



**Background Note for
UNCTAD- UNECE Regional-Wide Policy Dialogue**

MSMEs and Digitalisation: Antitrust Regulation and Perspective for CIS region



**Prepared by
the BRICS Competition Law and Policy Centre**

The BRICS Competition Law and Policy Centre is an academic and expert platform, set in order to provide expertise and methodological support for the BRICS Competition Authorities and to promote BRICS competition law agenda for the global economy. The BRICS Competition Law and Policy Centre is currently based in National Research University ‘Higher School of Economics’ in Moscow, the Russian Federation.

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The findings, interpretations and conclusions expressed herein are those of the authors and do not necessarily reflect the views of the BRICS Competition Law and Policy Centre.

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Background

This Note has been prepared by the BRICS Competition Law and Policy Centre established by the HSE-Skolkovo Institute for Law and Development. The Note provides background and the critical dimensions for the regional policy dialogue between competition authorities of Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, Russia and Uzbekistan. Digitalisation becomes the Note's central theme due to its unprecedented opportunities for micro-, small- and medium-sized enterprises (MSMEs). However, it is evident that many entrepreneurial MSMEs either experience the lack of resources to enjoy the benefits of digitalisation or suffer from giants' exclusionary behaviour and unfair contractual terms.

The contributors seek remedies to protect jobs, MSMEs, and informal sector workers in the states concerned for the UN COVID-19 Response project to assist Governments and entrepreneurs by providing targeted advisory and capacity building services.

MSMEs in the Region

MSMEs are the essential driver for regional economic development. They stimulate domestic demand, contribute to the sustainability of local cultures and delicately nudge competition. The small and medium business may react faster and even more flexible to a crisis if they are able to utilise labour and existing infrastructure efficiently.

Moreover, being a natural element of social context, MSMEs can come up as a remedy to tackle social problems, such as poverty and inequality, by developing innovations and creating new jobs.

However, there is no lack of evidence on how severely MSMEs are affected by the current COVID-19 pandemic.¹ Latest forecasts on the perspectives of MSME remain pessimistic even though the governments of the countries in question have adopted packages of financial tools to provide temporary support for the sector. While some worrying factors, such as the negative impact of the pandemic on global GDP growth, are global, some regional specifics can be considered to improve MSMEs' position.

Global Trends on Domestic Markets

Digitalisation's key issues have been emerging on the markets in question strikingly resemble challenges for the competition that have been recently brought to Western economies by global platforms. One can observe the reducing effect of digital platforms' merger activity for national start-ups, including 'killer acquisitions' in R&D driven sectors. Upstream and downstream expansion of digital giants facilitate data collection and thus secure their gatekeeper position, which may prevent smaller firms from entering markets. The recent investigations in the region demonstrate the harmful effect of unfair contractual

¹ Tackling coronavirus (COVID-19) Contributing to a global effort <http://www.oecd.org/coronavirus/en/>

terms, such as securing the best offer for the platform, is particularly detrimental for SMEs due to market power asymmetry between platforms and smaller companies selling their goods and services through the digital channels.

The challenges and restrictions imposed by the COVID-19 pandemic have strengthened the importance of access to new digital markets and thus further justified cooperation of national competition authorities in development and coordination of policy approaches contributing to the fast recovery of the MSMEs sector.

Regional specifics

However, the understanding of the landscape is essential for both cooperation and targeted advisory. The motivation for enforcing competition law tools in the region's states may vary depending on national social norms and country experience of adopting and implementing the competition law. For instance, competition policies had often been introduced in the course of transition from the state-controlled economy to the market economy, and this transition was often accompanied by severe social turmoil.

Sometimes social and non-social efficiencies can be considered as a valid reason for the distortion of competition. Historically, high tolerance to the state economy and massive concentration had been observed.

It is essential to underline that the collapse of the Soviet Union preceded the formation of the states. Therefore, some similarities in economies can still be observed. There was no free market in the USSR, and the Soviet State economy had some structural specifics that predetermined the development of the relevant markets for decades.

Concentration and high degrees of vertical integration were very typical in the region for decades. Even by the date geographic segmentation, and the concentration of buyers and sellers in selected markets may result in economies' immunity to robust competition. Besides, the state is likely to represent the most significant player across all markets.

Social norms and business practices are essential factors facilitating (or undermining) competition law tools' effectiveness. The positive social norms could back up the normal functioning of policy tools. For this reason, they are to be thoroughly examined and considered for a policy. Those consumers and business people who grew up under a command economy may have conflicting views for the projected remedies. Traditional for Muslim cultures respect for authority, age, and experience can also be considered in the project's design.

Dimensions for the Regional Policy Dialog

Bringing together policymakers, competition authorities, chamber of commerce and MSMEs' representatives to discuss how COVID-19 impacts SMEs in the region will result in networking, exchanging the best practices, and creating a solid basis for mutual support and harmonisation of approaches.

Concentration, Ecosystems and Their Influence on MSMEs

1. General Background

Market power in digital markets is a complex characteristic created and supported by a number of different factors.² However, for MSMEs, presence and persistence of firms with a substantial degree of market power may become a high barrier to entry.

To start with, merger activity of digital platforms can significantly reduce the number of start-ups in the market. In a recent study, several leading economists and researchers at the University of Chicago—Raghuram G. Rajan, Luigi Zingales, and Sai Krishna Kamepalli—found that major acquisitions by larger firms in a certain sector in the digital economy led to significantly less investment in startups in this same sector.³ As they note, in the wake of an acquisition by Facebook or Google, investments in startups in the same space “drop by over 40% and the number of deals falls by over 20% in the three years following an acquisition.”⁴ Small firms that are about to enter a market with one or several dominant platforms face problems in attracting investments as venture capital firms would not want to invest into a start-up that directly competes with a dominant platform or operates in a vertically integrated market and thus is susceptible to dominance from the same platform.⁵ As a logical consequence, lower possibility of investments and high barriers to entry caused by market concentration lead to a decrease in innovation by smaller firms and to overall stifling of innovation in the market.⁶ Furthermore, as market power in digital markets is largely supported by data concentration in the hands of gatekeeper platforms,⁷ lack of access to datasets is another factor that disadvantages less resourceful digital companies.⁸

Autonomy of small and medium-sized digital businesses is further endangered by the so-called “killer acquisitions” that are often observed in innovation and R&D-driven markets. Big digital platforms engage in strategic acquisitions⁹ to retain parts of the markets as well as to expand their dominance to upstream and downstream markets. Very often such platforms acquire their direct smaller competitors that may pose threat to their established position on the market. As noted in the US House Report on Antitrust, Amazon engaged in aggressive

² Business to Business Relations in the Online Platform Environment. ECORYS (2017). P.8. See also: Market Power in Digital Platforms. Oxera (2018). P.3.

³ R. Rajan, S. K. Kamepalli & L. Zingales, Kill Zone (Becker Friedman Institute Working Paper No. 2020-19, 2020). URL: <https://ssrn.com/abstract=3555915> (accessed 06.01.2021).

⁴ Id.

⁵ G. Petropolous, Competition Economics of Digital Ecosystems. OECD (2020). At 24-25. URL: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)91/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)91/en/pdf) (accessed 06.01.2021).

⁶ Id. See also: Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary. U.S. House of Representatives (2020). At 47-48. [US Antitrust Report]. See also evidence of Amazon’s harmful impact on innovation at 328.

⁷ C. Busch. Small and Medium-Sized Enterprises in the Platform Economy. More Fairness for SMEs in Digital Markets. The Friedrich Ebert Foundation (2020). At 7.

⁸ Unlocking Digital Competition. Report of the Digital Competition Expert Panel. UK CMA (2019). [Furman Report]. At 1.72.

⁹ Id., at 1.49.

acquisition activity having bought at least 100 companies many of which happened to be its quite successful competitors.¹⁰ Interestingly, due to lax antitrust enforcement, many of these acquisitions avoided antitrust scrutiny¹¹ and could have “killed” nascent small firms (thus giving rise to the killer acquisitions issue).¹²

Smaller firms are also under threat beyond those markets that are initially crucial for the platform. Digital platforms tend to expand their business to upstream and downstream markets and thus compete there, collect more data and seal their gatekeeper position.¹³ Expansion is clearly seen in the case of digital ecosystems that provide a beneficial business model for companies thanks to cross-market leverage¹⁴, but may harm competition using the same leverage, such as access to more data and data synergies, network effects and information asymmetry.¹⁵

2. Spotlight on the CIS

The CIS 2030 Development Strategy puts significant emphasis on cooperation for the development of digital economy and digitalization including e-commerce in the CIS territory.¹⁶ Likewise, the CIS countries are called upon to coordinate their efforts to support MSMEs in the region.¹⁷ This agenda explains the need for a more active discussion on the role digital markets and, in particular, digital platforms play for the competitiveness of MSMEs in the CIS region. While this discussion is still dormant in most of the CIS countries, some countries can share examples of successful digital platforms and businesses that operate nationally. For instance, Kazakhstan has a number of big e-commerce platforms that are popular among consumers - Kaspi.kz, an e-commerce marketplace and a superapp, Flip.kz and Arbuz.kz. In 2020, Kazakhstan created a council on barriers to market access under the umbrella of the national antitrust authority to support the competitiveness of MSMEs.¹⁸ Belarus is among CIS leaders in terms of digital development and has a number of quite

¹⁰ US Antitrust Report, at 261-266.

¹¹ Id., at 391-392. See also: G. Petropoulos, Competition Economics of Digital Ecosystems. OECD (2020). At 26. URL: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)91/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)91/en/pdf) (accessed 06.01.2021).

¹² G. Petropoulos, Competition Economics of Digital Ecosystems. OECD (2020). At 27. URL: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)91/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)91/en/pdf) (accessed 06.01.2021).

¹³ Competition Issues in the Digital Economy. Note by the UNCTAD Secretariat (2019). Para 18. URL: https://unctad.org/system/files/official-document/ciclpd54_en.pdf (accessed 06.01.2021).

¹⁴ A. Fletcher. Digital Competition Policy: Are Ecosystems Different? (OECD 2020). At 28-33. URL: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)96/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)96/en/pdf) (accessed 06.01.2021).

¹⁵ G. Petropoulos, Competition Economics of Digital Ecosystems. OECD (2020). Pp. 17-27. URL: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)91/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)91/en/pdf) (accessed 06.01.2021).

¹⁶ Decision of the Heads of The CIS Governments on the Strategy of Economic Development of the Commonwealth of Independent States until 2030 adopted on May 29th 2020. URL: <http://cis.minsk.by/reestr/ru/index.html#reestr/view/text?doc=6229> (accessed 06.01.2021).

¹⁷ Id.

¹⁸ Council on Detection and Elimination of Barriers to Market Access. Petrocouncil.kz. November 19 2020. URL: <https://petrocouncil.kz/soviet-po-vyyavleniyu-i-ustraneniyu-barerov-vhoda-na-tovarnye-rynki-strany/> (accessed 06.01.2021).

promising small and medium-sized IT businesses.¹⁹ In general, Kazakhstan, Armenia, Russia and Belarus are the CIS members with the highest level of economic digitalization.²⁰

For the purposes of the current background note, Russia presents a better illustration of how MSMEs function in a concentrated digital market, since, as shown below, Russian digital business demonstrates quite a tendency towards oligopolistic competition and public discussion of this topic is on the rise.

Within Russia, the digital economy has been steadily growing recently²¹ and is predicted to continue its expansion despite COVID-19's stagnating effect.²² Importantly, the digital economy in Russia is not only driven by a small number of dominant digital platforms. A recent 2020 study by the Russian Venture Company lists 50 most promising micro, small and medium (plus large-scale) companies that work with end-to-end technologies, neurotechnologies and AI, Big Data, virtual reality and show good growth rates.²³

Apart from digital MSMEs, Russia's digital economy has its own tech giants – Yandex, Sberbank and Mail.ru (with Tinkoff and MTS as other examples) that emerged in different markets but have recently begun to expand into many other markets competing with each other in some of them. These companies are in focus since they clearly demonstrate the shift to ecosystems and thus may pose a more obvious risk to competition in their respective markets.

Ecosystem building is part of the strategy for each of the three companies.²⁴ As of now, these ecosystems are already developed enough and extend far beyond markets where the companies initially thrived. Thus, Yandex now has businesses in transportation with its Yandex.Go superapp, foodtech (Yandex.Lavka), media and entertainment (Yandex.Music and an online streaming platform Kinopoisk), it also owns an online marketplace Yandex.Market. Sberbank also explores markets beyond financial services and banking with entertainment (Okko), telecommunications (SberMobile), health services (SberHealth) and

¹⁹ Belarus Among CIS Leaders in the Development of the Digital Economy [Russian only]. Thinktanks.by. November 6, 2019. URL: belarus-sredi-liderov-sng-po-razvitiyu-tsifrovoy-ekonomiki.html (accessed 06.01.2021).

²⁰ Digital Potential of the Eurasian Development Bank Member States. Eurasian Development Bank Analytics Department (2019). URL: https://eabr.org/upload/iblock/551/EABR_Digital_Potential_06_2019.pdf (accessed 06.01.2021).

²¹ Runet Economy/ Russia's Digital Economy 2019. RAEC. URL: <https://raec.ru/activity/analytics/9884/> (accessed 06.01.2021).

²² Digital Economy: Key Factors of Growth in the Post-Crisis Period. Analytical Center for the Government of the Russian Federation. April 30, 2020. URL: <https://ac.gov.ru/news/page/cifrova-ekonomika-kluevye-faktory-ekonomiceskogo-rosta-v-postkrizisnyj-period-26601> (accessed 06.01.2021).

²³ Top-5- Developing Companies in the Digital Economy. Analytical Survey of Micro, Small, Medium and Large Enterprises. Russian Venture Company (2020). URL: https://www.rvc.ru/upload/iblock/d53/Top-50_digital_economy_company.pdf (accessed 06.01.2021).

²⁴ "Yandex - Russia's Silicon Valley": Arcadiy Volozh on the most promising IT sphere and on new magic. Forbes. June 17, 2019. URL: <https://www.forbes.ru/milliardery/377923-yandeks-rossiyskaya-kremnievaya-dolina-arkadiy-volozh-o-samoy-perspektivnoy> (accessed 06.01.2021).

2020-2022 Strategy. Focus on the Core & Ecosystem Development. Mail.ru Group. URL: <https://corp.imgurmail.ru/media/files/strategy2020-22.pdf> (accessed 06.01.2021).

Sber's Digital Ecosystem. Sberbank. URL: <https://www.sberbank.com/ru/eco> (accessed 06.01.2021).

has recently launched a project in autonomous driving for agriculture.²⁵ Mail.ru focuses on social media through VKontakte and Odnoklassniki, but also runs projects in online commerce (Yula, Pandao), education (Skillbox) and foodtech (Delivery Club). Notably, just like Amazon,²⁶ Yandex, Mail.ru and Sberbank aim to use their voice assistants to reach consumers with their additional services and apps, such as smart home systems. Adding to the constantly developing ecosystems and consolidation of services, the three giants also attempted to join their resources in a number of joint ventures, such as Beru (an online marketplace created by Sberbank and Yandex), Samokat (food delivery platform by Sberbank and Mail.ru), 2GIS (joint acquisition by Mail.ru and Sberbank). In 2020, however, Sberbank and Yandex terminated their collaboration thus potentially causing a new, more robust curve of competition between the ecosystems.²⁷

Yandex, Sberbank and Mail.ru also quite actively acquire start-ups and smaller companies raising concerns of growing concentration on the market. These firms either continue to operate more or less independently or serve as bases for new ecosystems services. For instance, Yandex acquired Foodfox later transformed into Yandex.Eda delivery service²⁸ and based its Yandex.Chef service on a previously acquired start-up.²⁹ Sberbank acquired Instamart to later transform it into its own marketplace³⁰ and plans to use data from its latest acquisition – 2GIS mapping platform³¹. Mail.ru acquired foodtech start-up Samokat together with Sberbank to develop their food delivery offers.³²

While none of the bigger companies have yet received regulatory scrutiny because of their expansion into new markets, there are complaints from smaller companies (although not necessarily MSMEs) that big consolidated businesses engage in exclusionary behavior. Thus, a number of digital companies complained to the FAS of Russia that Yandex unfairly prioritized its own services in organic search.³³ The competition authority issued a warning³⁴.

²⁵ Sberbank, Cognitive Pilot and Rusagro Launch Industrial Use of Autonomous Driving to Farming Equipment. ICT Moscow. May 26, 2020. URL:<https://ict.moscow/news/sberbank-cognitive-pilot-i-rusargo-nachali-promyshlennoe-vnedrenie-bespilotnykh-sistem-v-selkhoztekhniku/> (accessed 06.01.2021).

²⁶ US Antitrust Report, at 305-306.

²⁷ Yandex and Sberbank Announce Assets Break-Up. Vedomosti. June 23, 2020. URL:
<https://www.vedomosti.ru/business/articles/2020/06/23/833263-yandeks-i-sberbank> (accessed 06.01.2021).

²⁸ Transaction Value for Yandex and Foodfox Made Public. RBC. March 28, 2018. URL:
https://www.rbc.ru/technology_and_media/28/03/2018/5abb97099a794746e00c8b0f (accessed 06.01.2021).

²⁹ Partiya Edy Renamed to Yandex. Chef. Kommersant. March 26, 2019. URL:
<https://www.kommersant.ru/doc/3924048> (accessed 06.01.2021).

³⁰ Sberbank Takes Up Food Delivery. RBC. September 6, 2019. URL:
https://www.rbc.ru/technology_and_media/06/09/2019/5d7131c49a79471c31c8614d (accessed 06.01.2021).

³¹ Sberbank Becomes Majority Shareholder for 2GIS. Vedomosti. August 20, 2020. URL:
<https://www.vedomosti.ru/business/news/2020/08/20/837249-sberbank-stal-osnovnim-vladeltsem-2gis> (accessed 06.01.2021).

³² Sberbank and Mail.ru Acquire Controlling Interest in Samokat. Vedomosti. May 21, 2020. URL:
<https://www.vedomosti.ru/business/articles/2020/05/21/830754-sberbank-i-mailru-group-samokata> (accessed 06.01.2021).

³³ Avito, Cian and 2GIS Lodge a Complain to Antimonopoly Service against Yandex. Vedomosti. August 7, 2020. URL: <https://www.vedomosti.ru/business/news/2020/08/07/836167-onlain-servisi-pozhalovalis-v-fas-na-yandeks> (accessed 06.01.2021).

³⁴ FAS of Russia Warns Yandex against Online Search Discrimination. FAS of Russia. February 24, 2021. URL: <https://fas.gov.ru/news/31152> (accessed 13.02.2021).

If Yandex does not comply with the regulator's orders, an antitrust investigation may be started. Promt, an independent machine translator, already lost a case against Yandex on similar grounds.³⁵ There are other complaints from small business owners³⁶ and concerns by regulators that consolidated megabusinesses of Yandex, Sberbank, Mail.ru and other ecosystems can lead to previously unseen levels of concentration that would harm competition in Russia's growing digital markets. To get ready for this tendency, the new package of amendments to Russia's competition law that is currently under consideration is aimed at restricting dominance rules for digital platforms and at the same provides for a more liberal regulation for smaller companies with less revenue.³⁷

In other CIS countries, there is no significant evidence of either high levels of market concentration or development of digital ecosystems of the scale observed in Russia. Despite this, most CIS member states show rapid development of digital economy and what is observed in Russia now may be detected in other CIS economies later. For them, Russia's emerging struggle with digital giants can become a valuable case-study to look at when designing their own policies in the field of digital competition.

Potential problems may arise with the expansion of Russian digital ecosystems to the CIS markets. For instance, joint cab platform by Yandex and Uber now operates in almost all CIS countries as well as some sizeable Russian online marketplaces, such as Wildberries and Lamoda. To prevent possible negative effects of concentration in digital markets, the Eurasian Economic Commission which governs part of the CIS market, is currently looking into ways of transforming its competition policies, *inter alia*, to protect smaller national companies.

Online search: gatekeepers oppress MSME

IT giants such as Google, Microsoft, Apple, Baidu, and Yandex diversify their business to novel areas by including healthcare, food delivery, passenger transportation and development of self-driving vehicles, e-commerce marketplaces, and other areas into their ecosystems. For example, in 2020 Yandex has launched Yandex.Go, a superapp that gathers different Yandex services into a one-stop-shop app, covering food delivery, taxi and car sharing services. Internet search, however, still remains the main pillar for IT giants' supremacy, because search advertising revenues are a significant source of income for IT giants.

³⁵ Promt Faces Translation Challenges. *Kommersant*. July 23, 2019. URL: <https://www.kommersant.ru/doc/4039659> (accessed 06.01.2021).

³⁶ Moscow City Administration to Check Delivery Tariffs of Yandex and Delivery Club. *Interfax*. October 20, 2020. URL: <https://www.interfax.ru/moscow/732256> (accessed 06.01.2021).

A Siberian Start-Up Turns Against Yandex's Monopoly. *Secret Firmy*. November 15, 2019. URL: <https://secretmag.ru/news/sibirskii-startap-opolchilsya-na-monopoliju-yandeksa.htm> (accessed 06.01.2021).

³⁷ Fifth Antimonopoly Package Proposal: Highlights. *FAS of Russia*. September 17, 2020. URL: <https://fas.gov.ru/news/30477> (accessed 06.01.2021).

Recent antitrust cases and ongoing investigations have shown that IT giants abuse dominant position in online search markets in Europe, US, Russia and some other countries³⁸. SME throughout the world have complained to antitrust authorities that IT giants artificially prioritize their vertical services in online search – and underestimate vertical services of SME³⁹.

The unfair prioritization of IT giants' services in online search increases traffic for gatekeepers and decreases traffic for MSME. As a result, MSMEs suffer losses and leave the market. Consumers are also in the red, as they receive an artificially inflated gatekeepers services instead of the most relevant response to their search queries.

In the Google Search (Shopping) decision, the European Commission concluded that the abuse of Google's dominant position was the following: first, Google's website ranking algorithm disrupts competition. The Commission found that Google's search algorithm was tuned to lower the ranking of competing sites in search results. It was found that since August 2011, when Google began using the Google Panda ranking algorithm, which drastically changed the ranking of search results, the German vertical search service ciao.de had a sharp decline in user traffic that lasted five years (until December 2016). The Commission found that the sites with the highest user traffic (and ciao.de is one such site) are shown by Google on the second SERP and below.

Secondly, the way of displaying search results was anticompetitive. The Commission found that competitors' sites are listed on Google only in organic search results and are not available visually "rich", attractive format (rich format) with images and additional information about products and prices. After examining the evidence, the Panel concluded that a rich site display format — with the addition of images, prices, and seller information — increased the click-through rate (CTR). According to the research, this format increases traffic and the number of conversions to the site, and has a significant impact on user behavior. Thus, the use of the "rich" display format contributed to an increase in traffic for the Google service, and vice versa, led to a decrease in attention to competitors' sites.

Moreover, as noted by the Commission, both in terms of its location in the search and the way it is displayed (in an "enriched" format), the Google service differs significantly from its competitors, despite the fact that, in fact, all services (both Google and competitors) are services similar in characteristics. That is, the advantages of the location and display of the Google service are not justified by the essential difference of the Google service, but only by artificially inflating the place of the service in the search.

³⁸ See, for example, European Commission Case AT.39740 — Google Search (Shopping); Investigation of competition in digital markets, Majority Staff Report, Subcommittee On Antitrust, Commercial And Administrative Law, US 2020

https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519;

³⁹ For example, the list of SME who suffered from anticompetitive behavior of gatekeepers, include the following companies: Foundem in the UK, and PROMT in Russia (Decision of the Moscow Arbitration Court of 17.07.2019 in case No. A40-54596/19-121-450. URL: https://kad.arbitr.ru/Document/Pdf/1979ca8c-d079-485b-910a-59ed57d75e87/56e8450b-6921-4aaf-a701-812ee11a2c61/A40-54596-2019_20190717_Reshenija_i_postanovlenija.pdf?isAddStamp=True)

The panel found that Google ranked its services on the first page of search results in two ways: (1) either above the organic results, (2) or among the first organic results. Moreover, Google services have always been located on the first page in such a way that the user can see them immediately, without having to scroll down the search results page. The reason for this is simple - “boost your traffic ... and direct it to Google's product comparison service”.

Concerning CIS region, it is interesting to note that in 2019 in Russia both SME and big digital platforms, including profi.ru, cian.ru, 2gis.ru, complained to Russian Federal Antimonopoly Service asking Russian IT giant Yandex to stop similar discriminatory practices. According to complaints, Yandex services (for example, Yandex.Realty, Yandex.weather, etc.) “appear on the search results page immediately after the advertisement and before the organic search results”.

Abuse of dominance by gatekeepers kills MSMEs in the online search market all over the world. This leads to increased monopolization in this market due to a decrease of competition and collapse of innovations.

Price Parity Provisions

Price parity provisions (or so-called ‘Most Favoured Nation Clauses’, MFNs) is a form of contractual terms which enables the company to require that suppliers do not offer lower prices or better terms via other distribution channels⁴⁰.

Price parity provisions have been widely used by many digital platforms including dominant ones. While these clauses are not inherently anticompetitive, digital giants have been using MFNs to ensure that none of their suppliers or third-party sellers can collaborate with an existing or potential competitor to make lower-priced or innovative product offerings available to consumers⁴¹. This could have a negative impact for small and medium suppliers which have to agree on terms of the digital platforms, commission for intermediation services of which could be quite high, and are not able to make a better offer on other distribution channels⁴².

Antitrust authorities from different parts of the world have investigated MFNs practices. The most illustrative example in this regard is investigations carried in relation to popular global hotel booking platform Booking.com. This example is quite relevant for CIS region, because Booking.com is now present in almost all CIS jurisdictions, considers CIS countries to be of a strategic interest for the platform and have contractual agreements with many small and medium hotels.

⁴⁰ E-Commerce Competition Enforcement Guide // GCR Insight ed. By C. Jeff, UK: Law Business Research. - 2018. - P. 24.

⁴¹ Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations. Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary. U.S. House of Representatives (2020). At 295. [US Antitrust Report].

⁴² Price Parity – Making it Work for Your Small Business. - URL: <https://sirvoy.com/blog/2018/10/19/price-parity-making-it-work-for-your-small-business/> (accessed 5.01.2021).

First of all, it is important to mention that the price parity clauses can be ‘wide’, if they prevent the supplier from offering better terms on other sales channels or they can be ‘narrow’ if they prohibit a supplier from offering better terms on its own website⁴³.

Many competition authorities have considered ‘wide’ clauses as anti-competitive, because they limit price competition and make it difficult for new entities to enter the market. For example, platforms willing to enter the hotel booking market could offer a lower commission for intermediation services. However, hotels will not be able to offer better prices on that platforms, because of the existence of an agreement with a larger platform, which uses MFNs. So the hotels have less incentives to go to alternative platforms, because they cannot secure lower prices on them.

‘Narrow’ price parity clauses have experienced, so far, different opinions of antitrust regulators. In 2015 after several European jurisdictions (France, Sweden and Italy) opened formal investigations, Booking.com proposed commitments to eliminate ‘wide’ price parity and keep ‘narrow’ provisions, according to which hotels are free to set better terms and lower prices on any other platforms, excluding their own official web sites. These commitments were proposed to spread on the whole EU territory. Competition authorities of France, Sweden and Italy agreed on the proposed commitments and closed their investigations⁴⁴. Several other European national competition authorities (the Netherlands, Denmark, Greece, Ireland, Austria, etc) published press releases announcing their approval of the proposed pan-European solution, refraining from launching their own investigation.

At the same time, the Federal Cartel Office of Germany in its decision on Booking case considered ‘narrow’ clauses to have essentially the same anti-competitive effects as ‘wide’ clauses⁴⁵. But, in its recent judgement on this case, the Higher Regional Court of Düsseldorf considered that while narrow clauses do restrict competition in principle, they are not illegal because they are objectively necessary to ensure a fair and balanced relationship between hotel platforms and hotel operators⁴⁶. Platforms invest considerably in the development and improvement of their websites in order to attract bookings. These investments would be jeopardised if consumers were able to search and find an attractive

⁴³ Solek L. Price Parity Clauses and Online Platforms: Is There a New Way Forward? - URL: <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2019/november/price-parity-clauses-and-online-platforms-is-there-a-new-way-forward> (accessed 5.01.2021).

⁴⁴ See Decision 15-D-06 of Autorité de la Concurrence. - URL: www.autoritedelaconcurrence.fr/user/avisdec.php?numero=15-D-06; Italian Competition Authority, Press Release, (April 21, 2015). - URL: www.agcm.it/en/newsroom/press-releases/2207-committments-offered-by-bookingcom-closed-the-investigation-in-italy-france-and-sweden.html; Swedish Competition Authority, Press Release, (April 21, 2015). - URL www.konkurrensverket.se/en/news/commitments-given-by-booking-com-benefit-consumers/, (all accessed 5.01.2021).

⁴⁵ Case summary ‘Best price clause of online hotel platform Booking. - URL: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B9-121-13.pdf?blob=publicationFile&v=2> (accessed 5.01.2021).

⁴⁶ Witting, J. The Higher Regional Court of Düsseldorf overturns the German Competition Authority’s decision which sanctioned price parity clauses between hotel platforms and hotel operators (Booking.com). - URL: <https://www.concurrences.com/en/bulletin/news-issues/june-2019/the-higher-regional-court-of-dusseldorf-overturns-the-german-competition> (accessed 5.01.2021).

hotel via the platform and then book it at a lower price via the hotel's own website. In the court's view, there is no less restrictive measure to protect against free-riding⁴⁷.

The case in relation to Booking was investigated by the Federal Antimonopoly Service of Russia. In December 2020 the Russian enforcer made a decision that the platform violated Russian competition legislation by using price parity clauses in agreements with the hotels⁴⁸. The FAS notes that Russian hotels are dependent on the platform, any action of which has a direct impact both on hotels' commercial activity and consumers' behaviour⁴⁹. FAS prescribed to eliminate both 'wide' and 'narrow' parity clauses from agreements with Russian hotels.

Thus, practice of including price parity clauses in agreements between a platform and suppliers raises an important related question about the extent to which limitation of ability to use the competitive distribution channels is compatible with competition law. From one perspective, suppliers, especially MSMEs, could benefit a lot from the ability to distribute their products or services via various platforms using various terms and prices. From the other hand, it is important to avoid the 'free-riding' problem when suppliers advertise their products or services on the popular platform and actually sell them via the other one (or via its own web site), where the price is lower⁵⁰. It should be taken into account, especially in CIS region, that sometimes the digital platform is a unique opportunity for MSMEs to reach the target audience⁵¹. The crucial task for the competition authorities is to evaluate all pros and cons of the platform behaviour and to limit the platform's power on establishing MFN clauses which could be harmful for vulnerable suppliers, which are MSMEs, and allow the market to develop in a pro-competitive way.

Case-study: 'Wildberries' marketplace

It seems relevant to consider in more detail the Wildberries case. The Wildberries digital platform is a company engaged in the international trade of clothing and household goods whose geographic coverage includes Russia, Belarus, Kazakhstan, the Kyrgyz Republic, Armenia, Poland, Slovakia, and the Ukraine. During the 11 months of 2020, the number of small and medium-sized businesses, individual entrepreneurs and self-employed individuals selling their goods through Wildberries increased by 273% year-on-year, reaching

⁴⁷ 'Free riding' is a type of market failure that occurs when those who benefit from resources, public goods or services of a common nature do not pay for them or under-pay. (according to Baumol W. *Welfare Economics and the Theory of the State*. Cambridge, Massachusetts: Harvard University Press, 1952).

⁴⁸ In particular, Para 3 Part 1 Article 10 of the Federal Law No. 135 as of 27 July 2006 'On Protection of Competition'.

⁴⁹ Press-release: the FAS Russia found Booking.com to violate antimonopoly legislation [Russian only]. - URL: <https://fas.gov.ru/news/31001> (accessed 5.01.2021).

⁵⁰ Ezrachi A. The Competitive Effects of Parity Clauses on Online Commerce // European Competition Journal. - 2015. - Vol.11.

⁵¹ Digital Era Competition: A BRICS View. Report by the BRICS Competition Law and Policy Centre / Ed. by A. Ivanov, I. Lianos. - 2019.

55 000. In November 2020, the maximum growth was noted: in a month, the number of new partners-representatives of MSMEs reached 5.1 thousand⁵².

The largest Russian online retailer, Wildberries, has strengthened its bargaining power and began to dictate its own terms to sellers who list their products on the platform.

Thus, Wildberries required sellers to set a 25% discount on their goods to participate in a sale on the marketplace from November 4 to 10, 2020. Subsequently, the discounts were extended within the period of the World shopping day and "Black Friday"⁵³.

On November 3, 2020 Wildberries sent out a letter to sellers, according to which they had to set a 25% discount on the entire range, or the product would be removed from sale for the duration of the promotion. Subsequently, instead of removing products without discounts from the platform, Wildberries began to force such discounts.

The implications were as follows:

- 1) Wildberries set a 25% discount on goods during the promotion period;
- 2) Sellers could not cancel or change the discount set by the platform;
- 3) Sellers could not change the product's price or remove their product from sale during this promotional period.

As a result, thousands of sellers of the MSMEs sector who thought their product would not be sold on the marketplace had a price that their business could not afford⁵⁴.

In response to numerous complaints from sellers, Wildberries recalled that the offer for sellers contains clause 4.2, which allows the marketplace to set discounts on goods independently: "Wildberries have the right to deviate from the seller's instructions on the selling price of the goods without prior requesting about this, namely, to apply discounts to the retail price indicated by the seller, including selling the goods at a price lower than the retail price indicated by the seller". In response to its complaint, one of the small business owners of the Wildberries platform received a letter stating that if the seller is not ready to participate in the action, the marketplace is ready to end the partnership. Wildberries indicated that the marketplace is not ready for further cooperation with disloyal sellers⁵⁵.

This case will probably be interesting for the CIS countries' antitrust agencies where the platform operates. Wildberries platform has a significant market share, and hypothetically, its actions may fall under all CIS countries' antitrust laws. In 2014, a Model Law on "Protection of Competition" was adopted in the CIS, establishing uniform approaches to preventing and suppressing antitrust legislation in the CIS countries. At the same time,

⁵² Wildberries recorded an increase in the number of MSMEs in November for the year / TASS, Dec, 4, 2020. URL: <https://tass.ru/ekonomika/10168577>

⁵³ Wildberries sellers complained about the conditions of sales in the marketplace / Vedomosti, Nov, 6. <https://www.vedomosti.ru/business/articles/2020/11/06/846096-postavschiki-wildberries-pozhalovalis-na-usloviya-uchastiya-v-rasprodazhah-marketpleisa>

⁵⁴ Wildberries forcibly set discounts on the products of some partners for its sale / Vc.ru, Nov. 6. URL: <https://vc.ru/trade/174235-wildberries-prinuditelno-ustanovil-skidki-na-tovary-nekotoryh-partnerov-k-svoey-rasprodazhe-rasskazali-prodavcy>

⁵⁵ Wildberries sellers complained about the conditions of sales in the marketplace / Vedomosti, Nov, 6. <https://www.vedomosti.ru/business/articles/2020/11/06/846096-postavschiki-wildberries-pozhalovalis-na-usloviya-uchastiya-v-rasprodazhah-marketpleisa>

each state has flexibility according to national legislation to initiate an investigation on its own.

For example, in Russia, Wildberries has an estimated market share of 36%⁵⁶, which exceeds the 35% threshold established in Part 2 of Article 5 of the Law on the Protection of Competition, where an economic entity cannot be recognized as dominant. Therefore, the platform's actions, hypothetically, may fall under Paragraph 3 of Part 1 of Article 10 of the Russian Federal Law of 26.07.2006 No. 135-FZ "On Protection of Competition"— the imposition of unfavorable terms of the contract. Thus, the Russian antitrust law provides flexible options for protecting competition from an economic entity's unfair behavior with increasing market power.

Unfair competition negatively affects the economic and innovative development of states and primarily worsens the MSMEs sector. In the crisis and post-crisis period, the issues of ensuring conditions for the development of small and medium-sized businesses and protection of competition are crucial. With the ever-increasing digitalization and the spread of the COVID-19 pandemic, the boundaries between traditional marketing and e-commerce are blurring. Under these circumstances, MSMEs need to be provided with access to new digital markets. At the same time, trade and the development of small and medium-sized businesses largely depend on the rules that digital platforms establish unilaterally. In view of these circumstances, it is important to keep track of the bargaining power of digital platforms, cases of imposing contract terms unfavorable for the MSMEs, and unreasonable blocking of access to platforms. In particular, the platform can use bargaining power to determine pricing policy (in the case of Wildberries, it is discounting). CIS antitrust authorities need to pay close attention to anticompetitive practices that digital platforms can use due to their bargaining power or even market dominance. Here, competition authorities' cooperation in new competition policy approaches to contribute to the effective recovery of the MSMEs sector post-crisis is of great importance.

⁵⁶ Wildberries.ru captured more than a third of the market for Internet sites and mobile applications selling clothes / RBC. 28 July, 2020. URL:

[https://marketing.rbc.ru/articles/11696/#:~:text=%D0%9B%D0%B8%D0%B4%D0%B5%D1%80%20%D1%80%D1%8B%D0%BD%D0%BA%D0%B0%20wildberries.ru%20%D0%B7%D0%B0%D0%BD%D0%BD%D0%8B%D0%80%D0%BC%D0%B0%D0%BD%D1%82,%D0%B8%D0%B7%20%D0%BA%D0%B0%D1%82%D0%B5%D0%B3%D0%BE%D1%80%D0%B8%D0%B8%D2%C2%AB%D0%BF%D1%80%D0%BE%D1%87%D0%B8%D0%B5%C2%BB\)](https://marketing.rbc.ru/articles/11696/#:~:text=%D0%9B%D0%B8%D0%B4%D0%B5%D1%80%20%D1%80%D1%8B%D0%BD%D0%BA%D0%B0%20wildberries.ru%20%D0%B7%D0%B0%D0%BD%D0%BD%D0%8B%D0%80%D0%BC%D0%B0%D0%BD%D1%82,%D0%B8%D0%B7%20%D0%BA%D0%B0%D1%82%D0%B5%D0%B3%D0%BE%D1%80%D0%B8%D0%B8%D2%C2%AB%D0%BF%D1%80%D0%BE%D1%87%D0%B8%D0%B5%C2%BB))