

## FOREIGN EXPERIENCE OF COMPETITION POLICY IN DIGITAL ECONOMY

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Economic reality has dramatically changed in the 21st century. Competition and monopoly behaviour are under radical transformation due to digital effects in contemporary business world. Digitalization has engendered many new types of monopolistic conduct and deeply altered traditional forms of firms' misconduct. In a digital era, the antitrust policy should rethink its concepts of regulation, market power, and anticompetitive behaviour. The analysis of contemporary competition policy in different countries shows that traditional antitrust rules could not effectively deal with digital activity. Having entered even in an ordinary space of anticompetitive firm behaviour, digital world has challenged traditional concepts of antitrust policy. The antitrust rules that dominated in the 20th century are mostly outdated when applied to digital era trends. What should and could competition policy do to meet the requirements of the 21st century? The article touches upon contemporary foreign investigations in the sphere of competition and competition policy. Our analysis demonstrates the challenges that are under way in antitrust regulation. Special attention is paid on new patterns that characterize traditional forms of monopolistic behaviour (cartels, dominant misconduct, predatory pricing, exclusive dealing, etc.) in a digital world. There was drawn the conclusion concerning the vital necessity of a cardinal transformation for the antitrust policy from a hard state controller into a flexible business consultant, with the aim not to punish but to prevent market misconduct.

**Keywords:** competition, monopoly, anticompetitive behaviour, digital economy, competition policy, antimonopoly policy, foreign competition policy.

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The 21st century is changing many economic realities, including competition and monopoly effects. The digital world challenges the policy of competition support. Traditional forms of anticompetitive behavior are also changing. New formats of monopolization and market power can be observed in online interactions. In the digital age, antitrust laws in all countries face the problem of how to regulate the economy and inter-company interactions to reflect the new realities, so that company behavior changes in line with society's needs. It is not always clear which way to develop competition in the digital economy to ensure a balance between the interests of companies, consumers, and regulatory bodies.

The digitalization of business models of companies and virtualization of intercompany interaction that creates new forms of competition and market power can be considered the main change. It is natural to ask what the role of the state regulator should be in the new environment. Foreign countries were the first to respond to digital challenges, and they have accumulated some experience in dealing with digital forms of monopolization by now.

### THE REALITY OF COMPETITION IN THE TWENTY-FIRST CENTURY

Digitalization has brought the phenomenon of platformization to the world of supply and demand. The market is enriched with a digital intermediary – multiple platforms, which provide a quick and cheap (not always neutral) search of goods for the client. Consumers' expenses in online searching for a required product came close to zero. Some studies show the presence of a U-shaped curve of non-linear influence of search expenses on company profits [1].

On the one hand, low search expenses decrease the market prices, which attracts new consumers, but does not give an advantage in deals with loyal buyers. On the other hand, the growth of search expenses increases the prices, which can push away new clients, but contributes to the extraction of the consumer surplus from loyal buyers. High search expenses prevent uninformed customers from comparing products of different companies. Very often, customers may not even suspect the availability of competing products. Small search expenses provide an increase in a company's profit, and then after the achievement of max-

imum profitability, the further growth of search expenses leads to a reduction in a company's profit.

Companies respond to such competitive pressure in several ways. Primarily, it is a question of product differentiation, the level of detail, which in the digital world makes it possible for the company to bring its product to the specific desires of each individual [2]. Second, companies are soliciting from digital platforms, paying for the direction of digital search towards the advertiser's product [3, 4]. Third, companies use masking strategies to create phantom products – supposedly cheaper analogs of existing products of competing companies [5]. Choosing in search of the cheapest product option, the customer is inevitably led to the phantom product Internet page of the real company, the objective of which is now to entice, to catch the consumer.

Digitalization contributes to a new configuration of competition in **local markets**. The use of non-linear pricing and price discrimination at the local business level can result in different results depending on the intensity of competition.

The local advertising market in the USA can serve as a good example [6]. The prices for advertising activities set by different agencies are almost the same for small advertising spaces but significantly differ for large-size spaces. Stronger competition can be seen among less wealthy advertisers who only demand small advertising products. Discounts and price wars are effective for advertising companies with high price elasticity of demand. Discounts are ineffective for those customers who have a demand for colorful and vivid advertising in a large area, because they are interested in an exclusively high-quality product.

Ambiguity and the non-linear nature of the impact of digital competition on company performance can also be seen in **banking** [7]. Digital competition does not necessarily result in a reduction of the full cost of banking services; an increased flow of clients between banks due to increased competition can actually increase bank costs (for example, due to an increase in expenses on advertising and maintenance of new clients). As a result, the impact of competition on banks' lending activity and credit institutions' profitability also takes on an inverted U-shape nature.

The **perception of competition** in modern society is also changing. It may be said that the current period is characterized by disillusionment with competition, private property, and market mechanisms. In the 1980s and 1990s, the growth of interest in and support for the free market paradigm was observed everywhere in the world community, but the market ideas have been losing their power since the begin-

ning of the 2000s [8]. According to the surveys, the benefits of the market cease to play a dominant role in the public consciousness. In the period from 1990 to 2012, the index of free market priority fell by 24% [9, p. 575]. A particularly strong decline in the value of free competition, reflecting a deep disappointment in the market economy, was observed in Latin America and Africa.

At the same time, the values of fair competition are increasingly penetrating the corporate environment. Corporate business ethics increasingly prioritize the compliance of companies' planned actions with the antimonopoly legislation. Antimonopoly compliance (i.e. antitrust expertise of investment projects as prevention of competition law violation risks) is becoming increasingly widespread [10]. In general, a certain increase in the competition culture of modern companies is observed.

Thus, with changes in the format of intercompany relations towards virtualization and active use of online interactions, competition does not disappear. Moreover, problems related to its strength and significance in the economy are being debated once again.

## FRESH APPROACH TO OLD REALITIES

The traditional forms of behavior of companies, defined in competition law as unfair competition, are also undergoing a digital transformation.

Primarily, the notion of a company's **domination** in the market is changing. The key role is played by an opportunity and force of influence of the company on the parameters of economic interactions (first of all, on market prices), but not the market share as such [3]. The practice of market power expansion to the conjugate markets has become more widespread. A company, small according to formal criteria, which has a decisive influence on its counteragents, can act as a dominant actor in a digital network and use its dominant position in the market to prevent the appearance of a potential competitor, the products of which can constitute a threat to the basic goods of the leading company in the future (in the case of a favorable growth of the competing company).

Second, a new attitude is formed toward **mergers and acquisitions**, which can change a competitive situation in the market for the worse. In the modern economy, mergers and acquisitions are characterized by complex effects, the nature of which is not always easy to assess as purely competitive or monopolistic. For example, when analyzing the merger of two companies – *Japan Airlines (JAL)* and *Japan Air System (JAS)* – in the Japanese air transport market

in 2002, it was found that as a result, the combined market share of the merged company exceeded 50% [11, p. 159]. According to formal criteria, no permission could be granted for such a transaction; moreover, as a result, the market price of air tickets on most of the routes should have increased significantly. However, research has shown that simultaneously the frequency of flights increases, more comfortable routes are offered, and many small airports receive additional convenient flights. The consumer gains in the quality and efficiency of air travel were found to be significantly greater than the possible monopoly price effects, and the merger was allowed to proceed.

Similarly, the analysis of mergers of traditional airlines in the USA [12] revealed a significant pro-competitive effect for the whole market. As a result of such mergers (unlike reorganizations among low-cost carriers), airfares did not grow, but passenger traffic and aircraft load grew. However, the imperfection of information and asymmetry of information flows between the suppliers lead to the fact that the end buyer power could not compensate for the anticompetitive harm from the merger [13].

The anti- or pro-competitive effect of mergers and acquisitions often depends on the elasticity of demand for basic and intermediate (complementary) products, for which companies-parties to the transaction are liable. According to studies, if the price elasticity of demand is high enough, an anticompetitive effect is absent [14]. The mergers with inelastic demand should cause caution.

The U-shaped dependence between the intensity of competition of companies before the merger and changes in the quality of products offered by the new company after the merger is established [15]. If the companies were involved in fierce competition before the merger, then the merger often leads to the deterioration of the quality of products. If the competition before the merger was weak or non-existent, then the quality improves.

State policy to support competition may lead to anti-competitive results in reality. An empirical study of more than 1300 cases of mergers and acquisitions in the EU during the period from 2001 to 2011 has shown that the strengthening of control over mergers reduces the market corporate control mechanisms [16]. Under the conditions of strict antitrust control, there is less chance of reorganization of the company, its acquisition by a competitor, or its bankruptcy. The threat of merger as a disciplinary factor for managers' behavior to solve the "customer-executive" problem is reduced. The merger policy works against competition, implicitly encouraging dishonest, careless, and even criminal actions of managers.

Third, **exorbitant pricing** practice is reassessed. In the digital world, it is taking new, more subtle forms. In many markets with formal competition, the excessive use of low prices by the dominant company is observed [17]. Primarily, in order to lower prices, the company should have a certain margin of safety, to use the cost reduction in the presence of economies of scale or economies of diversity. These effects are available only to large companies; small and medium-sized competitors are forced to adhere to the traditional mechanism of linear pricing and cannot follow the price leader. Second, the demand for the goods increases with a decrease in price. The company should have corresponding capacities to satisfy the raised demand. Again, this is only available to large companies. Small companies do not have sufficient capacity to expand quickly their production. Thus, a seemingly competitive pricing strategy acts in the interests of large companies, reinforcing the monopoly effects of the dominant company.

A form of exorbitant pricing may include "free" digital products. As noted by the EU Supreme Court in the *Cisco* case, the mere fact that a service is provided free of charge acts as a market power factor. If users expect to receive communications services free of charge, the ability of new competitors to set their own prices is severely curtailed. Similar cases regarding free digital services were observed in the cases of *Microsoft/Skype*; *Microsoft/Nokia*; *Facebook/WhatsApp*; *Microsoft/LinkedIn* [18, p. 264].

European courts have repeatedly emphasized that the free-of-charge basis does not mean the absence of a market. Even if some digital services are provided to one market party (individual users) on a free-of-charge basis, this does not mean that the service is actually free. A digital service is not a free product, which means that another market party – advertisers, content providers, hardware manufacturers, etc. – pays for its delivery. For example, advertisers pay to platforms for access to information about consumers, their transactions, and their interests, required for targeted advertising campaigns, as well as for users' attention to advertising through the forced display of commercials.

Customers pay for the formal absence of a price with their personal data, providing a lot of sensitive personal information to the digital platform, as well as with their time and attention. The American economist D. Zax considers personal data to be the new currency of the digital age [19]. Every year, the European and American courts increasingly regard the free-of-charge basis as a factor of excessive use of the dominant position by large digital companies. An example is the hearing of the case *Bundeskartellamt*

vs *Facebook* in Germany in 2017–2019. It was established that *Facebook*, covering 95% of active users of social networks in Germany, used customers' personal data to prevent other companies from entering this market [18, p. 275].

Fourth, **cartels** are of particular interest. On the one hand, digitalization facilitates collusion between companies. On the other hand, it makes it difficult to detect cartel agreements. Traditional cartel control measures, primarily fines and penalties, are proving ineffective today. For example, penalties for participating in cartels in the EU grew from 100 million Euros per year in 1990–1995 to 300 million Euros in 2015–2019 [20, p. 1188]. Nevertheless, the number of cartel cases is not decreasing.

Economists are searching for methods to determine the propensity of companies to participate in cartel agreements. When analyzing cartels, the emphasis is made on the moral responsibility of company managers. The cartel is perceived as a way for a manager, especially a mid-manager, to reach a higher financial position or more tempting career prospects, as a tool to reduce the risk of bankruptcy of his/her company or his/her own business failures. The psychological characteristics of managers, along with their strategic behavior, have a decisive influence on the propensity of the company to form a cartel.

Researchers allocate managers with special characteristics – “hotheads” [20, 21] – which are mainly responsible for the cartel behavior of this or that company. The experiments showed that the strongest anti-cartel measure for such hotheads would be direct prohibition; the monetary fines do not play almost any role for them. The cartel becomes the choice of the individual running the company, not the company as a whole.

How to establish that price parity in a market is the result of cartel behavior rather than ordinary competitive business practice? An empirical study of the USA aviation industry (1993–2016) revealed that companies-members of a cartel reduce the difference between the prices for different classes of air services [22]. The cartelization increases price rigidity: in order to avoid information costs, companies reduce the spread of prices and the number of price categories of fares for consumers. Companies participating in cartels do not adjust their prices in response to cost shocks or demand fluctuations.

Many provisions of cartel theory are not supported by modern empirical research. It is conventionally believed that cartels form more easily and stay longer in highly concentrated industries with few participants. The more players in the market, the more dif-

ficult it is to create and maintain a secret agreement. However, modern practice shows a very different format [23]. Cartels with a sufficiently large number of participants (6–10 companies) are more sustainable than cartels with 2–3 members.

Nowadays, notwithstanding highly standardized production and sales technology, market transparency in a digitized environment, and a well-developed business intelligence and signaling strategy, companies in highly concentrated industries do not need formal or informal, secret or explicit cartel arrangements to conduct parallel pricing and product policies. Cartelization is more likely in the industries with a high degree of asymmetry between companies and therefore it is difficult for them to establish a like-for-like arrangement without some form of collusion.

Previously, it was believed that the presence of multiple contacts of the same companies contributed to their closer coordination and stimulated cartel behavior. The research of the domestic airline market in China (the second biggest in the world) in 2007–2016 years revealed that the multiplicity of contacts to form the mutual dependence and facilitate collusion was significant only for the top highly profitable 25% of air routes [24]. Airlines are prone to cartel agreements and deliberate parallelism on the routes that bring high revenues. Meanwhile, the airlines with insignificant incomes (on the verge of unprofitability) tend to rigid, aggressive price wars.

Similar results were obtained on the basis of empirical research of the domestic air transport market in Australia in 2013–2017 [25]. The main driver of price wars and a sharp drop in passenger fares was an indicator of aircraft congestion, and the multiplicity of airline contacts only accelerated price confrontation. A “capacity war” usually precedes a price war and increases its duration.

Forms of communication play an important role in effective cartelization. Many companies, for example, in the airline industry, announce future airfares in advance, but do not sell tickets at them. According to Porter, such actions become a signal for competitors, rather than a selling factor for customers [26]. In this way, the dominant company establishes a focal point for the price dynamics.

Silent collusion can be observed in the relationship between the manufacturer and retailers through an information exchange agreement. As the antitrust cases in the gasoline market in Germany (2017) and in the luxury car market in Australia (2014) have shown, retailers study the retail market, transmit the identified demand signals to the producer, and the producer sets wholesale prices based on this infor-

mation, based on which the retailers set their retail prices. This mechanism works so that retailers end up sharing the retail market equally [27]. The strategic exchange of information becomes a tool of market division.

Many business practices of modern companies lead to heated debates on their propensity to stimulate cartel formation. One of the most disputable variants is the *price matching* strategy, when a shop is ready to give a client a discount if he or she finds a competing product with a lower price. Shops sell both branded goods of competing companies and their own generic products (unbranded or store-branded goods) at the same time, which is why some researchers consider this practice a focal point for carting [28]. Other economists emphasize the competitive effects of such a strategy (minimization of search costs for consumers, lack of discrimination between informed and uninformed consumers, and an increase in demand for generics, which prevents the growth of prices for branded products) [29].

Fifth, the attitude of the state towards **vertical integration and vertical contracts** is characterized by a new view. The monopsony power of the *downstream company* under vertical integration is able to neutralize the monopsony power of the *upstream company*. The effect of neutralization of dual monopoly power can be achieved through state antitrust policy and through mergers. For example, an empirical study of the interaction between hospitals and insurance companies in the USA showed that a typical merger of two medium-sized hospitals increased the price of hospital services by 4.3% for insurance companies from the 25th percentile, but only by 0.97% for insurance companies from the 75th percentile [30, pp. 3, 15].

The lack of price discrimination and unified price for supplied resources for all clients of the upstream company in practice can mean high barriers to entry for independent companies [31, 32]. If some companies within vertical relations participate in the ownership of each other or their contracts imply mutual profit sharing, then at nominally the same wholesale price for resources with other participants in a vertical chain, the real effective price for the resource will be lower, as if the buyer company is provided with a significant discount. Partially integrated companies, firms with mutual property rights have advantages in costs in comparison with independent companies, which creates price entry barriers in the industry for the latter.

Vertical integration can lead to the practice of excessive use on the part of a group of companies – the collective dominant company in the vertical product

chain. Collective anti-competitive domination was observed in 2008–2009 in the national oil market of Germany, where the five largest vertically integrated oil companies implemented the joint pricing strategy that limited entry for independent competitors in the product market (retail petrol stations). A similar low pricing strategy to oust the competitors from the retail market was implemented within vertical integration in the market of mobile and fixed-line operators in Brazil, in the market of mobile phones in Italy, and in retail gasoline markets in Great Britain, Australia, Spain, and Portugal [33, pp. 330–331].

Digitalization facilitates the use of *resale price maintenance* (RPM) in vertical interactions of franchise type. Such companies as *McDonald's* are often accused of using RPM in franchise contracts. This practice is forbidden in Europe. However, as the surveys of franchisors and franchisees in France have shown [34], despite the legislative obstacles, the control of the retail price level is welcomed by many, because this mechanism makes it possible to maintain unified standards and coherence of work in a vertical food chain and avoid potential conflicts among the participants.

The sixth area of concern for competition authorities is **exclusive contracts**, which are still under discussion. The Chicago School of Economics believes that if companies themselves (on the demand or supply part) enter into such contracts voluntarily, there is no problem and competition continues to operate [35, 36]. Companies compete for the right to enter into an exclusive contract. The exclusivity of the contract is a mechanism to reduce the risk of a “stowaway effect” and an investment trap for the partners [37].

At the same time, as the antitrust cases in the EU and the USA show, exclusive contracts create barriers to entry for new companies and close many markets to potential competitors [38]. The partial or complete closure of the market and deterioration of competitive conditions occur even with non-exclusive long-term contracts in the markets with product differentiation [39].

Exclusive contracts are often found in the activities of digital platforms [40]. Platforms as bilateral markets deal with two levels of customers: with suppliers of goods and with their consumers. Although formally the two parties to the market are independent of each other, the intermediary activity of the platform has an impact on both of them. It is manifested through price effects, through the size of the customer base, and through the choice, variety, and quality of digital goods and services.

There are two effects everywhere: the direct effect – through the impact on the customers of the one side of the market and the indirect effect – through the impact on the customers of the other side of the market. In contrast to one-side markets, bilateral platforms often experience a “bottle-neck” situation: the customers have a choice of counterparties on one side of the market (multi-node structure, multi-homing), and do not have it on the other side (single-node structure, single-homing). In the struggle for clients in a one-node structure, platforms use price wars, i.e. the competition here is strong and is conducted in the price field. For potential multi-homing, platforms use non-price strategies to avoid the situation of choice. Exclusive contracts are the main tool here.

There is a paradoxical situation: the lack of choice (one-node platform structure) is accompanied by the strongest competition; the presence of choice (multi-node platform structure) leads to monopoly effects. Both the degree of competition and the degree of monopolization can vary between platforms. Clients choose one or another platform also on the basis of how strong the external effect will be (as such) and how significant it is for this or that client (regardless of its formal size). Asymmetric platforms in this respect can both reduce and increase competitive or monopoly effects.

Economists point out that notwithstanding the presence of theoretical potential for multihoming in the digital world, the actual competition is unlikely to be implemented. For example, in the *US v Microsoft* case, it was stressed that, although it was technically possible to download and install browsers other than the obligatory Internet Explorer on computers running the *Microsoft* operating system, few customers used that option. Similarly, in the European Commission case against *Google*, it was stated that the *Android* operating system had a limited capacity and, therefore, additional applications from other companies could hardly be installed instead of or alongside the default *Google* applications [41, p. 3].

In modern conditions, explicit exclusivity contracts are subject to antimonopoly legislation. There-

fore, many companies refuse them in favor of complementary product supply contracts. Although supplies of the basic goods can be not covered by the exclusive format and formally be in a competitive space, such variants of exclusivity as payment for a trading place, goods on a load, payment for distribution (preparation of a place on a warehouse or shop shelves, entering the data on the goods in a computer database of the shop), additional elements, applications to the basic software, compulsory complementary assortment, testify to the existence of the market power of the company-supplier [42]. Companies use intellectual property rights and patents to create exclusive contractual relations in the interconnected markets, not only in the markets of substitutes but mainly in the markets of complementary products.

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Let us summarize. Competition in digital reality is becoming increasingly multifaceted, multi-component, and multi-layered. As before, competition in the digital economy requires state protection. Even ordinary, quite competitive practices in the digital world can become a form of abuse of the dominant position, a factor of market power, and an instrument of oppression of competitors and consumers. Markets are not capable of coping with various forms and strategies of unfair competition.

Under current conditions, the issue of antitrust and competition support policy is not only and not so much in developing new rules, but in interpreting (more strict or more soft) the existing legislation. As foreign experience shows, the optimal role of government antitrust policy is in the strategy of well-balanced support for competing groups of companies in real and virtual spheres. The tendency of antimonopoly service transformation from strict state control (it was in most countries in the 20th century) into a flexible business advisor is observed. A flexible approach to monopoly effects is the key property of competition policy to meet the needs of the third millennium.

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## ЗАРУБЕЖНЫЙ ОПЫТ ПОДДЕРЖКИ КОНКУРЕНЦИИ В ЦИФРОВОЙ ЭКОНОМИКЕ

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Представлен детальный анализ результатов зарубежных исследований, касающихся вызовов, с которыми в настоящее время сталкивается государственная поддержка конкуренции во всем мире, а также реакции антимонопольных органов на новые явления в цифровой экономике. Особое внимание уделено деятельности компаний в рамках традиционного антиконкурентного поведения (образование картелей, злоупотребление доминирующим положением, грабительское ценообразование, исключительные контракты) при столкновении с цифровым миром. В контексте цифровизации рассматриваются различные аспекты политики поддержки конкуренции.

**Ключевые слова:** конкуренция, монополия, антиконкурентное поведение, политика поддержки конкуренции, антимонопольная политика, цифровая экономика, зарубежный опыт.

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