86

## I. Introduction

The term digital revolution refers to a critical change of the technological and social environment under digitalisation. Usually, entrepreneurs are the first to adapt to changes, while state bodies are much less flexible. In the competitive field, current economies are situated within the gap between these two milestones: business actors have already readjusted their business processes in order not only to meet the digital challenges, but to make it profitable; meanwhile competition agencies have, at best, just realised the risks of unregulated digitalisation. The Antimonopoly Committee of Ukraine (hereinafter: AMCU) has not yet reached even this milestone. The AMCU's list of priorities for 2022 focuses on markets of electricity, natural gas, freight

transportation, financial services, construction materials – with no mention of digital challenges even though the Ukraine is a regional leader of offshore software developments,<sup>1</sup> where exports of IT services increased more than 4 times for 2015–2021 and has reached \$ 6.8 billion.<sup>2</sup>

The paper consists of 5 sections, two of which provide an introduction and conclusions. The second section describes the changes of the competition environment under digitalisation. The third one presents the downsides of conventional tools of antitrust analysis in meeting digital challenges to the competition law enforcement both in Ukraine and worldwide. The fourth part provides a legal analysis of Ukrainian competition law and its capability to meet the challenges of on-line giants. The article shows the necessity to recalibrate regulatory provisions, adopt a new methodology of market definition and choose a proper combination of *ex ante* and *ex post* measures towards on-line giants.

## II. Digital coordinates of competition

In recent years, many socio-humanitarian studies have acquired a technical flavour. Such terms as fin-tech, leg-tech, etc. have become part of the lexicon of both academics and practitioners due to digitalisation that is making large waves across the planet.

The Gartner Glossary defines digitalisation as the use of digital technologies to change a business model and provide new revenue and a value-producing opportunity.<sup>3</sup> It is not so much about the production of digital technologies or digital content, but mostly about the changes that are taking place in other fields of business due to the use of digital technologies. The list of the Top 10 ‘digitally-disrupted’<sup>4</sup> determined by the OECD is presented in Table 1.

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<sup>1</sup> Amcu.gov.ua. 2022. *АМКУ затвердив Пріоритети на 2022 рік*. <<https://amcu.gov.ua/news/amku-zatverdiv-prioriteti-na-2022-rik>> accessed 20 May 2022.

<sup>2</sup> Daxx Software Development Teams. 2022. *Global Offshore Developer Rates By Country in 2021* <<https://www.daxx.com/blog/development-trends/average-rates-offshore-developers>> accessed 20 May 2022.

<sup>3</sup> Gartner. 2022. *Definition of Digitalization – Gartner Information Technology Glossary*. <<https://www.gartner.com/en/information-technology/glossary/digitalization>> accessed 20 May 2022.

<sup>4</sup> Digital disruption is an effect that changes the fundamental expectations and behaviors in a culture, market, industry or process that is caused by, or expressed through, digital capabilities, channels or assets. [Gartner. 2022 *Definition of Digital Disruption – Gartner Information Technology Glossary*. <<https://www.gartner.com/en/information-technology/glossary/digital-disruption>> accessed 8 September 2022.

**Table 1.** Top-10 digitally-disrupted sectors

SPA code	Name
49	Land transport services and transport services via pipelines
55	Accommodation services
56	Food and beverage serving services
58	Publishing services
59	Motion picture, video and television programme production services, sound recording and music publishing
K	Financial and insurance services
73	Advertising and market research services
79	Travel agency, tour operator and other reservation services
P	Education services
92	Gambling and betting services

Source: OECD Guidelines for Supply-Use Tables for the Digital Economy<sup>5</sup>.

In the land transport services sector, the most remarkable changes have affected the taxi market, where the introduction of digital technologies has actually pushed conventional taxi companies out of the market, resulting in the dominance of taxi-apps' operators such as Uber, Lyft, Bolt, Uklon and others. For example, the share of the whole set of conventional taxi services in the Ukrainian market takes 11%, while the market leader Uber controls 51% of the market.<sup>6</sup>

In the accommodation services sector, competition has changed significantly with the introduction of AirBnB. In its first 4 years, it accumulated the same amount of supply that took the Hilton hotel chain more than 90 years to achieve.<sup>7</sup> Distribution of other digital services such as booking.com, TripAdvisor, etc. is another way to increase competition in the sector. It is based on the effect of reducing information asymmetry on prices, assortment, quality characteristics of services (including consumer feedback). Now this information is available to consumers in a one-stop-shop form, simplifying the comparison of commercial offers and ensuring rational choices. It is a guarantee of concentration of

<sup>5</sup> OECD, 2019. Guidelines for Supply-Use tables for the Digital Economy. Paris, p. 13. <[https://unstats.un.org/unsd/nationalaccount/aeg/2019/M13\\_2\\_3\\_2a\\_SA\\_Digital\\_Economy.pdf](https://unstats.un.org/unsd/nationalaccount/aeg/2019/M13_2_3_2a_SA_Digital_Economy.pdf)> accessed 20 May 2022.

<sup>6</sup> Економічна правда. 2019. У компанії Bolt оцінили розмір тіньового ринку таксі в Україні [www.epravda.com.ua/news/2019/07/9/649486](http://www.epravda.com.ua/news/2019/07/9/649486) accessed 20 May 2022.

<sup>7</sup> Pennington, J., 2017. *The numbers that make China the world's largest sharing economy*. World Economic Forum. <[www.weforum.org/agenda/2017/06/china-sharing-economy-in-numbers/](http://www.weforum.org/agenda/2017/06/china-sharing-economy-in-numbers/)> accessed 20 May 2022.

consumer demand at the relevant on-line platforms, granting them enough market power to win in the context of vertical competition with hotels or other accommodators.

Publishing services and advertising markets belong to different sectors of the economy, but nowadays they are intermediated by the same e-platforms – Google, Facebook, etc. These platforms are the digital core of multisided markets that attracts both publishers and advertisers through: a) an effective digital mechanism of intermediation that significantly reduces their transaction costs compared to direct contracting or non-digital intermediation, b) this service tying to free placement. The latter is a key resource of the platforms that generates a network effect and leads to the demand's lock-in and the gatekeeping of the value-chain.

The analysis of competition changes in digitally-disrupted sectors may go on and on, but at least one more field should be mentioned in this context – the retail sector. It is absent in the abovementioned table 1, as it is 'digitally-benefited' rather than 'digitally-disrupted'. The retail sector was one of the first to start its active modification under digitalisation. As a result, today the share of e-commerce in the structure of the global retail sales is about 20%,<sup>8</sup> while geographical boundaries of retail markets have expanded from local to global. For example, in 2019, Ukrainians bought on-line goods worth \$3 billion, 600 million of which – from foreign retailers, primarily – Chinese e-platform AliExpress (about 60% of cross-border turnover).<sup>9</sup> This looks like pure positive effects on competition, but it is in fact not so. Firstly, global competition in e-retail is available only for a limited list of goods – consumer electronics, clothing, cosmetics, etc. By contrast, perishable goods are not covered due to the relatively long time to deliver them and high transport costs. Secondly, e-commerce, like other types of digital intermediation, is driven by network effects, so supply remains very concentrated. For example, in Ukraine, the national leader of on-line sales – Rozetka (this company owns several popular marketplaces in the country – Rozetka, Prom.ua, Bigl.ua, Crafta, Shafa) controls more than 70% of the B2C segment of the domestic e-retail market. Considering this fact in addition to the rapid growth of digitalisation in the global (according to Statista, the share of on-line sales in total retail sales worldwide is expected to increase up to 24.5% in 2025<sup>10</sup>) and Ukrainian retail

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<sup>8</sup> Coppola, D., 2022. *E-commerce share of total retail sales* | Statista. <<https://www.statista.com/statistics/534123/e-commerce-share-of-retail-sales-worldwide>> accessed 20 May 2022.

<sup>9</sup> Ugniva, S., 2019. *За китайським рахунком. Як Україна стала для AliExpress другим у світі покупцем за зростанням замовлень*. Biz.nv.ua. <<https://biz.nv.ua/ukr/tech/pokupki-na-aliexpress-ukrajinci-na-drugomu-misci-v-sviti-za-tempami-rostu-onlayn-zamovlen-novini-ukrajini-50061740.html>> accessed 20 May 2022.

<sup>10</sup> Ibid 9.

(the share of on-line sales in the total retail sales in Ukraine increased from 3.3% to 8.8% in 2017–2020, and it is expected to rise by 11% in 2025<sup>11</sup>) makes the risks to competition obvious.

Thus, the abovementioned issues show that digitalisation has had an ambiguous effect on competition in the markets. In some markets it has intensified competition; in others, it has weakened competition by blocking the most profitable (in terms of transaction costs) value chains and creating latent monopolists within them which are known as gatekeepers. They effectively exploit their market power, while remaining invisible to competition agencies due to the inefficiency of conventional tools of competition policy.

### III. Digital challenges to competition law enforcement

Why is the market power of gatekeepers invisible to current competition law? The fact is that conventional competition policy and the relevant competition law are based on the ‘Structure-Conduct-Performance’ paradigm (hereinafter: SCP paradigm). Only a small range of competitive practices may be *a priori* qualified as a violation of competition law. Most of them have a competitive or an anti-competitive effect, depending on the initial market position of the economic entity (group of economic entities) that conducts them. If a small firm (3% of a market) overcharges, it by itself suffers faster than consumers. The same done by a big firm (50% or 90% of a market) brings it a profit. If small firms (total market share less than 10%) agree to jointly purchase or sell goods, such concerted practice is likely to result in a level playing field in terms of vertical competition. The same done by dominant companies allows them to leverage their market power onto adjacent markets and facilitates abuse of their increased market power. Therefore, before interpreting the competitive behaviour of firms in the market, it is necessary to define the boundaries of such markets, their capacity and structure. However, this is where the problem arises.

Conventional methods of market definition are based either on the analysis of consumer price reactions or on the assessment of substitutability of goods. The use of the former is limited with respect to transactional on-line platforms, where prices are often set differently (for some platforms as a complex function of turnover, for others as royalties for the use of trademarks, etc.), complicating not only their comparison, but also their perception by counterparties. For

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<sup>11</sup> Дніпропетровське Інвестиційне агенство. 2021. *Минулого року ринок e-commerce досяг \$4 мільярдів*. <<https://dia.dp.gov.ua/minulogo-roku-rinok-e-commerce-dosyag-4-milyardiv/>> accessed 20 May 2022.

non-transactional on-line platforms, especially those that use the zero-price model, the application of a price response analysis for market definition is impossible.

An assessment of the substitutability of goods is the universal method of market definition, which can be very useful in investigating markets where on-line platforms work. However, the devil is in the details. For example, the relevant methodology in Ukraine contains 5 criteria of goods' substitutability: (1) similarity of functionality, consumer properties, way of consumption, etc.; (2) similarity of physical, technical, operational properties and characteristics, quality indicators, etc.; (3) common group of consumers; (4) no significant difference in prices; (5) the ability of producers to supply new goods in order to replace existing ones.<sup>12</sup> This list does not include the criterion of difference in transaction costs that is a source of competitive advantage of on-line platforms over other intermediaries. Let us compare the intermediation of a dominant e-marketplace and a non-digital trader. The methodology asks for a comparison of margins of each type of intermediation to merge/split the compared activities within a single/different markets. It does not compare transaction costs, which these intermediators incur trading via different channels to obtain the same effect. This is the same as comparing the price per 1 kg of goods with the price per 1 ton of its substitute. Thus, the AMCU does not see the difference between the channels, intermediated digitally and conventionally, which is obvious to their participants. Evidence of this is found in its decision from 2018 on the authorization of the merger of the two largest on-line retailers, which guaranteed the new entity control over more than 70% of e-commerce in Ukraine, while its share in total retail sales was about 6%.<sup>13</sup>

A no less difficult challenge to market definition is the need to consider network effects. If the difference in transaction costs creates a competitive advantage for on-line platforms, the network effect takes root. Contracting through a popular on-line platform is a guarantee of access to a significant and growing scope of customers. This means that measuring the capacity of a multisided market only by sales on one side of the core platform, is insufficient to assess its actual market power. Such an analysis should include the number of active users on each side of the on-line platform and the size of network effects multiplier. Unfortunately, economics has not yet developed an effective tool to estimate the latter. There is a lack of statistical data for its evaluation. However, this does not mean that competition agencies should abandon market

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<sup>12</sup> AMCU, 2002. *Методика визначення монопольного (домінуючого) становища суб'єктів господарювання на ринку*, Art.5. <<https://zakon.rada.gov.ua/laws/show/z0317-02#Text/>> accessed 20 May 2022.

<sup>13</sup> AMCU, 2018. *Desicion #446-p*. <<https://amcu.gov.ua/npas/rishennya-446-r-vid-07092018>> accessed 20 May 2022.

definition, while this idea circulates in the antitrust community.<sup>14</sup> Today there is no adequate alternative to the SCP paradigm, so it is better to focus on developing methods of market definition in the area of digitalisation.

Nevertheless, it should be considered that not every network effect leads to a lock-in, as well as the fact that zero-pricing is not always a source of market power. Sometimes it is a way to overcome it. The latter was visible at the border line of the 20<sup>th</sup> and 21<sup>st</sup> century in the case of the leveraging – of the market power obtained by Microsoft Corporation in the market of operating systems – onto the market of Internet browsers.<sup>15</sup> The monopoly of Microsoft Explorer in the latter was overcome in the 2000s thanks to free distribution of alternative Internet browsers.

There was another case in Ukrainian practice. The players of the Ukrainian market of mobile communication introduced the tariff plan ‘0 in the network’ (free communication of subscribers within one network). This resulted in the lock-in of consumers within the dominant networks, while the abandonment of the practice of zero-pricing (as a way of self-preferencing) has become a competitive advantage of Ukraine’s smallest mobile operator and the prerequisite for its growth.<sup>16</sup> The introduction of free national roaming during the war in Ukraine in the spring of 2022, although being a necessary means to maintain communication in the war zone, was a testimony to the positive contribution of multi-homing to effective competition and the growth of public welfare.

The practice of multihoming in competition law does not always work as directly described. There is still no coherent theory of multi-homing, because it almost cannot be implemented in the markets of non-network goods that dominated the economy of the 20<sup>th</sup> century, where modern competition law originates from. Its antonym – exclusive dealing – is more common in competition law and practice. It refers to vertical restraint to competition, which may be prohibited if it is used by dominant companies.<sup>17</sup> Under Ukrainian competition law, certain types of exclusive dealings are even subject to block exemptions, and are not subject to notification to the AMCU.<sup>18</sup> It

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<sup>14</sup> The European Commission, 2019. *Competition policy for the digital era*, pp. 3–4. <<http://doi/10.2763/407537>> accessed 20 May 2022.

<sup>15</sup> *United States of America v. Microsoft Corporation* [2018] (US District Court for the District of Columbia), 98–1232.

<sup>16</sup> Євгенія Підгайна, «Велика трійка» в цифрах: як мобільні оператори збільшують оборот і пірнають у збитки’. (*Mind.ua*, 2020) <<https://mind.ua/publications/20211288-velika-trijka-v-cifrah-yak-mobilni-operatori-zbilshuyut-oborot-i-pirnayut-u-zbitki>> accessed 20 May 2022.

<sup>17</sup> Law of Ukraine On Protection of Economic Competition, 2001, art. 13 <<https://zakon.rada.gov.ua/laws/show/2210-14#n416>> accessed 20 May 2022.

<sup>18</sup> AMCU. Типові вимоги до вертикальних узгоджених дій суб’єктів господарювання стосовно постачання та використання товарів, 2017, Art.2 <<https://zakon.rada.gov.ua/laws/show/z1364-17#Text>> accessed 20 May 2022.



brings us back to the open challenge of market definition – that is making exclusive dealing practices, which are quite common in digital intermediation markets,<sup>19</sup> unregulated.

Thus, no matter what competitive practice is undertaken – from overcharging to the leveraging of market power, various downsides of current instruments of competition enforcement have to be relied on, which significantly reduce the effectiveness of their application.

#### IV. Ukrainian competition law and on-line platforms

While competition bodies across the world are intensively engaged in discussion and/or adoption of new competition rules within the area of the digital economy, the AMCU – the primary state body responsible for the protection of economic competition in Ukraine<sup>20</sup> – has remained silent on the need to recalibrate the national competition law framework. The latest amendment to the Law of Ukraine ‘On protection of economic competition’ took place in June 2021, but had not embraced specific concepts or enforcement tools directly addressing the peculiarities of the business models of digital platforms.

In order to ‘tame the tech giants’, foreign jurisdictions have taken different approaches, mostly implementing *ex ante* regulation and empowering competition authorities with additional functions. Enforcement of *ex post* rules is often too slow to sanction wrongdoings and to avert their negative implications. Moreover, dealing with abuse of a dominant position is preceded by market definition, which poses certain difficulties, caused by complications of multisided markets and the sluggishness of ‘old-school’ market definition terminology. At the same time, many data-related behavioural requirements need to be specified in advance and controlled *ex post*.<sup>21</sup>

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<sup>19</sup> Cristian Chica, Kenneth Chuk, and Jorge Tamayo, *Exclusive Dealing and Entry by Competing Two-Sided Platforms* Harvard Business School Working Paper 21-092; Elias Carroni, Leonardo Madio and Shiva Shekhar, *Superstars in two-sided markets: exclusives or not?* CESifo Working Paper No. 7535; Jet Deng and Ken Dai, ‘Antitrust Enforcement Against Digital Platforms in China: Anatomy of “Choose One from Two” (*WWL*, 12 November 2020) <<https://whoswholegal.com/features/antitrust-enforcement-against-digital-platforms-in-china-anatomy-of-choose-one-from-two>> accessed 21 April 2022.

<sup>20</sup> Law of Ukraine On the Antimonopoly Committee of Ukraine, 1992, <<https://zakon.rada.gov.ua/laws/show/z1364-17#Text>> accessed 20 May 2022.

<sup>21</sup> Peter Georg Picht and Heiko Richter, ‘EU Digital Regulation 2022: Data Desiderata’ [2022] 71(5) GRUR International 395.

One of the directions to recalibrate competition law towards the challenges of the digital economy is to apply an asymmetric approach for defining rights and obligations of market players, that is, to actively ‘designate’ a *gatekeeper* status. The ways of assessing if a company holds a gatekeeper status vary across jurisdictions.

The Digital Markets Act applies both quantitative and qualitative criteria for designating a gatekeeper status. The latter (a significant impact in the internal market; an important gateway for business users to reach end-users; an entrenched and durable position in its operations) are presumed if quantitative thresholds are met (annual Union turnover of 57.5 billion in each of the last three financial years, at least 45 million monthly active end-users and at least 10 000 yearly active business users established in the Union in the last financial year<sup>22</sup>).

Andriychuk praises such a mechanism as it ‘appears to be the most suitable for inter-platform competition, as it imposes a range of market limitations on the gatekeepers while allowing their potential competitors to scale up without being subject to DMA obligations.’<sup>23</sup>

The DMA sets the obligation for an on-line giant to notify the Commission that it ‘meets all the thresholds within two months after those thresholds are satisfied and provide it with the relevant information...’,<sup>24</sup> failure to do so leads to an entitlement of the Commission ‘to designate that undertaking as a gatekeeper based on information available to the Commission.’<sup>25</sup>

The discussion of the new British pro-competition regime for digital markets<sup>26</sup> has focused on the need for a range of quantitative and qualitative evidence to support a designation of the Strategic Market Status by a competition authority.

The German Competition Act puts forward the rights of the Bundeskartellamt to issue a decision declaring that an undertaking, which is to a significant extent active on multi-sided markets, is of paramount significance for

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<sup>22</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (‘Digital Markets Act’) [2022]. When referring to the DMA in the following text, reference is made to the version dated 11 May 2022.

<sup>23</sup> Andriychuk, Oles, ‘*Shaping the new modality of the digital markets: the impact of the DSA/DMA proposals on inter-platform competition*’. [2021] 44 (3) *World Competition: Law and Economic Review* 261–286.

<sup>24</sup> Digital Markets Act, Art. 3.3.

<sup>25</sup> *Ibid* 25.

<sup>26</sup> A new pro-competition regime for digital markets – government response to consultation (Updated 6 May 2022). <<https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation#part-3-strategic-market-status>> accessed 20 May 2022.

competition across markets.<sup>27</sup> The next step the Bundeskartellamt may take is to prohibit specified conduct/practices listed in the Act.<sup>28</sup> The German decision that determined Google's paramount significance for competition across markets<sup>29</sup> has been a milestone in a new era of competition law enforcement on digital markets. It also promotes a research interest in the Bundeskartellamt's reasoning behind market power in general search engine services, search-based advertising, services with high user numbers, as well as the assessment of the various neighbouring and vertically related digital activities.

The Law of Ukraine on Protection of Economic Competition embraces a symmetric approach to undertakings – no further guidelines or methodology has been published regarding competition on digital markets. The only possible opportunity to 'tame a tech giant' is to determine that an abuse of its dominant position was committed.

The latter imposes a standard economic analysis mechanism: the market share threshold of 35% is established as well as the criterion of the absence of significant competition on the relevant market. The law defines this criterion as: 'does not experience significant competition due to limited access of other entities to purchase raw materials, commodities and sales of goods, the presence of barriers to market access for other entities, the availability of benefits or other circumstances.'<sup>30</sup>

The 'barriers to market access for other entities, the availability of benefits or other circumstances' imply that a relevant market is determined by the competition authority based on the relevant methodology. However, a debate has been underway in recent decades on whether market definition is required any longer when assessing potentially anti-competitive conduct, with market definition being a redundant step in the assessment process, given the availability of quantitative techniques capable of directly estimating the effects of such conduct.<sup>31</sup>

Nevertheless, under Ukrainian legislation, there is a requirement to define a relevant market, following the CJEU position that 'the proper definition of the relevant market is a necessary precondition for any judgment as to

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<sup>27</sup> Art. 19a.1 Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p. 2506).

<sup>28</sup> Ibid 28, Art. 19a.2.

<sup>29</sup> Fallbericht vom 5. Januar 2022: Google – Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 30.12.2021). <<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B7-61-21.html>> accessed 20 May 2022

<sup>30</sup> Law of Ukraine on Protection of Economic Competition, 2001, Art 12.

<sup>31</sup> Rhonda L Smith, 'Market Definition: Going, going, gone? Developments in the United States' (2010) 18(2) Competition and Consumer Law Journal 110.

allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined.<sup>32</sup>

Criteria for finding dominance are detailed in the Methodology on definition of monopoly (dominant) position of undertakings on the market (the Dominance Methodology), approved by the Order of the AMC dated 5 March 2002 No. 49-p.<sup>33</sup>

The AMCU has used this Methodology for digital markets only once to approve the merger of the Rozetka group and EVO group in 2018.<sup>34</sup> The AMCU decision defined the relevant market as ‘the national market for the provision of services for the promotion of goods (works, services) on the Internet through on-line platforms (Internet platforms).’<sup>35</sup> The AMCU decision stated that:

‘this market is open to entry/exit of new entrants and there are no significant regulatory barriers to entry, in particular the ability to enter the market of new competitors depends mainly on their financial capabilities and the success of marketing strategy. Competitors do not have exclusive rights to innovation, intellectual property, logistical support, etc. In addition, there are no regulatory barriers to market entry, for example, new market participants do not need to obtain licenses, permits, etc.’<sup>36</sup>

In 2017 a draft methodology on market definition was announced but it has not yet been approved.<sup>37</sup> The draft methodology suggests *inter alia* an analysis of the substitutability of goods, application of the SSNIP test, and the method of indicators of price elasticity of demand. However, it lacks terminological consistency beyond its methodological deficiencies. The application of

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<sup>32</sup> T-62/98 Volkswagen v Commission 2000.

<sup>33</sup> Ibid 13.

<sup>34</sup> Ibid 14. As the result of concentration, a number of Ukrainian marketplaces came under one umbrella: Prom.ua, Bigl.ua (on-line platforms for retail trade in consumer goods), Kabanchik.ua (an on-line service for finding contractors for ordering household chores and services as well as small commercial tasks), Crafta.ua (an on-line platform for the sale of handmade products as well as collectible and rare products), Shafa.ua (an on-line platform for the sale of women’s and children’s goods, which are usually second-hand), Zakupki.prom.ua (an on-line platform for the participation in public procurement, for the participation in the public e-procurement system Prozorro.sales, and the open system of commercial procurement RIALTO) and On time (an on-line service for exchanging, signing and storing any documents).

<sup>35</sup> Ibid part 67.

<sup>36</sup> AMCU, ‘Annual Report’ 2018 <[https://amcu.gov.ua/storage/app/sites/1/Docs/zvity/2018/AMCU\\_2018.pdf](https://amcu.gov.ua/storage/app/sites/1/Docs/zvity/2018/AMCU_2018.pdf)> accessed 20 May 2022.

<sup>37</sup> AMCU, Methodology on Market Definition (Draft), 2017 <<https://amcu.gov.ua/news/proekt-metodiki-viznachennya-rinku>> accessed 20 May 2022.

the SSNIP test and the HMT to digital undertakings has received different opinions. The OECD has noted that the HMT could still be used when defining markets for transaction platform businesses, and that the existence of a zero price on one side of the platform does not prevent the use of the HMT<sup>38</sup>. However, Smith and Duke argue that the application of the HMT to a transaction platform is less straightforward than for a traditional, single-sided business. That is so because no single price to both sets of customers (to which to apply a SSNIP test and the effect of a SSNIP on the demand of one set of customers) can be intensified by indirect network effects.<sup>39</sup>

Mandrescu argues that the challenges posed by on-line platforms primarily concern changes to practical application that do not exceed the boundaries of current practice.<sup>40</sup> Smith and Duke conclude that there is no 'need to alter the traditional approach to market definition, that is, starting from the product of the business to which the conduct at issue relates. On the contrary, that approach seems likely to assist in "cutting through" the additional complexity which seems to arise when market definition is based on customer groups.'<sup>41</sup>

Nevertheless, it must be stated that neither the old nor the new methodology accounts for the current market tendencies; for example, the emphasis remains on products, not services, and on the price dimensions of competition. The legal definition of 'commodity' entails any object of economic turnover, including products, works, services, documents supporting obligations as well as rights (including securities). In fact, AMCU practice shows that instead of studying the commodity/product substitutability of services (in fuel and pharmacy retail) of intermediaries, it was the substitutability of commodities (gasoline and medicines respectively) that was examined.<sup>42</sup> Neither methodology has embraced the limitations to substitution due to switching costs, though they are vital for competition enforcement in digital markets.

For determining the abuse of dominance, Ukrainian competition law takes both a formalistic approach (such as 'setting prices or other conditions for the purchase or sale of goods that could not be set in the face of significant

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<sup>38</sup> OECD, 2019 *Rethinking Antitrust Tools for Multi-Sided Platforms* <<https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>> accessed 20 May 2022.

<sup>39</sup> Smith, R. L., & Duke 'Platform businesses and market definition'. *European Competition Journal*, (2020) 1–25. <doi:10.1080/17441056.2020.1851>

<sup>40</sup> Daniel Mandrescu, 'Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)' (2018) 41 (3) *World Competition: Law and Economics Review*.

<sup>41</sup> *Ibid* 40.

<sup>42</sup> AMCU, Decision 680-p *AMCU v. Novo Nordisk A/C, Novo Nordisk Health Care AG, BaDM, BaDM-B, Apteka ZI, Ganza, Farmadix, Medfarm* (2020), 33–49; AMCU, Decision 329-p *AMCU v. WOG, OKKO-Retail, Socar Petroleum* (2019), 6–11.

competition in the market’, ‘creating barriers to market access (exit from the market) or elimination of sellers, buyers and other business entities from the market’); and an effects-based approach (for example ‘restrictions on production, markets or technical development that have caused or may cause damage to other entities, buyers, sellers’).<sup>43</sup>

Based on cases dealt with by foreign competition authorities and on academic research, the stance is taken in this paper that an effects-based approach should be a ‘determinant’ in handling anti-competitive behaviour in the digital economy.<sup>44</sup> However, practices constituting an abuse of dominance that are listed in Article 13 of the Law of Ukraine ‘On Protection of Economic Competition’ may be well suited to on-line platforms, for example:

- ‘setting prices or other conditions for the purchase or sale of goods that could not be set in the face of significant competition in the market’ – for self-preferencing of the products and services of the platform, imposing retail most-favoured-nation clauses (dictating that the seller may not offer better terms and conditions on its own website or other platforms);
- ‘creating barriers to market access (exit from the market) or elimination of sellers, buyers and other business entities from the market’ – for creating obstacles to users’ multihoming. Yet the cornerstone of adapting current legislation remains the same – the market definition methodology.

Setting aside the difficulties of merger control and vertical competition due to the limitations of the word count of this paper, it has been decided for the purpose of this paper to raise the issue of equipping the AMCU with enhanced capabilities in digital markets. The AMCU is expected to recalibrate the regulatory approach to anticompetitive conduct of on-line giants as well as to strengthen its investigative and enforcement functions – both goals can be accomplished with the involvement of a dedicated task-force. Foreign jurisdictions have mostly established additional departments for digital markets or hire additional digital specialists (for example, the Japan Fair Trade Commission has been reenforced with the Office of Policy Planning and Research for Digital Markets,<sup>45</sup> the UK authorities have established the Digital Markets Unit and are discussing its powers<sup>46</sup>). Beyond this, there is

<sup>43</sup> Ibid 31, Art 2.

<sup>44</sup> European Commission, ‘DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses’, 2005; OECD, ‘Abuse of Dominance in Digital Markets’, 2020, 42; Payal Malik and others, ‘Legal Treatment of Abuse of Dominance in Indian Competition Law: Adopting an Effects-Based Approach’ (2019) 54(2) Review of Industrial Organization.

<sup>45</sup> Japan Fair Trade Commission Organization chart <[https://www.jftc.go.jp/en/about\\_jftc/JFTCOrganizationChart22.04.pdf](https://www.jftc.go.jp/en/about_jftc/JFTCOrganizationChart22.04.pdf)> accessed 20 May 2022.

<sup>46</sup> Ibid 27.

a need for competition authorities to cooperate with other public bodies to ensure a consistent approach on digital markets. The draft DMA presupposes the establishment of a High-Level Group for the DMA, to be composed of the representative of: (a) body of European telecoms regulators, (b) European Data Protection Supervisor and European Data Protection Board, (c) European Competition Network, (d) Consumer Protection Cooperation Network, and (e) European Regulatory Group of Audiovisual Media Regulators<sup>47</sup>

In Ukraine, there is the National Commission for the State Regulation of Electronic Communications, Radiofrequency Spectrum and the Provision of Postal Services (hereinafter: NCEC) that may effectively involve itself in constant monitoring of quantitative criteria once set by the AMCU.

However, the main question is still open that is, whether the AMCU should initiate a recalibration of the competition law framework towards *ex ante* or *ex post* measures, or both in combination. From one point of view (which is underpinned by the acknowledged ‘tendency of the ‘Europeanization’ of competition law with the spreading of commitments on implementation of competition *acquis* in the Ukrainian legal order’<sup>48</sup>) Ukraine should implement the DMA framework and start negotiations with the EU on the amendments to the EU-Ukraine association agreement to set the rules for data communication. From the other point of view, the AMCU may follow the road of a procedure for notifying powerful operators of the digital economy of their dominant status, based on defining the boundaries of the information and intermediary services markets, and then set special obligations for intermediary, regulatory, and information-spreading functions of on-line platforms, alongside the Code of conduct.

## V. Conclusion

The Ukrainian competition law framework should undoubtedly be amended to, either, conform to the Europeanization direction, implementing the DMA cornerstones, or reform the *ex post* mechanism of economic competition protection. Both of these variants imply the necessity to develop a new methodology of market definition open to the challenges of multi-sided contracting, zero-pricing and network effects, as well as to other complications driven by the digitalisation of the economy.

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<sup>47</sup> Digital Markets Akt, Art. 31d.

<sup>48</sup> Kseniia Smyrnova, Natalia Fokina, The ‘Europeanization’ of Competition Law of Ukraine, *GRUR International*, Volume 71, Issue 1, January 2022.

The digital arsenal of the AMCU should be enhanced and involving the NCEC seems to be a viable solution because of the latter's expertise and experience in digital markets.

Due to the 'Brussels effect', the DMA would have an effect on Ukrainian competition law framework and foster the need for amendments to the EU-Ukraine Association agreement to enhance the cooperation in digital regulation and data exchange.

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