

## PRIVATE ANTITRUST ENFORCEMENT IN DIGITAL MARKET / Dominik Wolski

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**Abstract:** *The increasing popularity of private antitrust enforcement in the EU is reflected by number of antitrust damages claims in the member states, following the transposition of the Damages Directive. Meanwhile, rapid growth of digitization in every aspect of social and economic life, particularly in business like commerce and services, has taken place. Recently, the above phenomenon was intensified by COVID-19. This paper aims at discussing private antitrust enforcement and antitrust damages claims in the context of digital transformation of the market. To this extent, there are several main characteristics of the market (e.g. multi-sided platforms, the role of third-party sellers, etc.), that have to be taken into consideration in the above discussion.*

**Key words:** *Private antitrust enforcement; digital market; on-line platforms; networks; third-party sellers; market characteristics; antitrust damages claims*

**Suggested citation:**

Wolski, D. (2020). Private antitrust enforcement in digital market. *Bratislava Law Review*, 4(2), 147-160.  
<https://doi.org/10.46282/blr.2020.4.2.210>

Submitted: 25 October 2020  
Accepted: 02 December 2020  
Published: 31 December 2020

### 1. INTRODUCTORY REMARKS

For the last few years private antitrust<sup>1</sup> enforcement has becoming increasingly popular in the European Union (EU). Nevertheless, its birthplace is the United States (US), where private enforcement has been dominating the whole enforcement of antitrust law for the last approximately hundred years.<sup>2</sup> The underlying idea of private enforcement is to compensate parties injured by infringement of competition law (both businesses and consumers) as well as discourage actual or potential perpetrators from infringing competition law rules in the future (so called deterrence effect).<sup>3</sup> In the EU, the increasing popularity of private antitrust enforcement reflects number of antitrust damages claims

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<sup>1</sup> The term "antitrust" is of an American origin being a contradiction of "trust" (see Jones, 1999, pp. 7-8), whereas 'competition' has more in common with the European Union (EU) legal settings. Since this paper discusses private enforcement mainly referring to American and the EU legal environments, both terms are used interchangeably with no difference in meaning.

<sup>2</sup> See more about the US model of private antitrust enforcement Jones (1999, pp. 3-22) and Floyd and Sullivan (1996).

<sup>3</sup> It is worth noting that discussion of the primary goals of private enforcement seems to be never ending. As interesting examples of the debate see Lande, (2004; 2006); Dunne (2014) and Lande and Davis (2010).

in the member states<sup>4</sup> that follows the transposition of the Damages Directive<sup>5</sup> to the legal systems of the latter. The antitrust claims can be issued based both on the EU and national competition laws. Thus after years of hesitation towards private enforcement of competition law (contrary to the above mentioned US legal tradition), it eventually found its place on the EU agenda.

In order to successfully pursue antitrust damages claim, it is necessary to ascertain, that any infringement of antitrust law occurred (e.g. collusion, abuse of dominance, foreclosure, etc.). This in turn, to be an effective legal ground of both public and private intervention, must occur in the market, namely as it is called in competition law 'relevant market'. The latter constitutes a part of the whole market and it is denoted for the needs of a particular case upon certain criteria laid down in competition law.<sup>6</sup>

Meanwhile, rapid growth of digitization in every aspect of social and economic life, particularly in business like commerce and services, has taken place. This resulted in digital transformation of the market, sometimes even called "digital revolution" (see Bundeskartellamt, 2019, p. 1), which profoundly changed the way businesses run their economic activity (see also Bundeskartellamt, 2016, p. 1). Both digitization and business becoming increasingly global create new opportunities, however, at the same, time big digital companies can have ability to drive competition out (see Vestager, 2019). In the wake of the above transformation, an infringement of competition law is no longer the same infringement as it was in the traditional market, as the market is not the same as it was a couple of decades ago, at least seen from its technical structure. This change is also reflected in antitrust proceedings and decisions of the EU and national competition authorities, relating to digital market in various aspects of business operations (banking, e-commerce, travel bookings, etc.).<sup>7</sup> The examples mentioned in the footnote, taken mostly from the EU market but having usually global reach are not the targets, but they are used in order to portray the chief competition issues in digital market. This is also to

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<sup>4</sup> This conclusion is based on data accessible in legal literature, case-law, court records, press releases, etc. collected by the author. It is however worth emphasizing that no comprehensive report is publicly accessible in any of the member states, at least to the best of author's knowledge.

<sup>5</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1–19).

<sup>6</sup> See in the EU Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03). Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29> (accessed on 04.12.2020).

<sup>7</sup> See e.g. the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153); another Amazon case relating to possible anti-competitive conduct initiated by the EC on 17 July 2019, case no. AT.40462, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291) (accessed on 04.12.2020); Mastercard and Visa inter-regional interchange fee cases (cases no. AT.39398 and no. AT.40049), eventually ending in commitments accepted by the EC on 29 April 2019, available at: [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_40049](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40049) (accessed on 04.12.2020); Polish Allegro case (marketplace company) initiated by the Polish Office of Competition and Consumer Protection on 10 December 2019 (*Procedure against Allegro. A new platform for whistle-blowers*, 10 December 2019, available at: [https://www.uokik.gov.pl/news.php?news\\_id=16014](https://www.uokik.gov.pl/news.php?news_id=16014) (accessed on 04.12.2020); and another Allegro case initiated on 3 September 2020 by the same authority (see official website of the Polish competition authority, available at: <https://www.uokik.gov.pl/> (accessed on 04.12.2020); Booking commitments accepted on 21 April 2015 by the French Competition Authority (FCA), the Italian Competition Authority (ICA) and the Swedish Competition Authority (SCA) that have coordinated their investigations [*The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*, available at: <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-booking.com> (accessed on 04.12.2020)]; Lithuanian *Eturas* case (online booking platform): CJEU the preliminary ruling of 21 January 2016, *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba*, C-74/14, ECLI:EU:C:2016:42.

illustrate how complex relationships among businesses operating in the same market can be.

Digital platforms are in the scope of the interest of many stakeholders. For example, the double role of the platforms (owning a marketplace and selling out on it simultaneously) was the subject of the intervention of one of the US Senators, Elizabeth Warren, advocating for a law preventing large companies doing so (Magana, 2019). In the EU, the German Competition Authority (Bundeskartellamt) conducted extensive, in-depth analysis of digital market and its characteristics in order to know, if competition law methodology applicable to traditional market should change or not (Bundeskartellamt, 2016).

Digital transformation of the market was sharply intensified by COVID-19, which resulted in a massive shift of many consumers from traditional, brick and mortar market of commerce and services, to e-commerce and e-services. Many consumers who have switched online, simultaneously have changed their purchasing habits. For the latter reason many of them are not expected to return to the traditional market in the future.

Having said that, this paper aims at discussing private antitrust enforcement in the context of complexity of a digital market. Does antitrust damages claims environment has significantly changed or it has not as a result of the above mentioned "digital revolution"? Are the main elements of antitrust damages claim, such as determining an infringement, identifying a perpetrator, quantifying harm or causal link between the infringement and damage different in digital market? These are among other things questions that this paper tries to address against the background of changes that have taken place in the market and recent case-law, in particular cases pertaining to big digital companies. On top of that, there is a meaningful question of whether and to what extent, the application of private antitrust law should change due to the above mentioned digitization of the market.

## 2. ANTITRUST PRIVATE ENFORCEMENT IN THE "NEW ERA"

As already mentioned, private antitrust enforcement in the US has come a long way having more than a hundred-year legacy. This also means that the market at that time, when subsequently Sherman Act (1890) and Clayton Act (1914) were adopted (see Jones, 1999, pp. 6-13), was substantially different from nowadays. Overall, the legal settings, the economic and market environment significantly differ as well, comparing to the legal and economic environment at the end of the twentieth century, not to say the beginning of the twenty-first. However, interestingly enough, the idea of technological giants and their skirmishes with regulators and competition authorities is not a new one, at least in the US. There is a noticeable similarity between current digital platforms that can under certain circumstances dominate the market and Vail's idea of communication's empire, who valued more monopoly than competition (Wu, 2011, p. 8).

Even though, the history of private enforcement in the EU is shorter, reaching back the beginning of 2000s, the first case which is recognized as a pivotal point in this history, namely landmark decision in *Courage Crehan* case, was set in the traditional market (the exclusive purchase obligation - beer tie).<sup>8</sup> This means in turn, that private enforcement also in the EU, usually following public one, must be adopted to the new market reality.

Meanwhile not only the market has changed as a result of "digital revolution" bolstered by spread of COVID-19, but the application of the law to the new environment

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<sup>8</sup> See CJEU, judgment of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, ECLI:EU:C:2001:465.

had to be adjusted at least in some areas (e.g. data protection, privacy, IP and copyrights in the Internet, etc.). Did antitrust private enforcement change as well following the above mentioned changes of legal and business environment?

The above question needs to be addressed considering two separate preliminary assumptions that are discussed in the following parts of this paper. Firstly, from the legal perspective, the main principles of private antitrust enforcement remain unchanged. The party that suffered damage as a result of competition law infringement, irrespectively of whether in traditional or digital market, is entitled to sue the infringer under civil procedure and to seek remedy. The latter, usually monetary compensation, includes actual damages, lost profits, interests and other reasonable costs of litigation (e.g. legal service).

Considering recent, one of the most known private enforcement cases from digital market (Visa/Master Card 'multilateral interchange fees' case in the United Kingdom (UK)<sup>9</sup> or Amazon 'price parity' and 'fair pricing' case<sup>10</sup>), we can fairly realize, that the above mentioned elements did not change in digital market. In respect to quantum of damages, what we can learn from the above cases, it is how the court dealt with so called passing on defense and in this respect the "broad axe issue". It should be also noticed, that after the implementation of the Damages Directive, the overall rules do not significantly differ in the US and the EU member states, subject to some particularities of given legal settings (e.g. treble damages in the US or costs of litigation rules, see Floyd and Sullivan, 1996, p. 1047 et seq.; Jones, 1999, pp. 80-84).

As already mentioned, in spite of the above revolutionary change of the market, the overall principles of private antitrust enforcement have been remaining unchanged, not only since their implementation in the legal systems of the EU member states, but subject to some particularities, ever since the outset of private enforcement in the US. However, what could or should change is the application of the above principles to the new market environment (big digital platforms, big data, new market definition, etc.).

### 3. DIGITAL MARKET CHARACTERISTICS

Having considered the year 2001 (the Court's ruling in *Courage Crehan* case) as the beginning of an increasing role of private enforcement in the EU, thus not so much distant past, the market to which private enforcement rules apply substantially changed. As a consequence of the change, several features of the current digital market have to be borne in mind when applying such rules. First of all, a great part of the market of commerce and services that before the market transformation had been operating in a traditional, brick and mortar mode (independent shops and retailers, shopping centres, merchants, travel agents, cash transactions, etc.) moved to on-line platforms of various kinds. This shift pertains to goods and services, including home equipment, furniture, food including essentials, books, e-books, holidays, travel bookings, insurances, and many others. The list is obviously not exhausted. Recently, this on-line shift was bolstered and intensified by COVID-19. In fact, a great part of social, professional and commercial life moved on to "digital reality".

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<sup>9</sup> See *UK Supreme Court gives important judgement in the Visa/Marstercard 'interchange fee' litigation*, Sherman & Sterling, 23 June 2020, available at: <https://www.shearman.com/perspectives/2020/06/uk-supreme-court-gives-important-judgment-in-the-visa-mastercard-interchange-fee-litigation> (accessed on 04.12.2020) and the judgement of the Supreme Court of 17 June 2020: United Kingdom, *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others; Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others* [2020] UKSC 24, available at: <https://www.supremecourt.uk/cases/docs/uksc-2018-0154-judgment.pdf> (accessed on 04.12.2020).

<sup>10</sup> See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424).

Seemingly, the above process could only up competition game creating new opportunities (*"New companies, with millions or even billions of users, have emerged from nowhere ..."*, Vestager, 2019). This is because as a result of less actual and technological barriers (e.g. lower entry costs), it gives easier, quicker and cheaper access to the market of all players, namely producers, suppliers, retailers and customers. Theoretically, on the supply side, almost everyone is able to place his offer on-line, as on the demand side everyone having access to the internet, can buy or use services on-line. Whether traditional or digital market, there is nothing better for competition than quick, open, cheap and equal access to it for all participants.

From the above perspective (an open, easily accessible market), nothing better could have ever happened for the economy, but digitization. As a consequence, had this ideal world existed, neither public intervention of competition authorities nor antitrust damages claims of private claimants would have been needed. Nonetheless, at least since 1626, the year when 'New Atlantis' by Francua Bacon was published we know, that ideal world exists only in books and thinkers' minds. So it is in case of the digital transformation of the market. The openness of the digital market, that gives many opportunities and is sometimes expressed also in so-called net neutrality, is in some aspects not so obvious. The natural temptation to build an empire and close the market was in place as early as the first communication monopoly, namely the Bell system, was established in the US (Wu, 2011, pp. 50-51).

What is clear from merely a few interventions of competition authorities as well as private antitrust claims recalled in this paper, both in the US and the EU, in an open digital market, a few "digital giants" arose. As the worldwide scale examples can serve Amazon, Booking, Visa, MasterCard or Google. Only to give a picture of such scale, Amazon.com, Inc. is the world's largest online retailer and its sales account for almost half of all retail e-commerce in the United States.<sup>11</sup> In the E-book market, Amazon acting upstream as a publisher and downstream as an E-book retailer controls a big part of the market as well.<sup>12</sup> In 2017 Mastercard and Visa, based on purchase transactions, accounted together for above 75% of the market share globally (Szmigiera, 2019). Also big, but nationwide, operating locally, are *Eturas* (Lithuania) or *Allegro* (Poland), other examples of online platforms (travel bookings and both marketplace and retailer respectively). Allegro is the most popular online shopping platform in Poland (in 2019 79% of customers came to buy new items online on this platform).<sup>13</sup>

The above numbers reflect the market reality, which in some cases brings about the dominant position of companies insofar as they are able to control the market they operate. For the sake of the access to the great number of customers, from the third-party sellers' perspective, to be able to sell online through the platform is like Hotel California (*"lovely place to expand an online retail business"*).<sup>14</sup> However, on the other side, in many cases the dominant position (or almost dominant) of big digital companies causes a situation, in which open, cheap and easy-accessible market for all participants can exist only in theory. From the practical point of view, the position of big digital platforms can under certain circumstances result in a big market power, on both supply

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<sup>11</sup> See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 1.

<sup>12</sup> See the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-Book MFNs and related matters (case no. AT.40153), p. 7.

<sup>13</sup> *Procedure against Allegro. A new platform for whistle-blowers*, 10 December 2019, available at: [https://www.uokik.gov.pl/news.php?news\\_id=16014](https://www.uokik.gov.pl/news.php?news_id=16014) (accessed on 04.12.2020).

<sup>14</sup> The Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 17.

and demand side. On the demand side, the most important from the customers' perspective is to find an offer at good quality and price.

Therefore, having in mind massive information flow and a number of offers attracting customers' attention every day and hour, the consumer is overwhelmed. For obvious reasons, a real challenge of every retailer is not to place the offer but to do it in the most efficient way. Here the possibility given by digital platforms becomes a key factor. For the consumer living in a fast moving world and having limited time at disposal but at the same time persistently looking for the best offer possible (goods or services), it is easier to visit one of the well-known digital platforms, instead of searching smaller, independent retailers or marketplaces. On the supply side, occupying a big part of the market and having a great number of loyal customers, it is easier for a big digital platform to reach out consumer and attract him the offer, than for the above smaller businesses. As said, they have a great competitive advantage of holding a big market share and giving a number of smaller businesses opportunity to offer their goods and services, and eventually reach out customers.

Another characteristic of the digital market of great importance for private antitrust enforcement is complexity. As arises out of the above-mentioned cases of big digital platforms, most of them pursue many functions, at least two. They provide smaller businesses (retailers and service providers) with an opportunity to put up their offers on the platform, operating as a marketplace. At the same time, big digital operators offer their own goods and services on the same platform. This brings about the double role of digital platforms being the same time marketplace's owners and retailers. They are called "two-sided platforms" providing services to two different groups (third-party sellers and their customers).<sup>15</sup> Here is the complexity. It means that the platforms compete for their own offer with the offer of third-party sellers present on the same platform. As a result, a potential limitation of freedom in offering goods and services set up between the platform and retailer (e.g. in respect to prices, discounts, innovations, alternative distribution channels, etc.) can lead to restraints of competition. This effect is bolstered by the fact that most of the big digital platforms have the dominant position in the market or at least have attempted to monopolize it.<sup>16</sup>

How complex the digital market dominated by big digital platforms and networks is (matching platforms, advertising platforms, etc.) we can also see in the study conducted by the German Competition Authority (Bundeskartellamt, 2016). No less important from the perspective of the above complexity is using algorithms by many undertakings running their businesses online, in particular those big ones. It is also another subject under the scrutiny of competition authorities (see Bundeskartellamt, 2019).

Bearing in mind the complexity of the digital market, what is of great importance in the context of competition law infringement and potential private antitrust claims, it is the notion of 'relevant market.' In order to prove competition law infringement and to successfully pursue private damages claim following such finding, it is necessary to

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<sup>15</sup> See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 1; the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 7, and *Procedure against Allegro. A new platform for whistle-blowers*, 10 December 2019, available at: [https://www.uokik.gov.pl/news.php?news\\_id=16014](https://www.uokik.gov.pl/news.php?news_id=16014) (accessed on 04.12.2020), p. 1.

<sup>16</sup> See *The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*, available at: <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom> (accessed on 04.12.2020); the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), pp. 32-33; see the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 17.

ascertain that competition law infringement had occurred in the 'relevant market'. In the traditional market, this notion in the EU law was denoted by two elements, namely geographical scope and product substitutability.<sup>17</sup> Thus "*defining*" markets is to study the complex interplay between product characteristics, customer and supplier behaviour, firms' substitution decisions and regulation" (Vestager, 2019). The complexity of digital market causes a situation where neither of the above criteria would allow easily to denote 'relevant market', when needed in order to find competition law infringement. Considering online business reality, in particular fact that online platform is accessible even from the farthest corner of our globe, the geographical criteria are not sufficient enough, even considering shipping barriers, customs and other costs related with online shopping. As a consequence, the question of the geographical scope of the market translates in the question where the market's boundaries lie. For example, in telecom cases the market covers at least the EU single market or even the whole world (Vestager, 2019). Therefore, it is very often difficult to denote 'relevant market' based on the geographical dimension. Not better with substitutability criterion. Having considered products and services offers' complex characteristics as well as the whole range of different areas where big digital platforms operate (e-books and many accompanying functionalities accessible on the platform, ecosystem of services designed to work together, etc.) as well as customers' choices and habits, it is very difficult to find fully substitutive product. Moreover, in many cases it can be difficult for the customer to switch from one ecosystem to another (Vestager, 2019). These factors often result in a situation, in which even for businesses is difficult to find who is a competitor of whom, not to say about competition authority (Vestager, 2019).

In the wake of digital market transformation and due to its complexity and shortcomings of the current definition of the relevant market,<sup>18</sup> the EC following the 2019 speech of M. Vestager, in 2020 decided to launch public consultations aiming at the evaluation of the definition of the relevant market for the purposes of competition law.<sup>19</sup> On the other hand, the Bundeskartellamt concluded, that "*the current antitrust tools are in principle also suitable for the assessment of digital platforms and networks*" (2016, Results and Recommendations, p. 4).

#### 4. WHO DOES HARM, WHO IS HARMED?

As mentioned in the beginning, there are two main functions of private antitrust enforcement, compensation and deterrence, sometimes supplemented by public sector savings due to less number of interventions of state authorities. As in each part of the tort liability regime, social costs have to be taken into consideration as well (see e.g. Givati and Kaplan, 2020). Nevertheless, it goes without saying, that from the practical perspective of parties to antitrust litigation, the compensatory function is of the biggest significance and the others hardly matter. As a result, bearing in mind the above characteristics and complexity of the digital market, it is vital to realize which party did cause damage (and should pay compensation) and which party suffered it (and should be awarded of damages). There is however not an easy answer to this question, at least from a certain perspective.

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<sup>17</sup> See *Commission Notice on the definition of relevant market for the purposes of Community competition law* (OJ C 372, 9.12.1997, pp. 5–13).

<sup>18</sup> *Commission Notice on the definition of relevant market for the purposes of Community competition law* (OJ C 372, 9.12.1997).

<sup>19</sup> Competition: Commission consults stakeholders on the Market Definition Notice, 26 June 2020. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1187](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1187) (accessed on 04.12.2020).

To start with the claimant perspective, bearing in mind merely few cases recalled in this paper, the consumer usually can claim that he suffered damage. This is, however, only viable provided that other conditions of liability for damage caused by competition law infringement are fulfilled. For example, the consumer can claim that his damage equals price overpaid as a result of the infringement. Had an anti-competitive practice or prohibited agreement not occurred, the overprice (including overcharge<sup>20</sup>), would have not been paid by a consumer. As stated in one of the complaints, due to pricing policy one of the platforms, the sellers were forced to maintain supracompetitive prices paid by customers.<sup>21</sup> Anti-competitive practice can also result in a lack of choice or limited choice (which in the end raises prices as well), less innovative products or services.<sup>22</sup> As we can see in one of the studies, in the digital market, innovation potential and data sources matter a big deal as well (Bundeskartellamt, pp. 16-19).

Therefore, despite some particularities of the digital market, the consumer's perspective towards damage he can suffer in the digital market, as a result of competition law infringement, does not substantially differ from that one in the traditional market. Additionally, the consumer himself can neither infringe competition law nor cause harm or contribute to it. The latter situation in relation to the claimant other than the consumer can differ in some cases outlined below.

In respect to businesses other than the big digital platforms, they can also suffer damage resulting from infringement of competition. Said can pertain to retailers who do not want to use or are not allowed to use a given platform due to their lack of consent for conditions set forth by the platform. Obviously, this can be a case only if the above conditions are not consistent with competition law. The damage can consist of losses (more likely lost profits) caused by no entry in the market, higher entry costs, lack of opportunity to launch innovative product attracting consumers, etc.

The harm-related matters are more complicated in relation to other parties, usually businesses, operating in the digital market. This issue mostly concerns businesses that under certain circumstances can also suffer damage, namely third-party sellers or service providers (e.g. book or e-book sellers, hotels, travel agents, tourist apartments' owners, etc.) cooperating with one of the big digital platforms and placing their offers on it. The above smaller businesses, not necessarily small, but having significantly smaller market power, cooperate with the platform under the contract. Thus they have a legal relationship with the platform. They also to the great extent constitute the platform's business being an inherent part of it. On the other hand, considering the market share of big online platforms, the latter is big enough to be desired by the third-party sellers and service providers. This in turn allows online platforms to impose specific provisions in contracts. These provisions can put the platform in a better position comparing to other, smaller independent platforms and own channels of third-party sellers.

Based upon case-law recalled in this paper, typical anti-competitive clauses used by big online platforms are "price parity" (also "best price" clauses)<sup>23</sup> or platform most

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<sup>20</sup> According to Article 2 clause 20 of the Damages Directive 'overcharge' means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law.

<sup>21</sup> See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 5.

<sup>22</sup> See e.g. the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 22.

<sup>23</sup> See *The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*, available at: <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and->



favoured nation or “PMFN”<sup>24</sup> and “fair pricing” policy.<sup>25</sup> Conduct of online platform based upon contractual clause can also consist of data collection (competitively sensitive information, e.g. about marketplace sellers, their products and transactions on the marketplace) and its analysis in order to restrain competition.<sup>26</sup> As the above-mentioned study points out, data source becomes an important factor in the digital market (Bundeskartellamt, 2016, pp. 16-17). There are other non-price-related, though competitively sensitive clauses (e.g. “Notification Provisions”).<sup>27</sup>

As a result of the above, there are two basic types of competition law infringements that can cause damage. The first, bearing in mind the market power of the biggest online platforms can be an abuse of a dominant position. It can occur by imposing on the smaller businesses (e.g. third-party sellers) conditions that both limit their ability to sell products and services at a lower price than on the platform (price-related provisions) and set forth actual constraints in switching to other, independent platforms or sale through the third-party’s own channels. A typical example is the above-mentioned contractual clause constraining retailers from offering their products at better (i.e. lower) price on other than a big online platform. The other one set up barriers for retailers (e.g. e-book sellers) prone to use more innovative solutions or functionalities, throughout obligatory noticing of the big online platform about the solution, that the retailer is about to use on a competing platform or third-party seller’s own distribution channel. Innovation potential is also another factor well pointed by Bundeskartellamt as relevant when assessing the digital market from a competition law perspective (Bundeskartellamt, 2016, pp. 16-17).

Notwithstanding, the above clauses as integrated into the contract between the online platform and third-party seller, can under certain conditions be construed from an antitrust perspective as a collusion (e.g. price fixing), concerted practices or any other type of agreement that restrains competition. In this case, a retailer (booksellers, hotel, travel agency, etc.) is deemed as the party to the anti-competitive agreement in question.

Having said that, two types of relationships of a potential wrongdoer and injured party have to be analysed at length. Firstly, in case of the usually less complicated scheme, the stronger party abuses its dominant position over the other parties (e.g. retailers or service providers). Secondly, in a more complex situation arising under the above-mentioned contractual anti-competitive clause, a third-party seller and an online platform can be the parties to the contract including an anti-competitive clause. As we can see from the examples mentioned in this paper, in both typical cases (abuse of dominance and contractual constraints) damage suffered by an injured party, if proved under the conditions of civil proceedings, is considered the same way. It usually can result from the lack of ability of sale at a higher price on the independent platform or third-party’s own channel (e.g. lost profits) as well as from the lack (or constrained) ability of

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swedish-competition-authorities-accept-commitments-offered-bookingcom (accessed on 04.12.2020); and the European Commission (EC) decision of 4 May 2017 on Amazon’s commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 9.

<sup>24</sup> It reads, *„the purchase price and every other term of sale ... is at least as favorable to Amazon Site users as the most favorable terms via Your Sales Channels”*, see the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 3.

<sup>25</sup> See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 3; and the European Commission (EC) decision of 4 May 2017 on Amazon’s commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 9.

<sup>26</sup> European Commission (2019). *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon*, 17 July 2019. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291) (accessed on 04.12.2020).

<sup>27</sup> The European Commission (EC) decision of 4 May 2017 on Amazon’s commitments in relation to E-book MFNs and related matters (case no. AT.40153), pp. 11-12.

implementation more innovative solutions or functionalities due to obligatory noticing of the big platform. The occurrence of damage on the part of the retailer or service provider in the above cases is possible. However, in the second case (contractual clause restraining competition) two types of issues have to be discussed at length in order to ascertain if in a particular case, a perpetrator is liable for damage on the part of an injured party. The first issue pertains to the liability, namely is the party to an anti-competitive agreement liable for damage caused to the party to the same agreement? The second issue is relating to the quantification of harm suffered by a retailer or service provider.

The first of the above-mentioned issues was the subject of the landmark decision in *Courage Crehan* case. In its ruling, the Court ascertained eligibility of the party to the agreement infringing competition (prohibited agreement) to seek compensation from another party to the same agreement. As stated in the Court's judgement, the latter party infringed competition by forcing another party to integrate an anti-competitive clause in the agreement.<sup>28</sup> However, it is important that the litigant should not profit from his own unlawful conduct. The bargaining power of the party enabling to impose an anti-competitive condition on a weaker party has to be taken into account as well. The same rules apply to contractual relationships between the online platform and the retailer.

In relation to the second issue, namely quantification of harm suffered by an injured party in the aforementioned relationships, the answer seems to be even more complicated. This is because the quantum of harm in antitrust damages cases is based upon the economic and market analysis. It is usually a result of many factors, namely losses and profits of the injured party. Consequently, the question is not only to what extent the injured party suffered due to the anti-competitive practice but also whether the injured party has benefited from the infringement. Additionally, quantification of harm must answer to the question if the injured party passed the loss on to its customers.<sup>29</sup> In cases discussed in this paper it will be the question if a given retailer (e.g. book or e-book third-party seller) or service provider, as a consequence of the limitations arising under the contract with the online platform, benefited to any extent. For example, if case analysis allows to make the assumption, that if the seller had used an alternative platform to sell its products at a higher price or if it had applied in its operations more innovative solution or functionalities, it would have benefited more than it did when using one of the big online platforms. In relation to above-mentioned 'pass on defence', there is another question whether the claimant passed its actual or potential loss on to its clients or suppliers downstream or upstream. The result of this profound and complex analysis can show the actual damage and lost profits of the party seeking compensation from the perpetrator. Eventually, the compensation should be reduced by a part of the damage covered by benefits of an injured party or damage that was passed on to its clients or suppliers.

Bearing in mind the above, it seems that the simplest possible (not simple) calculation of damage suffered by the injured party applies to B2C transactions. It is the case of one of the recent class actions in the US concerning losses suffered by

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<sup>28</sup> See CJEU, judgment of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, ECLI:EU:C:2001:465.

<sup>29</sup> See e.g. *UK Supreme Court gives important judgement in the Visa/Mastercard 'interchange fee' litigation*, Sherman & Sterling, 23 June 2020, available at: <https://www.shearman.com/perspectives/2020/06/uk-supreme-court-gives-important-judgment-in-the-visa-mastercard-interchange-fee-litigation> (accessed on 04.12.2020) and the judgement of the Supreme Court of 17 June 2020: United Kingdom, *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others; Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others* [2020] UKSC 24, available at: <https://www.supremecourt.uk/cases/docs/uksc-2018-0154-judgment.pdf> (accessed on 04.12.2020).

consumers, resulting from abusive practices of a big online platform.<sup>30</sup> However, even though this calculation is seemingly not complicated being based upon so-called overcharge (i.e. supra-competitive prices paid by consumers), as well as less choice and less innovative solutions available for consumers, it is still at least in part based on estimated losses.<sup>31</sup> The exact calculation is hardly possible.

In the second case of a party to the contract suffering damage as a result of abusive practice of a bigger party, calculation of damage, considering all the above-mentioned factors, is even more challenging and complex. Both examples, however, well demonstrate the complexity of quantification of harm in antitrust damages claims that becomes even more complex when applying private enforcement rules to cases related to the digital market. The "double role" of mostly dominant platforms – the same time competing with third-party sellers and providing them with an opportunity of placing their offers on the platform – additionally increases the complexity of the application.

## 5. OTHER RELATED ISSUES

Apart from the calculation of damage, there are some other issues that have been discussed in the legal literature and case-law ever since the outset of private antitrust enforcement. Even though conclusions from the discussion and legal interpretation can vary in particular legal systems (e.g. the US and Europe), some of the elements have a lot in common. There are for example issues such as the concept of competition law infringement and identifying the infringer, causal link between the infringement and damage suffered by the injured party or standing of an indirect purchaser downstream and upstream in the supply chain.<sup>32</sup>

As regards to the infringement of competition law and identifying the infringer, if an antitrust damages claim follows decision of the competition authority ('follow-on' claim), then all what the claimant should know before filing a claim is included in the above decision. Therefore, in follow-on cases the main burden when finding the infringer and ascertaining the violation of competition law rests on the competition authority. This process does not significantly differ in cases related to the digital market, though, the competition authority is challenged by the complexity of the latter outlined above.

In case of 'stand-alone' actions (not preceded by a decision of the competition authority), this challenge rests on the plaintiff, which is more burdensome in some type of relationships related to the digital market (e.g. the platform-retailer contractual relationships discussed above). Additionally, in case of a contract (prohibited agreement), based on well-established case-law following *Courage Crehan* case, when identifying an infringing party, the decisive factor is which party, considering its bargaining power in given circumstances, was able to force another party to agree on the anti-competitive clause in the agreement. The application of this rule to the digital market would not change.<sup>33</sup>

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<sup>30</sup> The Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 5 and p. 12.

<sup>31</sup> See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 13.

<sup>32</sup> Some of the issues are discussed in the EU context in Wolski (2016, pp. 69-96; 2017, pp. 69-84).

<sup>33</sup> See also the Court's judgement in *Euras* case in relation to tacit consent for anti-competitive conduct of the travel booking online platform: CJEU the preliminary ruling of 21 January 2016, *Euras UAB and Others v Lietuvos Respublikos konkurencijos taryba*, C-74/14, ECLI:EU:C:2016:42.

Provided that the claimant, whether a business, a consumer or a group of consumers in case of the class action, is able to prove damage he suffered, the second issue is to link the damage and the infringement based upon private law principles of the particular legal system. This applies in each case the same way, whether follow-on or stand-alone. This is because competition authority decision does quantify damage, but merely ascertains the occurrence of competition law infringement. Therefore even considering presumption of damage resulted from a cartel infringement set forth in the Damages Directive,<sup>34</sup> although rebuttable, quantification of harm is not presumed. What this means is that the claimant in order to be successful in filing a claim must always prove the size of damage he suffered. This can be particularly complex and difficult bearing in mind the above-mentioned downstream and upstream relationships between the big digital online platform and retailers or service providers respectively.

## 6. CONCLUSIONS AND RECOMMENDATIONS

In conclusion, although many similarities with the traditional market, the so-called digital revolution brought about important changes, that have to be taken into account when discussing and applying private antitrust enforcement rules (e.g. consumers' easy access to the market, almost no geographical limits, the dominance of a digital online platform, etc.). The above-described complexity of the digital market, in particular in downstream and upstream online platform-retailers-suppliers scheme as well as main difficulties of private antitrust enforcement (e.g. quantification of harm, causal link, indirect purchaser standing, etc.), are in antitrust damages claims related to the digital market even harder. Certainly, the application of private enforcement rules to the digital market requires a profound understanding of the market, its functions and relationships between its participants. For the above reasons, the environment of antitrust damages claims significantly changed due to the digital transformation of the market. Whether to file a claim is easier or not, vastly depends on the understanding of the market structure and its characteristics. This is important not only on the part of a claimant but first and foremost for the court when adjudicating the case. As the example of the UK judgement mentioned in this paper makes it clear, the court is able to cope with such cases, in particular when specializing in competition law. On the other hand, having in mind the main elements of antitrust damages claims (e.g. damage, quantification of harm, causal link, etc.), they do not significantly differ when applying to cases related to the digital market.

Having said that, as recommendations, there are two elements worth emphasizing. Firstly, in relation to the infringement of competition law and antitrust damages claims following the infringement, definition of the relevant market (a market where the infringement occurs), is of great significance. The market changed and the definition of the market in competition law should be rethought and changed as well. In this respect, consultations initiated by the EC can bring about necessary adjustment of relevant market definition to the new market environment. For this reason, the Bundeskartellamt's conclusion with respect to current competition law tools and digital platforms seems to be at least premature.

From the perspective of practical application, assuming that eventually in competition law-based cases the court adjudicates the plaintiff and defendant's arguments, an understanding of the digital market is crucial. Therefore, not only the courts should have ability to cope with the complexity of the digital market, but the role of the experts' opinions are of great importance. Even though the court, in particular when

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<sup>34</sup> This presumption is set forth in Article 17 clause 2 of the Damages Directive.

not specializing in competition cases,<sup>35</sup> is highly skilled, considering the aforementioned complexity and fact that competition law is inextricably intertwined with the economy, an expert opinion is inevitable in order to just and effectively decide in antitrust damages cases. There is also a need for the impartiality of the above experts since they play crucial role in private antitrust cases.

#### BIBLIOGRAPHY:

- Bundeskartellamt. (2019). *Algorithms and Competition. Executive Summary*. Available at: [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms\\_and\\_Competition\\_summary.pdf;jsessionid=6A11BAF19E1FAE586226AC4380C3425D.1\\_cid390?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_summary.pdf;jsessionid=6A11BAF19E1FAE586226AC4380C3425D.1_cid390?__blob=publicationFile&v=4) (accessed on 04.12.2020).
- Bundeskartellamt. (2016). *Working Paper. The Market Power of Platforms and Networks. Executive Summary*. Available at: [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4) (accessed on 04.12.2020).
- Competition: Commission consults stakeholders on the Market Definition Notice, 26 June 2020. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1187](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1187) (accessed on 04.12.2020).
- Dunne, N. (2014). The Role of Private Enforcement within EU Competition Law. *King's College London Dickson Poon School of Law, Legal Studies Research Paper Series*, Paper No. 36/2014.
- European Commission (2019). *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon*, 17 July 2019. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291) (accessed on 04.12.2020).
- Floyd, C. D. and Sullivan, E. T. (1996). *Private Antitrust Actions, The Structure and Process of Civil Antitrust Litigation*. Little, Brown and Company.
- The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*. Available at: <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom> (accessed on 04.12.2020).
- Jones, C. A. (1999). *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford: Oxford University Press.
- Lande, R. H. (2006). Five Myths About Antitrust Damages. *University of San Francisco Law Review*, 40, 1-24.
- Lande, R. H. (2004). Why Antitrust Damage Levels Should Be Raised. *Loyola Consumer Law Review*, 16(4), 329-345.
- Lande, R. H. and Davis, J. P. (2010). Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases. *University of San Francisco Law Review*, 42, 879-918.
- Magana, G. (2019). Amazon is ending its restrictive pricing practice. *Business Insider*, 13 March 2019. Available at: <https://www.businessinsider.com/amazon-ends-restrictive-pricing-parity-2019-3?IR=T> (accessed on 04.12.2020).

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<sup>35</sup> As an example of specialized court serves Competition Appeal Tribunal in London (see more at <https://www.catribunal.org.uk/>).

- Procedure against Allegro. A new platform for whistle-blowers*, 10 December 2019. Available at: [https://www.uokik.gov.pl/news.php?news\\_id=16014](https://www.uokik.gov.pl/news.php?news_id=16014) (accessed on 04.12.2020).
- Szmigiera, M. (2019). *Distribution of credit card issuers worldwide in 2017, by purchase transactions*, 11 December 2019. Available at: <https://www.statista.com/statistics/278970/share-of-purchase-transactions-on-global-credit-cards/> (accessed on 04.12.2020).
- UK Supreme Court gives important judgement in the Visa/Marstercard 'interchange fee' litigation*, Sherman & Sterling, 23 June 2020. Available at: <https://www.shearman.com/perspectives/2020/06/uk-supreme-court-gives-important-judgment-in-the-visa-mastercard-interchange-fee-litigation> (accessed on 04.12.2020).
- Wolski, D. (2016). The Principle of Liability in Private Antitrust Enforcement in Selected European States In Light of the Implementation of the Damages Directive into the Polish Legal System. *Yearbook of Antitrust and Regulatory Studies*, 9(14), 69-96.
- Wolski, D. (2017). The Type of Liability in Private Enforcement in Selected CEE Countries Relating to the Implementation of the Damages Directive. *Yearbook of Antitrust and Regulatory Studies*, 10(15), 69-84.
- Wu, T. (2011). *The Master Switch. The Rise and Fall of Information Empires*. Vintage Books.
- Vestager, M. (2019). *Defining markets in the new age*, Speech, Chillin' Competition Conference, Brussels, 9 December 2019. Available at: [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en) (accessed on 04.12.2020).
- Givati, Y. and Kaplan, Y. (2020). Harm Displacement and Tort Doctrine. *The Journal of Legal Studies*, 49 (1), 1-30.