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Selected Legal Aspects of Protection of Undistorted Competition in the Digital Economy

Wybrane aspekty prawne ochrony niezakłóconej konkurencji w gospodarce cyfrowej

ABSTRACT

The article is of research and scientific nature, and its main purpose is to look at selected legal aspects of protection of undistorted competition in the digital economy. The key research question is whether the legal principles for the abuse of a dominant market position should be further developed by the competent competition authorities and courts on a case-by-case basis in regard to digital economy. Competition law's purpose is to reduce market distortions. In this way, the digital economy must be safeguarded. Otherwise, due to capacity limits in advertising space or just having too much data, there is a possibility of exploitation abuse. The extent to which platform markets have this potential for legal misuse is highly impacted by market development dynamics and platform features (the extent of data access, the type of network effects). As a result, we begin by looking at whether merger control in online markets has been effective enough so far. Then, we discuss the dangers of market power abuse due to a lack of legal enforcement. The article concludes with a summary of the

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authors' opinions based on the legal and economic grounds presented. The presented issue has not been analysed comprehensively in the literature on the subject so far, thus gives the opportunity to recommend avenues for future research.

Keywords: market power abuse; competition; digital economy; market development

INTRODUCTION

The goal of competition is to eliminate market distortions, and in this respect, the digital economy should be protected as a system of undistorted competition. The digital economy is generally developing dynamically. The emergence of internet platforms[1] and the use of the Internet by dominant companies have led to proceedings by the antitrust authorities and other authorities (e.g., for data and consumer protection) and legal disputes. Registered corporate takeovers were cleared by the competent authorities under merger control law, although in some cases (e.g., in *Google/DoubleClick*; in the USA apparently also in *Facebook/Instagram*) there were in-depth reviews. The U.S. authorities have initiated proceedings against Google, Apple and Facebook because of antitrust, data protection and consumer protection concern against certain company practices. In addition, many legal processes have already been filed in the United States against Internet service providers on the basis of claims of anti-competitive behavior.[2] The European Commission filed a complaint against Google in 2010 for abusing its market position in the EU. Simultaneously, the Court of Justice (ECJ) case law has provided a competition-relevant impetus for the further development of the European data protection legislation (C-131/12, *Google Spain*, or C-594/12, *Digital Rights Ireland*, or C-623/17, *Privacy International*, or C-511/18, *La Quadrature du Net and Others*, or C-520/18, *Ordre des barreaux francophones et germanophone and Others*).

The purpose is to discuss which deficits need to be remedied in merger control and in antitrust abuse control and to try to answer the question whether the legal principles for the abuse of a dominant market position should be further developed by the competent competition authorities and courts on a case-by-case basis in regard to digital economy. In cases of abuse, we see flaws in the enforcement of competition rules. A hypothesis can be made that the design of the abuse proceedings, especially at EU level, meets concerns about competition policy and the rule of law. In order to verify the hypothesis, the authors analysed the content, first of all, the aim of competition legislation to minimize market distortions. Platform

[1] P. Plavčan, R. Funta, *Regulatory Concepts for Internet Platforms*, "Online Journal Modelling the New Europe" 2021, no. 35, pp. 44–59.

[2] E. Gellhorn, W. Kovacic, S. Calkins, *Antitrust Law and Economics in a Nutshell*, St. Paul 2004, p. 1 ff.

services are the most economically successful services on the Internet, as they tend to be concentrated owing to network effects. Maintaining undistorted competition in the digital economy is tough. The authors also assumed that it has been questioned whether existing legal instruments are adequate to defend competition and market participants' rights. The law, in our judgment, needs to be further expanded and, in many circumstances, made more effective to ensure undistorted competition.[3]

The data was collected from scientific literature, as well as respective case law through in-depth document analysis. Several scientific methods of knowledge have been used in the exploration and development of our paper. We applied the method of analysis in order to examine the state of the protection of undistorted competition in the digital economy. The synthesis will allow us to combine partial information into a single unit. We tried using critical analysis to review the legal and regulatory situation as well as abstractions. Applying the comparative method is shared by the views from both sides of the Atlantic in this regard.

MERGER CONTROL IN ONLINE MARKETS HAS NOT YET PROVEN TO BE SUCCESSFUL?

Merger control is an important instrument, especially in dynamic markets, in order to prevent solidification of the market structure[4] that is hostile to innovation. It includes not only mergers between competitors (horizontal mergers), but also mergers within the value chain (vertical mergers), and mergers involving enterprises in close proximity (conglomerate mergers). The digital economy, on the other hand, has unique characteristics, such as the importance of multi-sided platforms. The current legal structure for merger control, in our judgment, is insufficiently effective.[5]

A REVIEW OF THE ACCEPTANCE CRITERIA IS REQUIRED

Abuses of market power in the digital economy are a hot topic. This is due to the fact that data access is crucial in product development and innovation, and that data gathering and use generate a slew of overlapping issues in terms of competitiveness

[3] P. Miskolczi-Bodnár, R. Szuchy, *Joint and Several Liability of Competition Law Infringers in the Legislation of Central and Eastern European Member States*, "Yearbook of Antitrust and Regulatory Studies" 2017, vol. 10(15), pp. 85–108.

[4] V. Stehlík, O. Hamuľák, M. Petr, *Handbook on EU Internal Market*, Olomouc 2016, p. 1 ff.

[5] V. Šmejkal, *How to control global mega-mergers? On premises of the discussed amendment to the EU Merger Control regulation*, [in:] *Právo v měnícím se světě*, Plzeň 2020, p. 1 ff.

and individual legal protection (copyrights, data and consumer protection).[6] The requirement to register a merger is triggered by acceptance criteria (turnover thresholds, existence of a merger). Even if the EU Commission is not involved, a merger control assessment under national law may be possible in particular circumstances. However, in the digital economy, the existing acceptance criterion architecture leads to control gaps. According to European law,[7] a notification requirement only exists if the sales of the companies involved in the merger have exceeded certain thresholds (Articles 1 and 4 of the Council Regulation (EC) No. 139/2004[8]). This can lead to protection gaps if a platform service is taken over without the turnover thresholds of European law being reached. As a result, even if the acquirer is a global market leader with billions in turnover, the acquisition of a company that has not had a turnover or has had a weak turnover can remain free of control. On the one hand, business models[9] that are associated with the generation of commercially useful data sets without the data owned by particular enterprises having already resulted in significant sales are relevant.[10] However, the existing registration system is insufficient to identify situations of purchases of fledgling companies, such as those in the technology sector, that have had limited sales too far despite having great market potential.[11] As a result, market-leading corporations can acquire market competitors before they become serious competitors. These factors highlight the significance of efficient merger control in protecting competition, particularly in dynamic technological markets.[12] The possibility of protection gaps is mitigated because merging initiatives surpass the variously specified admission standards of other states and are thus subject to their regulation. Merger control law, in essence, does not recognize any subsequent restriction of mergers that severely obstruct effective competition. It is feasible to prohibit mergers that represent a structural abuse of market power under EU law, based on an ancient case law that still claims to be valid (C-6/72, *Continental Can Company*). In the case of mergers, the EU Commission has stated that it will, in principle, dispense with retrospective misuse control under the Merger Control Regulation. Abuse control of this nature would be

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[6] T. Peráček, *E-commerce and its limits in the context of the consumer protection: The case of the Slovak Republic*, "Juridical Tribune" 2022, vol. 12(1), pp. 1–12.

[7] See K. Kalesná, I. Hruškovič, M. Ďuriš, *Európske právo*, Bratislava 2012, p. 1 ff.

[8] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, pp. 1–22), hereinafter: Regulation 139/2004.

[9] S. Fedushko, O. Mastykash, Y. Syerov, T. Peráček, *Model of user data analysis complex for the management of diverse web projects during crises*, "Applied Sciences" 2020, vol. 10(24), pp. 4–12.

[10] M. Mesarčík, *Ochrana osobných údajov*, Bratislava 2020, p. 1 ff.

[11] J. Wefersová, D. Nováčková, *Use of Digital Technologies in Business in Slovakia*, "Studies in Systems, Decision and Control "2021, vol. 376, pp. 335–355.

[12] D. Gregušová, A. Dulak, M. Chlipala, B. Susko, *Právo informačných a komunikačných technológií*, Bratislava 2005, p. 1 ff.

secondary in importance and unusual (T-175/99, *UPS Europe*).[13] A remedy, in our opinion, should be sought by further expanding European merger control legislation. For the sake of legal clarity, prior check under merger control law should continue to be the customary approach. Insofar as the sales thresholds are not meaningful for assessing the economic significance of transactions (Article 5 (3) of Regulation 139/2004), the legal requirements already take into account the particularities of certain markets according to the current legal situation when calculating the relevant sales. Additional criteria connected to transaction volume should be included in addition to existing regulations. Such activities would have a broader scope of applicability and, in our opinion, would be preferable to criteria particular to the digital economy (e.g., linked to a certain number of users). The transaction volume acceptance criterion should be adequate for resolving protection gaps in circumstances when a company's competitive potential is not accurately reflected. When Facebook acquired WhatsApp for a record sum of 19 billion US dollars in 2014, the business potential of the chat app was hardly represented in previous sales. As a result, the transaction was initially exempt from European merger control. Because the procedure was notifiable in three Member States according to their acceptance standards, and Facebook had asked that these procedures be submitted to the EU Commission, the EU Commission was only able to carry it out.[14] A relationship to transaction volume might be established in such a manner that the value of the service agreed upon in a transaction (e.g., the purchase price agreed upon in the instance of a company acquisition) is utilized instead of the company's prior sales figures (different as Section 7a of U.S. Clayton Act, 15 U.S.C. § 18a). Even if the transaction volume exceeds the specified threshold, the purchase of individual assets without a current market turnover would not be reported as a merger (Article 3 of Regulation 139/2004). An amendment to Article 3 (2) of Regulation 139/2004 might be thus proposed to close the gap.

NECESSARY FURTHER DEVELOPMENT OF THE ASSESSMENT CRITERIA

From a practical point of view, merger control requires a view as to whether the particular case can be expected to significantly impede effective competition (so-called SIEC test, Substantial Impediment to Effective Competition).[15] An overall

[13] D. Nováčková, J. Vnuková, *Competition issues including in the international agreements of the European Union*, "Juridical Tribune" 2021, vol. 11(2), pp. 234–250.

[14] E. Jančíková, J. Pásztorová, *Promoting EU values in international agreements*, "Juridical Tribune" 2021, vol. 11(2), pp. 203–218.

[15] P. Svoboda, *Úvod do evropského práva*, Praha 2019, p. 1 ff.

consideration is included in the examination of the effects of competition against this standard. The following characteristics of the services in question must be considered in this context:

- the services under consideration are multi-sided platforms with interconnected platform sides that cannot be viewed separately (platform interdependencies),
- the markets in which the platforms operate may be influenced by the connections and interactions that occur between the platform sides,
- the expansion of platforms through the integration of additional services allows for a combination of data that the platform provider can potentially use strategically for its own purposes.

These peculiarities, in our opinion, should be given greater consideration in practice under merger control law.

WHEN DETERMINING RELEVANT MARKETS, PLATFORM INTERDEPENDENCIES SHOULD BE TAKEN INTO ACCOUNT

Because certain Internet services are platform-based, identifying the market in the context of decision-making is problematic. Traditionally, merger control examinations have been focused on markets where products are traded directly for monetary value. In contrast to other market players' business strategies, internet platforms'[16] business strategy is built on the display of advertising, which may be used to set up a product range sponsored by third parties, rather than on direct monetary payment for particular services to platform users. Platform sides cannot be evaluated separately from one another, especially due to indirect network effects. This is especially true when it comes to market concentration and possible barriers to effective competition. The platform provider's business model must be built in such a way that it considers market conditions on all platform sides at the same time. Similarly, market power can only be estimated by considering the interdependencies of the platform sides. When it comes to software and internet platform mergers, the merger control method is still uneven. It also tends to catch platform sites on which services are provided without direct monetary consideration, according to current economic knowledge. However, testing platform linkages and the interactions that result in a separate test phase is still unusual. As a result, in merger control practice, platform-related relationships and their effects on market definition should be

[16] B. Šramel, P. Horváth, *Internet as the communication medium of the 21st century: Do we need a special legal regulation of freedom of expression on the internet?*, "The Lawyer Quarterly" 2021, no. 1, pp. 141–157.

evaluated separately.[17] Merger control practice on mergers involving software and internet platforms is still inconsistent, but now takes more account of the special features of platform-based business models. It also tends to record the platform sites on which services are supplied without immediate monetary consideration, in keeping with current economic understanding. Furthermore, platform-related relationships and their consequences in defining the market should be analyzed independently in merger control practice. We'd also like to point out that a different approach to market definition in the case of internet platforms with data-based business models, even outside the Internet, can lead to a market assessment that differs from previous practice, in which it's a question of examining "multi-sided markets" with a (partially) free market side.

CONSIDERATION OF PLATFORM-INHERENT CONCENTRATION TENDENCIES

When studying the competitive impacts of a merger, concentration tendencies must be taken into account. A merger incorporating a platform service as a buyer should, in general, involve the following considerations:

- in markets where the acquirer has been active from the beginning, it should be investigated whether the merger increases concentration tendencies and, if so, to what extent this can contribute to an impediment to effective competition,
- it should be looked into whether the aforementioned concentration tendencies in those third markets can contribute to anticompetitive merger impacts in areas where the acquirer only becomes active after the merger.

Previously, in merger control methodologies, platform-inherent concentration tendencies were rarely examined independently. Rather, the factors that contribute to or counteract such a concentration trend (e.g., positive or negative indirect network effects) are studied primarily in the context of a comparison of individual platform sides in competition with other providers (e.g., Facebook/WhatsApp, Google/DoubleClick, or Microsoft/Yahoo!). However, it's not always apparent whether or to what extent impacts that affect the platform as a whole and aren't limited to individual platform sites (e.g., indirect network effects vs. direct network effects) have been investigated. In any case, incentives for (potential) platform users to switch to the platform, which contribute directly to the platform's concentration tendencies, are rarely investigated. The emphasis of the investigation is on how the merger would affect the platform operator's rivals. This can be an issue if the merger

[17] J. Furman, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, London 2019, p. 1 ff.

leads to platform-inherent concentration tendencies being undervalued, or at least favoured, while rivals' capacity to express themselves against the platform is exaggerated.[18] We recommend that the legal framework for examining the consequences of mergers on competition be substantially developed to take into consideration the unique characteristics of multi-sided platforms. It should be stressed more clearly in the relevant guidelines that assessing the competitive situation on multi-sided platforms necessitates an overall view in which factors other than market shares or pricing leeway, such as direct and indirect network effects, pressure to innovate, and – on the Internet – user data, are given greater weight.

CONSIDERATION OF THE COMBINATION OF DATABASES

Through a merger-related database combination, an acquirer's platform may allow the operator to obtain information about user preferences. This can be used by a platform operator to expand into adjacent digital industries as well as areas that are unconnected to the company's previous concentration. Platform operators may be able to isolate themselves from the competition in the long run, regardless of their market dominance, or dominate new markets before their competitors have a viable response option, thanks to the merger-related data[19] combination. Currently, the extent to which such dangers exist is uncertain. We advise that the appropriate authorities keep a continual and attentive check on market movements in this respect.

RISKS OF ABUSE OF MARKET POWER DUE TO DEFICITS IN LAW ENFORCEMENT

The role of competition as a driver of product innovation in digital markets should be protected by competition law. It recognizes that the market success of creative businesses is a key factor in their success. The risk of abuse is present in the acquisition of market power by companies, as it is in other sectors of the economy,[20] some sectors may even have their own special legal regulation preventing the

[18] R. Funta, *Economic and Legal Features of Digital Markets*, "Danube" 2019, vol. 10(2), pp. 173–183.

[19] V. Šmejkal, *EU Control of Concentrations: Update to the Reality of Global Business?*, "The Lawyer Quarterly" 2020, vol. 10(4), pp. 448–461.

[20] A. Krausová, *Abuse of market power in ICT sector*, "The Lawyer Quarterly" 2018, no. 1, pp. 75–81.

abuse of market power.[21] The goal of abuse control in competition law is to avoid this. It's critical to protect innovation competitiveness when it comes to limiting abuse in the digital economy. There is a public debate in the digital economy about possible market power abuses. Obviously, the focus is on specific companies where allegations of abuse have been made in the past. However, the debate continues in the public sphere. This debate is about whether internet security against market power abuse is adequate. Access to data is critical in the realms of product creation and innovation, which is one of the main reasons for the conflict. As a result, as market actors in the digital economy, corporations compete fiercely for data and data access.[22] On the other hand, Internet users (consumers) are concerned about excessive data collection. As a result, data collection and use raise issues of copyright, data,[23] and consumer protection[24] in addition to competition law. Some may argue that existing competition law should be supplemented with antitrust-related regulation in order to adequately protect digital economy markets from public discourse distortions. However, we believe that the current substantive right to abuse is sufficient. In cases of abuse, however, we find flaws in the enforcement of competition laws. Market participants find it difficult to enforce their rights against powerful corporations due to legal uncertainty. This could encourage the exploitation of market power for nefarious ends. However, rather than competition law, the aforementioned protection issues should be addressed primarily through market players' ability to defend market-relevant individual rights.[25]

NEED TO IMPROVE THE ABUSE LEGAL FRAMEWORK

The legal framework governing abuse law appears to need to be strengthened. Although there is no fundamental doubt about the material abuse legislation's applicability, it needs to be fine-tuned in specific cases, taking into account the unique characteristics of the digital economy.[26] However, the way competition rules are enforced in cases of misbehavior has flaws. Binding transaction partners

[21] J. Škrabka, *Significant Market Power and the Sale of Agricultural and Food Products in the Agri-Food Supply Chain*, "European Food and Feed Law Review" 2021, no. 16(1), pp. 45–47.

[22] W. Wen, Z. Feng, *Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market*, Harvard Business School Working Paper 2018, no. 18, pp. 1336–1367.

[23] M. Daňko, P. Žárská, *Data protection vs. intellectual property*, [in:] *Počítačové právo, UI, ochrana údajov a najväčšie technologické trendy*, Brno 2019, pp. 127–135.

[24] A. Erdösová, *Právny zrod Charty základných práv EÚ – pred a po*, "Bulletin slovenskej advokácie" 2010, vol. 9–10, pp. 37–46.

[25] J. Svák, *Zásady a tendencie v ochrane práva na súkromie*, "Justičná revue" 2000, no. 11, pp. 1199–1215.

[26] J. Králik, K. Králiková, *Východiská ekonomickej gramotnosti I*, Sládkovičovo 2020, p. 1 ff.

on one platform side (e.g., binding the user in the case of Google) may expand the range of behavior of a multi-sided platform's operator on other platform sides (e.g. in the case of Google: indexing or advertising markets). Transaction partners on one platform (e.g., Google's content provider or advertising) should, on the other hand, be considered anti-market dominance if they can limit the platform operator's reaction on a related extra platform side (e.g. in the case of Google: the search markets). Regardless, the digital economy's dynamics should not prevent businesses from gaining market dominance if they can quickly recognize and respond to changes in demand.

On a case-by-case basis, competent antitrust authorities and courts should adopt legal standards for the abusive exploitation of a dominant market position. On the internet, detecting abuse of a dominant position can be difficult. A dominant market position can be exploited in one of two ways. On the one hand, competitors may be hindered (exclusionary abuse), while the services of other market actors may be misused (exploitation abuse).[27] Mixed types of behavior are also possible, in which both aspects are present. As far as can be seen, the digital economy's potential for exclusionary abuse has been discussed in two ways: in terms of Internet[28] denial of access and market power, such as preferring own services, exploiting third-party content and data to the detriment of competitors, or preventing customers (advertisers/users) from switching providers.[29] Platform features are important for monopoly plans and companies that currently hold a dominant market position. Platform operators' expansion plans can be based on targeted or acceptable legal infractions that provide a competitive advantage to the platforms, but they are not always tied to the two types mentioned above.[30] As a result, the dynamics of market development play a significant role. Because of their dominant position, Internet providers can detect and respond to changes in demand early, preventing their market dominance from eroding as a result of the dynamic market evolution. As a result, market dynamics don't always rule out the possibility of market power abuse. As a result, competition law enforcement instruments should be strengthened. We believe that the lack of clear regulation on the relationship between interim measures and main proceedings is a general flaw in the existing procedural rules. We recommend that interim measures be used more frequently in cases of digital economy abuse. We propose that as a test for ordering interim measures, we look at whether significant

[27] J. Vickers, *Abuse of Market Power*, "The Economic Journal" 2005, vol. 115(504), pp. 244–261.

[28] A. Jakab, M. Könczöl, A. Menyhárd, G. Sulyok, *Internet Jurisprudence: Encyclopedia*, Budapest 2021, p. 1 ff.

[29] P. Brestovanska, B. Mucha, L. Strazovska, *Legal regulation of drug advertising and its restrictions in the conditions of the Slovak Republic*, "European Pharmaceutical Journal" 2019, vol. 66(1), pp. 4–10.

[30] R. Funta, *Social Networks and Potential Competition Issues*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2020, vol. 12(1), pp. 193–205.

changes in the market (Article 9 (2a) of the Council Regulation (EC) No. 1/2003[31]) can be expected within two years, which is a commonly used assessment period for foreseeable competitive developments. Furthermore, in our opinion, it is critical to consider the risk in the main proceedings that the completion of the commitment procedure – even in the case of additional urgent measures – will be excessively delayed, potentially causing permanent damage to market structures. Third parties who were not involved in the proceedings and whose interests were not taken into account in the proceedings are likely to suffer the most damage.[32]

IMPROVING THE PROTECTION OF MARKET-RELEVANT INDIVIDUAL RIGHTS

Additional efforts to ensure the enforceability of individual rights of users and content providers within the digital economy must be added to the aforementioned competition-related measures. This is due to the fact that the unauthorized use of third-party data and content can be used to justify market power abuse. However, rather than relying on competition legislation to address gaps in legal protection for data and content, market players' ability to defend market-relevant individual rights should be prioritized. Taking advantage of third-party content and data is a form of competition. The use of third-party content and data in the context of an internet service offer can be competitive if it is justified. On the other hand, a dominant company's illegal use of third-party content and data can be problematic under competition law (antitrust law), especially if it is accompanied by competitor obstruction or exploitation of other market participants.[33] Existing copyrights, fair competition, and data protection laws[34] may be jeopardized when doing business on the internet. This type of behavior may be beneficial to companies with strong market positions. The display of protected content in vertical search results or in social networks (violation of copyrights or related rights); the collection of personal

[31] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pp. 1–25).

[32] B. Mucha, *Evaluation of the State of Implementation of the European Structural and Investment Funds: Case Study of the Slovak Republic*, "Online Journal Modelling the New Europe" 2021, no. 35, pp. 4–24.

[33] J. Crémer, Y.-A. de Montjoye, H. Schweitzer, *Competition Policy for the Digital Era*, Brussels 2019, p. 1 ff.

[34] K. Nyman-Metcalf, P.K. Dutt, A. Chochia, *The Freedom to Conduct Business and the Right to Property: The EU Technology Transfer Block Exemption Regulation and the Relationship Between Intellectual Property and Competition Law*, [in:] *Protecting Human Rights in the EU*, ed. T. Kerikmäe, Heidelberg 2014, pp. 37–70.

data[35] by internet service providers (search engines, social networks, trading platforms); and the display of misleading search results by search engine operators to redirect data traffic are just a few examples. Infractions of the law of this nature are practically relevant (e.g., Google has scrapped the original content of competing Internet services to present the results of its own search services). There are usually two criteria for a market power abuse to occur. On the one hand, due to the presence of the company in question, the market structure must be weakened.[36] The company, on the other hand, must act in a way that is distinct from typical competitive behavior and limits competition.[37] The possibility of market power abuse as a result of a violation of legal regulations (C-85/76, *Hoffmann-La Roche*) is especially relevant to competition-related legislative violations. Legally recognized rights can sometimes constrain a dominant corporation's ability to act. As a result, infringing on such rights could be considered abusive in terms of antitrust enforcement. It's hard to believe that a justification based on significant customer benefits is valid. Consumers benefit right away from having free Internet access and, in some cases, free access to protected material (short-term advantage). However, the possibility that dominant platforms can effectively isolate themselves from competition in the long run by expanding the scope of services (thus reducing the risk of long--term disadvantages) balances this out.[38] According to the above explanations, the possibility of market power abuse through a breach of law is fundamentally based on the fact that other market participants are unable to protect their rights from abuse (enforcement problem). This issue should be addressed in general, not just in terms of the actions of powerful corporations.

CONCLUSIONS

The internet allows for the development and differentiation of new business models. Because of the accompanying reduction in transaction costs, the economy can meet the demand for increasingly customized products and services. Consumers

[35] G. Karácsony, *Managing personal data in a digital environment – did GDPR's concept of informed consent really give us control?*, [in:] *Počítačové právo, UI, ochrana údajov a najväčšie technologické trendy*, Brno 2019, pp. 1–9; J. Králik, K. Králiková, P. Kozák, *Právna ochrana osobných údajov de lege lata*, [in:] *Sociální média v oblasti řízení lidských zdrojů IV. Akademie krizového řízení a management*, Uherské Hradiště 2021, pp. 208–242.

[36] L. Zingales, F.M. Lancieri, *Stigler Committee on Digital Platforms. Final Report*, George J. Stigler Center for the Study of the Economy and the State 2019, pp. 23–138.

[37] H. Dan, *Cultural influences on competitiveness in the European Union. An exploration of causality*, Paper presented at Transylvanian International Conference in Public Administration, Cluj–Napoca 2017, pp. 124–134.

[38] M. Horvat, H. Magurová, M. Srebalová, *Protection of consumers' rights in railway in the Slovak Republic*, "Yearbook of Antitrust and Regulatory Studies" 2017, vol. 10(16), pp. 177–190.

can also use the Internet to become providers of goods and services, as well as in other economic areas. The internet broadens the competitive landscape.[39] Regulatory constraints, on the other hand, frequently stifle market development. The new business models are up against a regulatory framework that hasn't kept up with changes in the market in terms of space, content, or time. Because other market players are unable to protect their rights from abuse for the reasons stated above, market power abuse through a legal breach is more likely (enforcement problem). This is a problem that needs to be addressed in general, not just in terms of the behavior of large corporations. There is a risk that inadequate protection of market participants' individual rights favors market power abuse when internet service providers gain structural advantages from other market participants' inability to effectively exercise their rights (in particular, copyrights and personal rights), and the service providers can use these advantages to consolidate their market position and isolate themselves from advancing competition.[40] In these circumstances, a balance must be struck between the competitive interests of digital economy service providers and the non-competitive interests of copyright owners and customers (prevention of wide data access). Calls to limit the scope of copyright and personal rights protection on the Internet, on the other hand, appear to be problematic. It is critical to evaluate the regulatory framework in the economic areas shaped by the digital economy on a regular basis and, if necessary, adapt it to new market conditions. To avoid artificial market fragmentation, all relevant product and geographic markets should have uniform regulations. Users can get the same information from Internet services as they can from traditional media (press, radio). Websites of traditional media companies, aggregator services, and user-generated information sources all deliver media content via the Internet through a variety of providers and formats (blogs). As primary sources of information, people are increasingly turning to news aggregators (Google News) and social media platforms (Facebook, YouTube, and Twitter). If the legislation is limited to increasing the clarity of the service offer's restrictions, it does not appear to be a problem. Content-related regulation, on the other hand, should be avoided from a competitive policy standpoint. There is no evidence that such a restriction is required to protect freedom of expression, or that the resulting competition interference is justified. This is less likely in the case of new media than it is with services that also create content for journalistic and editorial purposes, with the risk that the middleman will falsify the display of the

[39] L. Signoret, *Code of competitive conduct: A new way to supplement EU competition law in addressing abuses of market power by digital giants*, "European Competition Journal" 2020, vol. 16(2–3), pp. 221–263.

[40] H. Schweitzer, J. Haucap, W. Kerber, R. Welker, *Modernizing the Law on Abuse of Market Power. Report for the Federal Ministry for Economic Affairs and Energy (Germany)*, September 17, 2018, p. 1 ff.

content for political reasons. On the contrary, there is concern that enacting media law, which would result in a government agency dictating what material should be displayed regardless of user preferences, could sway political opinion. Because defining selection criteria is difficult, incumbent providers may be able to shield themselves from competition by employing content-related rules. If an adjustment of the regulatory framework appears necessary due to the emergence of new service providers, the rules should in principle be uniform across the relevant product and geographic market in order to avoid an artificial fragmentation of markets. The different regulatory and cultural policy goals of the respective national legislation can justify such fragmentation, but only to the extent necessary and appropriate to achieve the goals. Thus, the aforementioned competition-related measures are to be supplemented by additional measures to improve the enforceability of the individual rights of content providers and users within the digital economy. In our opinion, the illegal exploitation of third-party content and data can also justify abuse of market power. A rectification of legal protection deficits for content and data should primarily not be passed through competition law, but rather through an improvement of the legal possibilities of market participants to enforce market-relevant individual rights. The problems should be approached in general and not only with a view to the behavior of powerful companies.

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ABSTRAKT

Artykuł ma charakter naukowo-badawczy, a jego głównym celem jest spojrzenie na wybrane aspekty prawne ochrony niezakłóconej konkurencji w gospodarce cyfrowej. Głównym pytaniem badawczym jest to, czy zasady prawne dotyczące nadużycia dominującej pozycji rynkowej w gospodarce cyfrowej powinny być dalej jednostkowo rozwijane w drodze orzecznictwa właściwych organów ochrony konkurencji i sądów. Celem prawa ochrony konkurencji jest ograniczenie zakłóceń rynku. W ten sposób należy chronić gospodarkę cyfrową. W przeciwnym razie istnieje możliwość nadużycia w zakresie wykorzystania ze względu na ograniczenia wielkości przestrzeni reklamowej lub po prostu posiadanie zbyt dużej ilości danych. Duży wpływ na zakres potencjału nadużycia prawa na rynkach platform ma dynamika rozwoju rynku i cechy platformy (zakres dostępu do danych, rodzaj efektów sieciowych). Dlatego rozważania rozpoczęto od zbadania, czy dotychczasowe środki kontroli łączenia przedsiębiorstw na rynkach internetowych są dostatecznie skuteczne. Następnie omówiono zagrożenia związane z nadużyciem pozycji rynkowej wynikające z braku egzekucji prawa. Artykuł zakończony jest podsumowaniem zawierającym opinie autorów sformułowane w oparciu o przedstawione uzasadnienia prawne i ekonomiczne. Omówiona problematyka nie była dotychczas kompleksowo analizowana w literaturze przedmiotu, co daje okazję do wskazania zalecanych kierunków dalszych badań.

Słowa kluczowe: nadużycie pozycji rynkowej; konkurencja; gospodarka cyfrowa; rozwój rynku