
"Addressing Unfair Competition in Digital Platforms: A Legal Perspective from Azerbaijan"

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Abstract

As a result of digital transformation business practices have been changed completely. Today, in digital environment, more specifically in digital platforms consumers can easily find what entrepreneurs offer and which offer meets their needs. However, the shift of the business practices from conventional means to digital environments brings new legal issues and risks. Although the digital environment offers more comfortable and easier way for entrepreneurs to perform their business activities, due to lack of the control and gaps in the legislation, it is more vulnerable for anticompetitive or unfair business practices. The existing legislation is designed to regulate conventional business practices. The new problems cannot be addressed by the current legislation. Therefore, the necessity of adopting new rules regulating the business activities in the social platforms is undeniable.

Keywords: Competition law, unfair competition. digital platforms, technology.

Introduction.

As the technology developed its products became more and more accessible to the people. Today, the products of the technology (including digital platforms) play an important role in our lives. We, as consumers, use digital platforms to buy goods, get services, etc. As a result, business practices also have been changed. Today, companies and entrepreneurs offer their products and services using digital platforms. Such platforms happen to be the cheapest and most comfortable way of creating marketing contents, promoting businesses and performing branding activities.[2]

The innovations that digital platforms bring are beneficial for users. In addition, internal market also benefits from digital platforms, as opening new business opportunities and facilitating cross-border trading are positive effects of such platforms.[3] The digital platforms offer more convenient tools for companies and entrepreneurs to realize their business activities. However, due to the gaps in the legislation regarding the digital platforms, they became suitable environments for unfair competition cases. On the one hand, digital platforms offer better means for business activities, but from the other perspective, people with bad intentions can use these platforms to realize their unfair practices. Regarding the competition, digital platforms can easily be the means of unfair advertisement and trademark infringement. Nowadays it is as easy as to create a Facebook page (or account on any other digital platforms) to realize unlawful business practices. Moreover, the current legislation does not provide competition authority with efficient tools to investigate such cases.

[2] MA Yosep and others, 'Does Digital Marketing Platforms affect Business Performance? A Mini-Review Approach' [2021] Proceedings of the International Conference on Industrial Engineering and Operations Management <<http://www.ieomsociety.org/singapore2021/papers/772.pdf>> accessed 30 April 2023

[3] REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act). EXPLANATORY MEMORANDUM (2020) XXXX <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:842:FIN>> accessed 7 May 2023.

Gaps in the competition legislation regarding the digital platforms made governments adopt new rules or revise existing legal frameworks.[4] For example, Europe has long been concerned about creating fair and competitive environment for small companies in digital platforms. Digital Markets Act (DMA) was proposed by European Commission in 2020, which was signed by the European Parliament and the Council of EU in 2022. The DMA aims to limit the powers of the big technology companies (as they have acquired too much power over the years), make internet more competitive and safer for its users.[5]

Causing by the platform economy and differentiating from the conventional market, digitalization transformed ‘competition in the market’ into ‘competition for the market’.[6]

The impact of the digital transformation on the domestic economy is rather complex, however, its role in the economic development is undeniable.[7] But state control is necessary to make digital environment more competitive friendly for smaller firms which are dependent on big technology companies to realize their business activities.

Competition issues that digital platforms can cause.

As mentioned above, the development of the technology changed business practises. Considering the diversity in businesses, it’s obvious that some business fields are more dependent on the digital platforms than others. Consequently, the issues that digital platforms can cause should be adressed from several perspectives.

1. Businesses that completely depend on digital platforms to offer their services.

One of the outcomes of the shift of business practices from conventional means to digital is the establishment of businesses that completely depend on digital platforms. The characteristics of the digital sector (such as strong network effects) stimulated digital platforms to merge. Today, there are few platforms which cover the significant percentage of the market and these platforms intermediate the majority of transactions between end users and business users.[8]

In such cases, small firms have no other option but to comply with what big technology companies dictate. According to the legislation of the Azerbaijan Republic, more specifically the Law on “Antimonopolistic Activities” (“Antiinhisar fəaliyyəti haqqında” Qanun), some measures (under Article 14 of the Law on “Antimonopolistic Activities”) are available for Competition Authority to prevent antimonopolistic practices. But considering the characteristics of the digital market and also the fact that the law is designed for conventional business practices, the competition authority can hardly take any measures.

2. Unfair practices by the companies in digital platforms.

Another issue regarding the competition in digital platforms is the unfair competition practices. According to the current practices, the most frequent type of unfair competition practices are trademark infringement and unfair advertisement.

a. Trademark infringement.

According to World Intellectual Property Organization (WIPO), a trademark is defined as “a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises.” [9]

[4] Akman P, ‘Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act’ [2022] 4 <<https://eprints.whiterose.ac.uk/181328/7/Akman,%20DMA,%20ELR%201-12-21,%20SSRN.pdf>> accessed 7 May 2023

[5] Liberto D. Digital Markets Act (DMA): How the EU Law Will Work. (2023) < <https://www.investopedia.com/digital-markets-act-7097402>> accessed 14 May 2023

[6] Sarçıçek, C. et al. (2022) E-PAZARYERİ PLATFORMLARI SEKTÖR İNCELEMESİ NİHAİ RAPORU. rep. Ankara.

[7] Zaoui, F., & Souissi, N. (2020). Roadmap for digital transformation: A literature review. *Procedia Computer Science*, 175, 621-628.

[8] REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act). EXPLANATORY MEMORANDUM (2020) XXXX <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:842:FIN>> accessed 7 May 2023.

[9] Trademarks - What is a trademark? , < <https://www.wipo.int/trademarks/en/> > accessed 14 May 2023.

Trademark infringement is one of the most common unfair competition practices. As a result of digital transformations, it became easier to cause such behavior in digital platforms. Anyone, who can create Facebook or Instagram page, can easily infringe any trademark, which causes confusion in consumers. One of the problem in such cases is the problem of identification. Due to the lack of the efficient tools available for Competition Authority, it is almost impossible to identify such subjects and take any measure.

Hypothetical case 1:

Company A registered trademark "A". Its competitor B (rather small company) created pages in digital platforms, unlawfully using trademark "A" to promote its products benefitting from the market reputation of Company A.

Hypothetical case 1 is a basic example of trademark infringement cases, which constitutes unfair competition under Article 4 of the Law on "Unfair Competition" ("Haqsız rəqabət haqqında" Qanun). When such violations take place in conventional business environment, Competition Authority has powerful tools (such as demanding informations, imposing sanctions, etc.) to investigate such cases. However, when such cases take place in digital platforms, the tools that current legislation provide Competition Authority with, are not sufficient. As the digital platforms do not hold representatives in Azerbaijan, Competition Authority cannot directly demand information from such platforms, etc. Moreover, Company B can easily deny its connection to the violations. Therefore, the insufficiency of the investigation starts with the problem of identification. Besides that, Competition Authority

is not able to block the activity of such pages on digital platforms. The issues mentioned above put the whole investigation under question.

b. Unfair advertising

The problem regarding the advertising issues in digital platforms is broader than just unfair advertising. Today, social platforms can easily be used for advertisement of prohibited goods, services, etc. Another problematic issue here is online behavioral advertising, which analyzes the data collected from consumers to target them.[10] In European Union, according to Unfair Commercial Practices Directive (UCPD), "using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise" is prohibited.[11]

Hypothetical case 2:

Company C published advertisements on social media. However, the advertisements contain misleading and untrue information.

Hypothetical case 2 is a basic unfair advertisement violation, which is prohibited under Article 6 the Law on "Advertisement" ("Reklam haqqında" Qanun) and constitutes unfair competition under Article 9 of the Law on "Unfair Competition". When such violations take place in TV channels (or any other conventional advertising method), the Competition Authority can easily demand information or ban the certain advertisement, if necessary. However, due to the reasons mentioned above, when such violations take place in digital platforms, the tools that current legislation provide Competition Authority with, become insufficient. What makes such violations more dangerous is the possibility that the companies can use these gaps to start an advertising campaign targeting the market reputation of their competitors.

[10] Mittelstadt, Brent, and Johann Laux. "Neutralizing online behavioural advertising: Algorithmic targeting with market power as an unfair commercial practice." *Common Market Law Review* 58.3 (2021). < https://ora.ox.ac.uk/objects/uuid:c755300a-a03f-4900-a69a-1ca359794255/download_file?file_format=&safe_filename=Laux_et_al_2021_neutralizing_online_behaviour.pdf&type_of_work=Journal+article > accessed 14 May 2023

[11] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, O.J. 2015, L 149/22

Main issue here is the fact that huge digital companies, due to the characteristics of the digital sector, do not have representatives in small countries, which makes it almost impossible to involve them as a party in investigations. In such situation, only possible measure to take against the digital companies is to block such platforms nationwide, but that in the end harms the economy of the nation. Therefore, sufficient measures are necessary to protect the market without damaging the market.

One of the most critic economic issues is the market definition in digital platforms. The most powerful tools that are used today are designed to determine markets in conventional practices. But the digital markets cannot be determined the same way. For example, “small significant non-transitory increase in price test” (SSNIP test) is a conceptual tool used to define the relevant market. In a standard market, to implement a SSNIP test, the first step is to simulate a price increase by a hypothetical monopolist who owns just one product, secondly increasing the number of products owned by the monopolist and when profits are not estimated to decline following a small but significant increase in price by the hypothetical monopolist, the set of products owned by the monopolist in the last simulation constitutes the relevant market.[12] But the same tools cannot be used for market definition in digital platforms. The concept of ‘geographical market’ cannot be applied to digital platforms. In practice, if there’s an increase in price in local market, consumers can choose ordering the same product online from abroad. In such cases, the market definition suppresses the national borders. The incompatibility of the current legislation in Azerbaijan Republic with the existing situation in digital platforms block the activity of Competition Authority. In addition, it leads to impunity in digital platforms.

Possible solutions.

The problems mentioned above require drastic measures. A complete functioning mechanism needs to be formed in order to address such problems.

First of all, digital platforms must be forced into cooperation with competition authority, more specifically to provide it with necessary information and regular reports. In order to achieve this, digital platforms have to keep representatives in Azerbaijan, so that it would be possible to involve them in investigations and legal processes. If such platforms hold properly registered offices in Azerbaijan, they could be forced into cooperation with competition authority easily, as current legislation defines obligations for undertakings to provide competition authority with the all necessary information and if fail to comply with these obligations, monetary sanctions can be imposed. (Article 16 and 18 of the Law on “Antimonopolistic Activities”, Article 12 of Law on “Unfair Competition”)

Secondly, activity of digital platforms must be monitored regularly. In order to ensure state control over digital platforms, a governmental body is required to carry out monitoring on their activities. More specifically economic (such as market disruptions, anticompetitive activities) and legal (such as compliance with competition law) aspects of their activities need to be addressed.

Thirdly, proper amendments must be made to current legislation or new laws have to be proposed in order to ensure the measures mentioned above work. It can be done in 2 ways:

- Making a new law project that would embrace existing competition legislation and fix the issues regarding social platforms;
- Making certain amendments to the existing competition legislation to make it compatible with digital platforms.

[12] Filistrucchi, L. (2008). A SSNIP test for two-sided markets: the case of media. Available at SSRN 1287442.

As the current competition legislation is not sufficient generally (besides the gaps regarding the digital platforms), making a new law project seems like a better option. Such law project must embrace and improve the existing competition rules, and bring the new concepts into legislation. It is also necessary for such law project to introduce new economic concepts into the legislation. First, market definition in digital platforms needs to be clarified in a law project. The geographical market (even though the term is not compatible for digital market) can be defined as whole Azerbaijan. Secondly, the obligations of platforms need to be determined. Considering the specific features of the digital sector, few digital platforms cover the high percentage of the market, therefore, it can be estimated that these platforms will hold dominant position in the market. As the current legislation mandates the companies, which hold dominant position in the market with specific obligations, digital platforms will share the same obligations. However, due to the data that they collect from users, they hold the power that no other conventional businesses hold. But the issues such as data problems, identification issues and forcing them to keep representatives in Azerbaijan, are not covered by the scope of competition law, therefore, need to be addressed specifically. Thirdly, the current concepts in unfair competition needs to be clarified in accordance to digital platforms. It needs to be admitted that the comprehensively regulating the digital platforms and commercial activities in digital platforms is almost impossible, as it is highly developing sector. According to the press, a project for “Competition Code” is already proposed by the Competition Authority.[13]. However, as mentioned above not all the issues caused by the

digital platforms can be addressed within competition law. The experience of foreign nations is crucial here. However, most of the legislative acts of foreign nations are accepted in recent years. Therefore, their efficiency and impact cannot be estimated properly:

- In 2020, Turkish government adopted new “Social Media” law, which aims to regulate social media content and mandates digital platforms to open offices in Turkey, government also imposed financial penalties and threatened to slow the traffic to these sites if the technology companies don’t comply with these rules.[14]According to the law, if a platform is accessed more than one million times in a day, it is mandatory to keep representative in Turkey.
- In 2020, the European Commission published a proposal for Digital Market Act and became applicable since May 2023. It introduces new rules to the digital economy, however, its impact raises host of concerns (more specifically regarding innovations in digital sector).[15] The DMA defines the concept of “gatekeeper” and mandates the companies to comply with new rules.

Conclusion.

Considering the all mentioned above, it is obvious that digital platforms became important part of our economy. They play a significant role in socio-economic transformation and various sectors such as product markets, transport, housing, health, and education.[16] It is almost impossible to separate digital platforms from economic activities. The measures such as slowing their internet traffic or even blocking them nationwide, in the end will be harmful for the economy of the nation.

[13] “Azərbaycanda yeni Rəqabət Məcəlləsi hazırlanıb.” (23.02.2023) <https://report.az/biznes-xeberleri/azerbaycanda-yeni-reqabet-mecellesi-hazirlanib/> accessed 14 May 2023

[14] Aslı Aydıntaşbaş. Turkey’s new media law is bad news – but don’t report it. (18.10.2022) < <https://www.brookings.edu/blog/order-from-chaos/2022/10/18/turkeys-new-media-law-is-bad-news-but-dont-report-it/#:~:text=In%202020%2C%20Turkish%20lawmakers%20gave,to%20open%20offices%20in%20Turkey.> > accessed 15 May 2023

[15] Cennamo, C., Kretschmer, T., Constantinides, P., Alaimo, C., & Santaló, J. (2023). Digital platforms regulation: An innovation-centric view of the EU’s Digital Markets Act. *Journal of European Competition Law & Practice*, 14(1), 44-51.

[16] Neittaanmäki, P., Galeieva, E., & Ogbechie, A. (2016). Platform economy & digital platforms. *Informaatioteknologian tiedekunnan julkaisuja/Jyväskylän yliopisto*, (2016, 25). < <https://www.tandfonline.com/doi/pdf/10.1080/2157930X.2021.1975361>> accessed 15 May 2023

Therefore, any measures to be taken must accept the role of the digital platforms in our economy in the first place.

As the increasing role of the digital platforms in our life is undeniable, the necessity of taking measures becomes more and more important. It also needs to be admitted that digital platforms are one of the driving factors of innovations. Therefore, suppressing regulations also may have bad effects over economy. However, for the sake of fair competitive environment, there needs to be certain legal framework that regulates their activities. Moreover, such framework must also comply with the principle of legal certainty. It also needs to be mentioned that the technological and economic aspects of the issue must not be underestimated. From economic perspective, market definition (both geographical and product market) in digital platforms is crucial to deal with the problems mentioned above.

It needs to be mentioned that the digital platforms entered our lives in last 30 years. And today, it's almost impossible to predict how things will work out regarding to digital platforms, even small interferences to such platforms can cause to huge consequences.

Finally, the digital platforms are today's realities. We can see that these platforms cannot be addressed by existing regulatory framework. However, it is also fact that their role in the economy cannot be easily predicted. But we can foresee the possible problems. It is better to take a step and start working on these issues.

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