# DIGITAL ECOSYSTEMS

## Market challengers and pro-competitive solutions

*a cura di*

**VALERIA FALCE**

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Valeria Falce

# Market challenges and Pro-competitive Solutions

SUMMARY: 1. Introduction. – 2. Technological storm and creative destruction. – 3. Competitive assessment. – 4. The European Strategy. – 5. The Regulatory Framework. – 6. National *momentum*. – 7. Conclusions.

## 1. Introduction

In the context of the digital transition that is taking place in Europe,[1] data are mastering the technological transformation,[2] disintermediation and decentralization of relationships prevail, contamination and subsequent integration of activities, products and services are pivotal, and hence new players, platforms, become key actors of the data economy.[3]

Platforms, data and artificial intelligence are (not surprisingly) elevated to the hallmark of the industrial revolution: new (the fourth) and unique

[1] EUROPEAN COMMISSION, *Directorate-General for Communication, Leyen, U., Political guidelines for the next European Commission 2019-2024*; *Opening statement in the European Parliament plenary session 16 July 2019*; *Speech in the European Parliament plenary session 27 November 2019*.

[2] On this topic, let me refer to V. FALCE, *Strategia dei dati e intelligenza artificiale. Verso un nuovo ordinamento giuridico di mercato*, Turin, 2023; V. FALCE, J. CANNATACI, O. POLLICINO, *Legal Challenges of Big data*, Cheltenham, UK, 2020; V. FALCE, G. GHIDINI, G. OLIVIERI, *Informazione e Big Data tra Innovazione e Mercato*, in *Quaderni romani di diritto commerciale*, 2018; as well as V. FALCE, *Financial Innovation tra disintermediazione e mercato*, Turin, 2021; V. FALCE, A. GENOVESE, *La portabilità dei data in ambito finanziario*, in *Quaderno FinTech*, CONSOB, 2021; V. FALCE, G. FINOCCHIARO, *Fintech: Diritti, Concorrenza, Regole*, Bologna, 2019; V. FALCE, *Competition Law Enforcement in Digital Markets*, Turin, 2021.

[3] OECD, *Big data: bringing competition policy to the digital era, Background note by the Secretariat*, 8; OECD, *Hearing on Competition Economics of Digital Ecosystems held during the 134th Meeting of the Competition Committee on 1-3 December 2020*.

(because while the previous ones were 'ignited' by a single technology (steam engine, electric power, computer), the new revolution is characterized by a set of technologies that, thanks to the Internet, are aggregated in a systemic way.

New players (platforms), new products and services (interconnected through the Internet) and new business models, centered on data and enabling technologies (big data, data analytics and cognitive systems, but also the Internet of Things, cloud, augmented reality, enabling technologies and advanced robotics), disrupt the market, with an extraordinary economic and societal impact.

In this first phase, data is the new oil, platforms refine it and extract value from it.

Thanks to data analytics and AI systems, platforms are increasingly and better adapted to offer better services. Competition is 'between' and 'within' platforms, markets are dynamic, processes innovative, disruptive and fast.

## 2. Technological storm and creative destruction

Through a process of relentless creative destruction, context and dynamics evolve rapidly.[4] Platforms spring up quickly and are quickly swept away. What remains are digital ecosystems that offer technologically connected and functionally complementary products and services.[5] Examples

[4] For an initial survey of the literature on the subject, see V.H.S.E. ROBERTSON, *Antitrust Market Definition for Digital Ecosystems*, in *Concurrences No. 2-2021/On-Topic/Competition policy in the digital economy*, 3-9; M.J. JACOBIDES, I. LIANOS, *Ecosystems and competition law in theory and practice*, in *Industrial and Corporate Change*, 30(5), 2021, 1199-1229; D.A. CRANE, *Ecosystem Competition and the Antitrust Laws*, in *Nebraska Law Review*, 98(2), 2019, 412 ss.; M. JACOBIDES, *How to compete when Industries Digitize and Collide: An Ecosystem Development Framework*, in *California Management Review*, 64(3), 2022, 99 ff.; M. JACOBIDES, C. CENNAMO, A. GAWER, *Towards a theory of ecosystems*, in *Strategic Management Journal*, 39(8), 2018, 2255 ff.; A. FLETCHER, *Digital competition policy: Are ecosystems different?*, DAF/COMP/WD(2020)96, 2; G. PETROPOULOS, *Competition Economics of Digital Geosystems*, DAF/COMP/WD(2020)91, 5; M. BOURREAU, *Some Economics of Digital Ecosystems*, DAF/COMP/WD(2020)89, 5; M. BOURREAU, A. DE STREEL, *Digital Conglomerates and EU Competition Policy* (CERRE Report, 2019), 9-10; D.A. CANE, *Ecosystem Competition*, DAF/COMP/WD(2020)67. Please also refer to N. FARAONE, V. FALCE, *Digital ecosystems in the wake of a legislative/regulatory turmoil: A first (tentative) antitrust assessment of the Italian (and European) experience in the AGCM case law*, in *World Competition*, vol. 46, Issue 1, 2023, 37.

[5] More generally, for an overview of the mainstream literature on multi-versant (or multi-sided) platforms and markets, see A. HAGIU, J. WRIGHT, *Mulli-sided platforms*, in *Interna-*

of 'happy' ecosystems are Google, which, in addition to the search engine, expands into related products and services, such as browsers, i.e. software for surfing the Internet, operating systems and video streaming, or even Facebook, which from the social network 'expands' into adjacent but also distant products and services, from gaming to messaging, from retail to devices.

In the market context that emerges, it is difficult to compete (because the ecosystem is unequally trained) and it is difficult to enter except under the conditions that the ecosystem requires. Funded innovation is the one that sustains the ecosystem and not the one that can interfere if not disrupt its business models.

The reasons for the primacy of ecosystems are different but all converging.

First of all, due to the fact that it offers both integrated and complementary products, the ecosystem is able to generate substantial economies of scale because the same production factors can be used to produce different goods and services and the savings increase as the quantities increase. Moreover, the more it spans different markets, the stronger it becomes, because the value of the ecosystem and its services increases as the number of users increases. And it consolidates its position thanks to data, which, processed and refined with sophisticated AI techniques, are able to first intercept and then create new needs, classify emotions, and direct directions.[6] Moreover,

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*tional Journal of Industrial Organization*, vol. 43, 2015, 163 ff.; B. CAILLAUD, B. JULIEN, *Chicken & egg: Competition among intermediation service providers*, in *RAND Journal of Economics*, 34(2), 2003, 309-328; M. ARMSTRONG, *Competition in two-sided markets*, in *RAND Journal of Economics*, 37(3), 2006, 668 ff.; D.S. EVANS, M. NOEL, *Defining antitrust markets when firms operate two-sided platforms*, in *Columbia Business Law Review*, 2005(3), 2005, 101 ff.; L. FILISTRUCCHI, D. GERADIN, E. VAN DAMME, *Identifying Two-Sided Markets*, in *World Competition*, 36(1), 2013, 33 ff.; J. ROCHET, J. TIROEE, *'Pro-sided markets'. A progress report*, in *RAND Journal of Economics*, 37(3), 2006, 645 ff.; J.C. ROCHET, J. TIROLE, *Platform Competition in Two-Sided Markets*, in *Journal off the European Economic Association*, 1(4), 2003, 990 ff.; D.S. EVANS, *The Antitrust Economics of Multi-Sided Platform Markets*, in *Yale Journal on Regulation*, 20(2), 2003, 325 ff.; C.M. DA SILVA PEREIRA NETO, F.M. LANCIERI, *Towards a layered approach to relevant markets in multi-sided Transaction platforms*, in *Antitrust Law Journal*, 82(3), 2020, 701 ss.

[6] According to estimates in the McKinsey report (2022) *Value creation in the metaverse*. «The real business of the virtual world, are pro-metaverse 60 percent of consumers, mentioned estimates of the potential economic value of the Metaverse vary widely, up to an impact of $5 trillion by 2030, equivalent to the size of the world's current third largest economy, Japan. According to McKinsey's analysis, the potential impact on the e-commerce market would be between $2 trillion and $2.6 trillion by 2030, ranging between base and positive scenarios; likewise, an impact of $180-270 billion on the academic virtual learning market, $144-206 billion on the advertising market, and $108-125 billion on the gaming market».

since the forms of 'pre-emptive occupation' of spaces and areas of possible commercial interest ensure a competitive advantage, it favors cross-sectoral collaborations and strategic acquisitions, but also innovative forms of appropriation of intangible assets.

Two main factors underlie the 'strength' of the 'digital ecosystem'[7]. The first is subjective: the ecosystem arises from a 'community' of interrelated and interdependent actors, who participate in the creation of value that no enterprise could create alone. The second is functional: the ecosystem has a "multi-product" vocation, in the sense that, by leveraging a set of products offered in a dominance regime, it radially extends its market influence to other products and services that are often but not necessarily complementary or related, thus enabling the various member firms to align investments and business strategies.[8]

Ecosystems are strengthened by the presence of significant economies of scope and economies of scale, which attract markets and allow for considerable cost savings (because the same factors of production are used to produce different goods and services, and because the savings increase as the quantities increase). Also relevant are the network effects, by virtue of which the value of the ecosystem and its services increases as the number of users increases and is enriched, each time, by the use and processing of data, which become an inescapable input in the definition of market strategies and investments.[9]

These 'genetic' characteristics facilitate the interaction between services and the convenience of remaining within the ecosystem (while switching costs for users become very high and continue to increase),[10] thus drawing the attention of competition law to verify the behavioral

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[7] In the 1990s, James Moore, a pioneer in the studies of business applicated ecosystems, wrote a seminal paper in which he argued how fierce competition among business ecosystems was fueling today's industrial transformation and transition. See J.F. MOORE, *Predators and Prey: A New Ecology of Competition*, in *Harvard Business Review*, 71, 1993, 75.

[8] For an overview of these two definitions of ecosystem in the digital economy, see M. JACOBIDES, C. CENIAMO, A. GAWER, *Towards a theory of ecosystems*, cit., 2255 ff.; A. FLETCHER, *Digital/competition policy: Are ecosystems different?*, cit., 2.

[9] For a general overview, see M.A. CUSUMANO, A. GAWER, D.B. YOFFIE, *The business of Platforms: Strategy in the Age of Digital Competition, Innovation, and Power*, Harper Business, 2019. N. FARAONE, V. FALCE, *Digital ecosystems in the wake of a legislative/regulatory turmoil*, cit., 87 ss.

[10] Digital operators relying on product ecosystems have adopted different business models, now centered on a modular structure (so-called device-centric ecosystems), now on advertising (so-called ad-centric ecosystems). On this differentiation, see M. BOURREAU, *Some Economics of Digital Ecosystems*, cit., 5.

and more recently the structural profiles.[11-12]

Such attention focuses on a double competition dimension: the one which takes place between ecosystems and a second one which unfolds within them.[13] While the latter occurs when firms offering an ecosystem of products and services face a competitive constraint also exerted by "specialized" firms, located at another level of the value chain, the latter refers to a competitive race between incompatible product and service systems, which inevitably keeps the consumer loyal,[14] "locking" them in.[15]

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[11] In the EU, see, among others, the decision on Case AT.40099-Google Android, rendered on July 18, 2018, and the subsequent appellate ruling rendered by the Tribunal, Judgment of September 14, 2022, Case T-604/18, Google and Alphabet v. Commission (Google Android), § 268 ff.; or also European Commission, Case AT.40437, Apple-App Store Practices (music streaming), June 16, 2020; European Commission, Case AT.40652, Apple – App Store Practices (e-books/audiobooks), June 16, 2020; European Commission, Case AT.40452, Apple – Mobile payments, June 16, 2020. In the U.S., see Epic Games, Ine. v. Apple Inc., case No. 4:20-cv-05640-YGR (N.D. Cal.), Judge Y. Gonzalez Rogers, Sept. 10, 2021, 1 ("Epic v. Apple"), subsequently appealed: Epic Games, Inc. v. Apple Inc., case 21-16506-21-16695, July 15, 2022 (9th Cir).

[12] For further study, Competition and Markets Authority, Mobile Ecosystems Market Study, 10 June 2022. Please refer also to F. BOSTOEN, D. MÀNDRESCU, *Assessing abuse of dominance in Ihe platform economy: e case study of app stores*, in *European Competition Journal*, 431(16), 2020, 7 ff.

[13] See, for this analysis, M. BOURREAU, *Some Economics of Digital Geosystems*, cit. 6.

[14] C. MATUTES, P. REGIBEAU, *"Mix and Match": Product compatibility without network externalities*, in *RAND Journal of Economics*, 19(2), 1988, 221-234.

[15] See P. AGHION, N. BEOOM, R. BLUNDELL, R. GRIFFITH, P. HOWITT, *Competition and innovation: An inverted-U relationship*, in *Quarterly Journal of Economics*, 120(2), 2005, 701 ff. and F. MARTY, T. WARIN, *Innovation in Digital Ecosystems: Challenges and Questions for Competition Policy*, in *CIRANO Cahier Scientifique*, 20205-10, 4, according to which a dominant firm, even if protected by barriers to entry, may have incentives to innovate, especially outside the digital world, when, for example, they market durable goods and innovation is necessary to induce customers to renew their equipment. Second, it may have incentives to innovate especially when competing with other digital platforms. In this regard, such companies have an incentive to innovate to ensure the continuity of the data streams they have and, thus, increase the predictive capabilities of their algorithms. The predictive capabilities of algorithms are the greater the more up-to-date and diverse the data. The more a platform diversifies its services, the better its "predictive performance". Finally, innovation can be a means of sustaining and expanding one's dominant position. Moreover, innovation is also an essential factor for the provider firm operating within the ecosystem, since the success of its business strategy and inclination depends on being part of a dynamic ecosystem. At the same time, a low innovation rate may expose them to being replaced by other firms operating within the platform or even or, even, excluded from the platform. Finally, we find three additional reasons why "complementary" firms operating within the ecosystem have an incentive to innovate. The first reason is competition among the "complementary" providers themselves. The second reason lies in the risk that the platform will integrate the service provided into its own offering if not satisfied with the quality of the product or service performance. The third reason is the need to diversify

## 3. Competitive assessment

In order to assess each of the above dimensions of competition, the definition of the relevant market [16] remains essential: an process that is typically linked to a product [17] and geographic [18] dimension and, therefore, to the

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the risk if a strategic change driven by the platform/ecosystem is abstractly capable of challenging the sustainability of its technology or business model.

[16] Multi-product firms that are part of an ecosystem will, in fact, have an incentive to "bundle" and "centralize" even more the supply of services and products, thereby attenuating, the level of competition in the market, especially since "monad" firms, which sell complementary products, do not "internalize" the additional "living" costs resulting from not taking part in the ecosystem and tend, therefore, to set higher average prices, to the benefit of firms operating within the ecosystem. Moreover, that not all innovations that "ecosystems" bring are instrumental in promoting the "desirable" level of competition in a given market is now a given. In ecosystems, in fact, investments in innovation could well serve to make the platform even more "central", assimilating it into a quasi-monopoly with insurmountable barriers to entry, preventing users from multi-homing (i.e., the ability for users to use more than one platform at the same time) and "locking them in" within the digital ecosystem. In fact, the gatekeeper concept and designation, defined by Article 3 of the DMA, offers a new parameter for the European Commission's existing regulatory intervention that breaks with the traditional "relevant market" approach. These criteria are based on a set of qualitative and quantitative evidentiary thresholds (or a case-by-case assessment if a platform does not meet these thresholds) that support the designation of a platform as a gatekeeper. Moreover, apart from the establishment of these qualitative and quantitative criteria, it can be seen from the definition of gatekeeper in Article 3 that, through definitions such as "significant impact on the internal market", "important access point" for reaching end users, and "established and enduring position", a new perspective of market definition has been introduced, far removed from the classical definition of the relevant market. In addition, under Article 3(8), the Commission should designate gatekeepers even if they do not meet the qualitative and quantitative criteria, taking into account additional elements such as, among others, network effects and data-driven advantages, possible scale effects, lock-in of business and end-users, a conglomerate corporate structure or vertical integration of the firm. In conclusion, even if the role of the DMA will be limited to supplementing and supplementing competition protection legislation, it should be considered that the notion of "gatekeeper" is a clear indication that, in determining the existence of market power in the digital age, we should conduct a comprehensive and case-by-case analysis of the market power of the company involved, without limiting the analysis to defining the relevant markets from a product (or service) and geographic perspective.

[17] The relevant product market includes all products that customers regard as interchangeable with or substitutable for the product or products of the undertaking or undertakings concerned, on the basis of the characteristics of the products, their prices and their intended use, taking into account the conditions of competition and the structure of supply and demand in the market. See COURT OF JUSTICE, Judgment of February 13, 1979, Case 85/76, Hoffmann-La Roche v. Commission, para. 51.

[18] The relevant geographic market comprises the area in which the undertaking or undertakings concerned supply and purchase relevant products, which is characterized by sufficiently homogeneous conditions of competition and which can be distinguished from contiguous geographic areas in particular because appreciably different conditions of competition exist there.

analysis of the economic substitutability between products, as measured by the notion of market power.

According to this approach, the relevant market can thus be defined as the smallest perimeter (set of products in a given geographical area) where the creation of a significant degree of market power is possible, taking into account existing substitution possibilities.

The theoretical criterion used to determine whether all sufficiently 'contiguous' substitutes are identified is the possibility that a hypothetical monopolist could exercise market power in the 'candidate' market. That is, whether a hypothetical monopolist in the candidate market would find it advantageous to apply a small but significant non-transitory price increase (the so-called 'SSNIP test', which is equivalent to the English 'small but significant and non-transitory increase in price'). [19] Should this price increase prove unprofitable for the hypothetical monopolist, the process of adding further substitutes to the candidate market continues with the addition of the next closest substitute. If the price increase proves profitable for the hypothetical monopolist, the process stops and the products of the candidate market constitute a relevant market.

Well, in digital markets, competitive constraints may not originate from the relationship of substitutability (or 'rivalry') between goods and services, which, on the contrary, proves to be an unsuitable criterion. [20] In the context

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See COURT OF JUSTICE, Judgment of February 14, 1978, Case 27/76, United Brands v. Commission, para. 11.

[19] The small but significant non-transitory price increase taken into consideration usually corresponds to a price increase of between 5 percent and 10% applied to one or more products in the candidate market, including at least one product of the firm or firms concerned. However, the size of the price increase and how it is applied may depend on the specific case. For example, when the firms involved provide relatively little value added to the supply chain (because the raw materials or components purchased represent a high percentage of the total price), the question of whether a hypothetical monopolist may exercise market power may be better assessed in relation to its effect on that value added. Accordingly, in such cases, the Commission may apply the SSNIP test to the value added rather than the selling price.

[20] In this regard, L. KAPLOW, *Why (Ever) Define Markets?,* in *Harvard Law Review*, 124(2), 2010, 439 ff., according to which «[...] the market definition process should be abandoned. The central, conceptual ‹argument is that there does not exist any coherent way to choose a relevant market power, whereas the entire rationale for the market definition process is to enable an inference about market power. Why ever define markets when the only sensible way to do so presumes an answer to the very question that the method is designed Io address? A market definition conclusion can never contain more or better information about market power than that used to define the market in the first place. Even worse, the inferences drawn from market shares in relevant markets generally contain less information and accordingly can generate erroneous legal conclusions – unless one adopts a purely results-oriented market definition stratagem under which one first determines Ihe right legal answer and then announces a market def-

of markets in which companies compete on parameters other than price, such as quality or the level of innovation, the definition of the relevant market according to "traditional" canons is not exhaustive, especially when services are offered "free of charge"[21] and in so-called zero-price markets.[22] Secondly, econometric instruments such as the 'SSNIP' test do not hit the mark, as they focus solely on the willingness of consumers/users to switch providers in the event of a hypothetical price increase.[23] Finally, the 'static' approach of identifying interchangeable (or 'competing') products and services on the demand side gives way to the 'dynamic' reality of digital markets, where complementary products and services also compete with each other.

Digital ecosystems denounce this contradiction even more clearly, 'lifting the veil' of the inadequacy of the current definition of the relevant market.[24]

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inition that ratifies it. Additional, largely unavoidable difficulties are identified with the economic logic underlying market redefinition. Because virtually all of Ihe argument reveals inherent problems in the very conception of the market definition market share paradigm, it follows that the conclusion here do not depend on ore's assessment of the quality of various means of measuring market power either in general or in particular cases and that they are independent of the legal application at hand». Please refer also to, L.M. WOW, *Market Definition: Impossible and Counterproductive*, in *Antirust Law Journal*, 79(1), 2013, 361 ff.; R.S. MARKOVITS, *Why One Should Never Define Markets or Use Market-Oriented Approaches to Analyze the Legality of Business Conduct under U.S. Antitrust Law. My Arguments and a Critique of Professor Kaplom's*, in *Antitrust Bulletin*, 57(4), 2012, 747 ff.

[21] See Google Shopping case (Case AT.39740, decision of June 27, 2017, Google Search (Shopping), para. 158 ff.), in which the European Commission delineated a relevant market for a zero-price service, namely that of general on-line search. According to the Commission, this was justified by the fact that users were "paging with their data" when using Google's search engine. Moreover, free for users was an integral part of the business model of Google's platform, and price was not the most important competitive parameter in online general search. More recently, see also European Commission, decision of December 17, 2020, Case COMP/M.9660), Google/e Fitbit.

[22] See European Commission, COMP/M.4731-Google/DoubleClick, March 11, 2008, and of the Court of Justice (Third Chamber), judgment of September 11, 2014, Case C-382/12 P, Mastercard Inc. and others v. European Commission. At the national level, also Bundeskartellamt, Facebook (Br-22/16, Feb. 6, 2019), paras 422-521 (in January 2021, the German legislature adopted the long-awaited amendment to update German competition law to the digitization of markets (see "Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions" ("GWB-Digitalisierungsgesetz" – GWB Digitalization Act)). For the perspective taken overseas, see Ohio v. American Express, 585 US (2018).

[23] According to the Report "A new competition framework for the digital economy" promoted by the German Ministry for European Affairs, realized by the Commission c.d. "Competition Law 4.0" and published on 30 September 2019 ("Altmaier Report"), [a]analytical methods like the SSNIP test do not work as they focus on the willingness of customers to switch providers, in Ihe event of a hypothetical price increase› (28).

[24] Similarly, the European Commission and the General Court have recognized that market

First of all, the traditional delineation of the relevant market does not cover the fate of related or 'adjacent' markets, those where, for instance, a firm leverages its established market power in one market to 'tip' it towards another adjacent or neighbouring market at a contiguous level of the value chain. In fact, closely related 'families' of products that create autonomous ecosystems are able to artificially increase the costs imposed on potential entrants, who are forced to create, in turn, an autonomous ecosystem or to cooperate with existing complementary products/services.[25] However, a dominant player might respond strategically by making its core product/service incompatible with that of its rivals, thus undermining attempts to create replacement ecosystems based on more advanced technologies.[26]

Secondly, in the context of digital platforms, as mentioned above, the (market) value of the platform increases with each additional user and the quality of the product takes on a comparatively and progressively decreasing relevance with respect to the added value provided by the platform or ecosystem to the relevant user categories (most often, configured as a contractual performance concerning the exchange between digital services and personal data).[27]

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shares may not adequately reflect the existence of market power in the digital sector. See General Court (Fourth Chamber), Judgment of 11 December 2013, Case T-79/12, Cisco Systems, Inc. and Messagenet SpA v. European Commission, stating that «the private communication sector is a recent booming sector characterized by short innovation cycles in which large market shares can be ephemeral. In such a dynamic context, large market shares are not necessarily indicative of market power and, therefore, of the lasting harm to competition that Regulation No 139/2004 seeks to prevent». (§ 69). Shortly thereafter, in the 2014 Facebook/WhatsApp case, the Commission ruled in the same terms, again in the context of consumer communication services. According to European Commission, decision of October 3, 2014, Case COMP/M.7217, Facebook/WhatsApp, «[...] the Commission notes that the consumer communication sector is a recent and fast, growing sector which is characterized by frequent market entry and short innovation cycles in which large market shares may tum out to be ephemeral. In such a dynamic context, the Commission takes the drew that in this market high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition» (§ 99). In European Commission, decision of 6 September 2018, Caso M.8788, Apple/Shazam, «[t]he Commission acknowledges that market shares may not be a perfect prof for measuring market power in recent and fast-growing sectors characterized by frequent market entry and short innovation cycles» (§ 162). However, in the present case, the Commission defined the market as a mature market, not subject to this logic.

[25] Please refer to M. KATZ, C. SHAPIRO, *Systems Competition and Network Effects*, in *Journal of Economics Perspectives*, 8(2), 1994, 93 ff.; M. JACOBIDES, I. LIANOS, *Ecosystems and competition law in theory and practice*, cit., 1206 ff.

[26] J.F. MOORE, *Business Ecosystems and the View from the firm*, in *Antitrust Bulletin*, 51(1), 2006, 31-75.

[27] In the case of an advertising-based multi-versant platform that sells space to advertisers

The 'gauntlet' thrown down to the traditional narrative of the relevant market is clear: antitrust law needs to move away from a narrow emphasis on the price of final goods as a measure of market power, to encompass the dynamics of multi-product and multi-actor ecosystems.

In response to the above-mentioned concerns, in April 2020, the European Commission embarked on a process of evaluating and revising its 1997 guidelines (the 'Communication') [28] in order to take into account case-law orientations and new market dynamics. [29]

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while providing free search to users, such a configuration reinforces the positive feedback sky between search and the data inferences that the platform sells to advertisers: free search increases the demand for ads sold by Google, driving up the price of ads. Note, however, that search and ads are complementary services sold in different relevant markets, and focusing only on one market would miss the overall dynamics of the ecosystem. Cf. N. ECONOMIDES, I. LIANOS, *Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective*, in *Journal of Competition Law & Economics*, 17(4), 2021, 765-847.

[28] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), Official Journal No. C 372, 09/12/1997, 0005-0013. This Notice is, even today, the oldest of the acts of "secondary legislation" that make up the corpus of European competition law, which is clearly not accidental but rather an objective indicator of the quality of the document, which has punctually fulfilled its function as an instrument aimed at individuating the application perimeter within which the competitive contest between market operators develops.

[29] Commission staff working document evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, SWD (2021) 199 final, 12.07.2021. Following the aforementioned assessment, the European Commission addressed the issue of market definition with reference to general competition policy considerations in the Communication 'A Competition Policy Fit for New Challenges' (COM(2021) 713 final) issued on 18 November 2021 and announced the revision of the current Communication. More recently, on 8 November 2022, the Commission published a new draft Notice, inviting stakeholders to comment by January 2023, with a view to the definitive publication of a new Notice in the third quarter of 2023. See European Commission Press Release, Competition: Commission seeks feedback on draft revised Notice on market definition, 8 November 2022. That the time was ripe for a new redefinition of the relevant market aimed at re-including digital ecosystems was already evident from the European Commission's Crémer Report, which, already in 2019, emphasized that competition between ecosystems could not overlap with traditional competition law instruments that focus on the relevant market and the principle of substitutability between supply and demand. Cfr. *Crémer Report*, 46 ff., according to which «in digital markets, less emphasis should be put on the market definition part of the analysis, and more importance attributed to the theories of harm and identification of anti-competitive strategies. [...] Another problem of market definition arises when a dynamic market environment leads Io fluid, quickly changing relationships of substitutability and possibly partial overlaps of carrying significance between different services, sometimes combined with practices of multi-homing and for changing perceptions of consumer needs. Many experts argue, for example, that demand for cars is turning into a broader demand for mobility. Consumer demand for travel information can be met in very different ways compared to a fer years ago, and consumer perceptions of viable substitutes may change. In such settings, the determination of

For the first time, the European Commission thus opens up to an all-encompassing definition of the ecosystem as being part of a relevant market in its own right and drawing inspiration from principles similar to those applied to customer service markets and two-vertical markets.[30] In certain circumstances, digital ecosystems may be considered to consist of a main product and several secondary products, the consumption of which is linked to the main product, e.g. via technological links or the interoperability 'access key'.[31] When secondary (digital) products are offered in the

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substitutability relationships based on the present patterns of choice may tum out to be too narrow in hindsight and lead to "false positives". Al the same time, inaction in Ihe light of a mere possibility of changing market boundaries may lead to "false negatives"».

[30] According to the new draft Notice (39-40), under certain circumstances the consumption of one durable product (primary product) leads to the consumption of another related product (secondary product) (which is often referred to as a "customer service market"). In such circumstances, in defining the relevant markets for primary and secondary products I was in the competitive assessment, the Commission also takes into account the competitive constraints imposed by existing market conditions in the respective relevant markets. In general, there are three possible ways to define relevant product markets in the case of primary and secondary products, namely (i) as a system market comprising both the primary and secondary product; (ii) as multiple markets, i.e., one market for the primary product and separate markets for the secondary products associated with each brand of the primary product; or (iii) as dual markets, i.e., the primary product market on the one hand and the secondary product market on the other The system market definition may be more appropriate: (i) the more likely it is that customers will consider full lifecycle costs when purchasing the primary product; (ii) the higher the expenditure on the secondary product(s) (or the higher their value) relative to the expenditure on the primary product (or the higher the value of the latter); (iii) the higher the degree of substitutability among primary products, the lower the switching costs from one primary product to another; and (iv) when there are no, or few, suppliers specializing only in the secondary product(s). When the occurrence of such circumstances is less likely, it may be more appropriate to define dual or multiple markets, depending on the degree of substitutability among the secondary products of different suppliers. For example, if secondary products from different suppliers are compatible with all or most of the primary products, the definition of dual markets may be more appropriate, whereas if customers of the primary product are constrained to the use of a narrow set of secondary products, the definition of multiple markets may be more appropriate. In other circumstances, even if consumption of one or more products is not dependent on a primary product, customers may still prefer to consume several products jointly in the form of a bundle (grouping of products). In such circumstances, the Commission may assess whether such a bundle of products constitutes a relevant product market distinct from individual products.

[31] According to the ruling of the Court of 14 September 2022, case T-604/18, Google and Alphabet v. Commission, cit., para. 116, in a digital "ecosystem", the products or services that are part of the relevant markets that constitute this ecosystem can overlap or be connected to each other on the basis of their horizontal or vertical complementarity. Taken as a whole, the relevant markets may also have a global dimension, in light of the system discussing its components and any competing pressures within that system or coming from other systems. An example of a digital ecosystem would be a product ecosystem developed around a mobile operating system, including hardware, an application sales portal, and software.

form of bundles, the Commission may also assess whether the bundle in itself constitutes a relevant market.

Not that, in the past, alternative paths were not 'beaten'. In order to address the inadequacy of the 'traditional' definition of the relevant market in the context of the digital ecosystem and to take into account the growing importance of users' attention for the purpose of attracting advertising revenues, the possibility of defining the relevant markets, especially in the media sector, as 'attention markets'[32] (or Attention Brokerage[33]) has been discussed in many quarters.

Beyond the strictly economic and philosophical meaning of the term 'attention market',[34] the question has been raised as to how to define the substitutability relationship (and, consequently, the relevant market) between operators and technological players competing to 'monetize' users' attention, rather than specific products/services.[35]

In this respect, it has been suggested to define the relevant market

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[32] For an embryonic analysis of the importance of competition in attracting the attention of users in the television and radio market, see A. MBRUS, R. ARGENZIANO, *Asymmetric Networks in Two-Sided Markets*, in *American Economic Journal. Microeconomics*, 1(1), 2016, 17-52; S. ANDERSON, Ø. FOROS, H.J. KIND, *Competition for Advertisers and for Viewers in Media Markets*, in *The Economic Journal*, 128, 2018, 34; A. PET, T. VALLETTI, *Attention Oligopoly*, in *American Economic Roman. Microeconomics*, 14(3), 2022, 530-557.

[33] For the origin of this definition, see T. WU, *The Attention merchants: the epic scramble I get inside our heads*, Knopf Doubleday Publishing, 2016.

[34] In the sense of the qualification of attention as a "currency" and a scarce resource, see D.S. EVANS, *Attention to Rivalry among Online Platforms*, in *Journal of Competition Law & Economics*, 9(2), 2013, 313-357. In the sense of the qualification of attention as a scarce resource linked to time in terms of "cost-opportunity", see G.S. BECKER, *Theory of the Allocation of Time*, in *The Economic Journal*, 75(299), 1965, 493-517; ARJO A. KEAMER, A. MIGNOSA, O. VELTHIUS, *The economics of attention*, in *Journal of Cultural Economics*, 2(1), 2000, 1-7; D. EVANS, *Attention Platforms, the Value of Content, and Public Policy*, in *Review of Industrial Organization*, 54, 2019, 775-792.

[35] In the media sector, the application practice of the European Commission has implemented, to some extent, this trend, leaving the definition of the relevant market "open". Please refer to European Commission, decision of 7 April 2017 in case M.8354 – Fox/Sky and European Commission, decision of 15 June 2018 in case M.8861 – Comcast/Sky. As is known, in the past, the European Commission has divided the retail supply of television services into two distinct markets: (i) FTA and pay-TV. The Commission also questioned whether the pay-TV market could be further segmented into the following sub-markets: (ii) linear versus non-linear pay television services; (iii) according to distribution technologies (for example via cable, satellite or terrestrial); and (iv) premium pay television services compared to basic ones. See, on this, European Commission, decision of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/DeVijver Media; European Commission, decision of 25 June 2008 in case M.5121 – News Corp/Premiere; European Commission, decision of 10 October 2014 in the case M.7000 – Liberty Global/Ziggo.

based on the 'time spent' by the user/consumer and, therefore, by resorting to the 'A-SSNIP' test, or the 'Attentional Small But Significant and Non-Transitory Increase in Price' test.[36] The A-SSNIP test could be conducted simply by adding publicity to a product permanently and not transiently and determining whether this addition causes a significant number of consumers/users to spend their time with a different product/service/platform (and with a different device).[37]

Thus, a competitive 'playing field' seems to be emerging, focused on the attention of users/customers to the different services and products offered by the ecosystem.

On 8 February 2024, the European Commission has adopted a revised Notice on relevant market,[38] with the view to reflect the significant developments of the intervening years, in particular the increased digitalisation and the new ways of offering goods and services, and with the ambition to

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[36] T. WU, *Blind Spot: The Attention Economy and t/ze Lav*, in *Antitrust Law Journal*, 82, 2018, 771. On the contrary, David Evans argued that everything on the web that competes for the "market for attention" belongs to the same relevant market: in other words, while each of the global technological players comes from different "ecosystems" (e.g., operating systems, social media, online search and indexing, hardware), all seem, in reality, to converge towards a single and all-encompassing relevant market, in which they try to compete for their respective share of user attention. According to D.S. Evans, Attention to Rivalry Among Online Platforms, cit., 343, «Twitter provides a very different service to viewers (micro-blogging) than Yahoo (content curation) [...]. The reason for this article, though, is that those differences are not necessarily relevant for assessing competition among online platforms. These attention rivals are all competing aggressively with each other to secure attention».

[37] According to T. WU, *Blind Spot: the Attention Economy and the Law*, cit., 777, «if one added a fine-second advertising video that played before emery usage of Google search, would some number of consumers switch to Bing? Presumably yes, meaning that Google search and Bing are substitutes and competitors. But what if the additional load was added to all search engines – would consumers spend less time on search and spend more time on Facebook or Twitter instead? If not – if consumers continue using search, even at the new, higher attentional price – then this could suggest that search is, in fact, the right market definition and that a hypothetical search engine monopolist is in a position to raise attentional prices». Similarly – continues the Author –, «[f]or Ihe Google-Waze merger, the "online mobile mapping" market might have been the appropriate market; the hypothesis can be tested using an Attentional-SSNIP test [...]. The A-SSNIP could posit a hypothetical monopolist who adds a 5-second advertisement before the mobile map, and leaves it here for a year. If consumers accepted Ihe delay, instead of switching to streaming video or other attentional/options, then the market is correctly defined and calculation of market shares could be in order». Alternatively, dominant players in the market for attention may choose to exercise their market power by increasing the costs of attention, just as some traditional monopolists opt to ringfence the market (and sideline potential new entrants) by increasing prices. In these cases, the SSNIP test could be modified to facilitate the introduction of a so-called "SSNIC" test ("small but significant and non-transient increase in cost").

[38] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6001.

ensure transparency and predictability in its competition law enforcement, including through guidance, across sectors and at the sectoral level, also for strategic sectors. As recalled by the Commission, the revised Notice includes the following key elements: i) More accessible guidance thanks to a detailed structure and concrete examples, illustrating the practical application of market definition concepts; ii) A description of the general principles of market definition; iii) A recognition of the importance of non-price parameters for market definition, including innovation, quality, reliable supply and sustainability; iv) Specific guidance on the application of market definition concepts in specific circumstances, including: digital markets, for instance with respect to multi-sided markets and digital "ecosystems" (e.g., products built around a mobile operating system); v) innovation-intensive industries, where companies compete on innovation, including through the development of new products; vi) Clarifications on dynamic and forward-looking assessments especially in markets undergoing structural transitions, such as regulatory or technological changes; vii) Expanded guidance on geographic market definition focusing on the factors that can justify defining markets as global, EEA-wide, national, or local, and on the role of imports when defining the relevant geographic market; viii) Clarifications on various quantitative techniques used when defining markets, such as the small but significant and non-transitory increase in price ('SSNIP') test; ix) Guidance on alternative metrics relevant for the calculation of market shares, such as shares based on sales or capacity, or shares based on usage metrics like the number of (active) users or website visits; x) Extensive overview of the various sources of evidence and their probative value for market definition analyses.

Within the system markets, (digital) ecosystems can, in certain circumstances, be thought of as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance, by technological links or interoperability.[39] When considering (digital) ecosystems, the Commission may thus apply similar

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[39] In its judgment of 14 September 2022, Google and Alphabet v. Commission, T-604/18, EU:T:2022:541 the General Court stated in paragraph 116: «in a digital 'ecosystem' […] the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity. Taken together, the relevant markets may also have a global dimension in the light of the system that brings its components together and of any competitive constraints within that system or from other systems». An example of a digital ecosystem would be an ecosystem of products built around a mobile operating system, including hardware, an application store and software applications.

principles to those applied to after-markets to define the relevant product market(s).[40] When the secondary (digital) products are offered as a bundle, the Commission may also assess the possibility of that bundle constituting a relevant market on its own. Although not all (digital) ecosystems fit an after-market or bundle market approach, the Commission takes into account, where relevant, factors such as network effects, switching costs (including factors capable of leading to customer lock-in) and (single – or multi –) homing decisions for the purpose of defining the relevant product market(s).

## 4. The European Strategy

In order to exploit the potential of ecosystems without foregoing innovation and competition, there have been various proposals for solutions. While the OECD ventures down the road of regulation, Europe with the Digital Single Market Strategy brings technological disruption back to two lowest common denominators.[41]

On one hand, the new economy is based on data (personal, anonymous and commercial), the value of which is certain and the implications of which are closely linked to the current and potential uses to which individual data are or can be put through the use of extremely sophisticated digital techniques;[42] on other hand, antitrust law, the guardian of the functioning of the internal market, is confronted with an 'inevitable' novelty, which the enforcement tools and techniques with which it is equipped

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[40] See case AT.40099 – Google Android, paragraph 299, on the definition of the market for app stores, where the Commission concluded that the conditions to define a system market comprising app stores and smart mobile operating systems were not present.

[41] As recalled in the passage that has become "iconic" by R. BORK, *The Antitrust Paradox: A Policy at War with itself*, Basic Books, 1978, 50, «antitrust policy control be made rational until we are able to gite firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give».

[42] Please refer to the study promoted by the Committee on Payments and Market Infrastructures (CPMI), 2014, which distinguished the different categories of non-banking entities currently operating in the financial market (front-end providers – i.e. providers of interface services between end users of payment services and the traditional clearing and settlement process; Back-end providers – non-banking entities that provide services, outsourced by banks, linked to certain stages of the payment chain, such as services data security, data centers, audits, etc.; Retail payment infrastructure operators – operators who offer, often collaborating with banks, specific clearing and processing services for card transactions; Provider end – to-end – which category is made up of a combination of the previous ones).

struggle to intercept the anti-competitive strategies of digital operators in a timely and effective manner.[43]

A new season of European interventionism is being inaugurated through five complementary actions. Reference is made to: 1. the modernization of antitrust regulation and enforcement; 2. the introduction of asymmetrical rules graded on market power, type of services and related risks, in order to sow the seeds of market contestability and fairness of transactions (Regulations on digital markets and services[44]); 3. the promo-

[43] L. KHAN, *Amazon's antitrust paradox*, in *The Yale Law Journal*, 126(3), 2017, 710 ff.; A. EZRACHI, *EU competition las goals and the digital economy*, Oxford Legal Studies Research, Paper No. 17/2018, 4-21; A. EZRACHI, M.E. STUCKE, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, 2016; O. ODUDU, *The wider concerns of competition law*, in *Oxford Journal of Legal Studies*, 30(3), 2010, 599-613; O. BROOK, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 Tfeu*, Cambridge, 2022; I. LIANOS, *Polycentric competition law*, in *Current Legal Problems*, 71, 2018, 161; K. STYLIANOU, M. IACOVIDES, *The goals of EU competition law: A comprehensive empirical investigation*, in *Legal Studies*, 42(4), 2022, 620-648. Introduced into the antitrust debate in recent years is the notion of fairness, which exemplifies the change of pace from the traditional approach: see M. VESTAGER, *Competition and fairness in a digital society*, Speech, 22 November 2018; N. DUNNE, *Fairness and The Challenge of Making Markets Work Better*, in *The Modem Law Review*, 84, 2021, 230-264; S.M. COLINO, *The Antitrust F Word: Fairness Considerations in Competition Law*, CUHK Faculty of Law Research, Paper n. 2018-09, 18. At the same time, in the United States, this novelty has been facilitated by the rise of the so-called 'Neo-Brandeisian' wave, which prospectively foreshadows a 'renewed' role for antitrust law, free from the 'bottlenecks' of the Chicago School, oriented towards welfare and efficiency: see A.D. MELAMED, N. PETIT, *The misguided assault on the consumer welfare standard in the age of Platform markets*, in *Review of Industrial Organization*, 54, 2019, 741-774; T. WU, *After consumer welfare, now what? The "protection of competition" standard in practice*, in *Competition Policy International*, 2018, 4-9; L. KUM, *The New Brandeis Movement: America's Antimonopoly Debate*, in *Journal of European Competition Law & Practice*, 9(3), 2018, 131 ff. For an overview of the Italian literature on the subject, see M. CAPPAI, G. COLANGELO, *Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.*, Stanford-Vienna TTLF Working Paper n. 55, 10 April 2020; G. FERRARI, M. MAGGIOLINO, *Il potere across markets delle GAFAM: come reagire?*, in *Orizzonti del diritto commerciale*, 2021, 463-488. V. FALCE, *Fairness e innovazione nel mercato unico digitale*, Turin, 2020. For an initial bibliography, please refer to V. FALCE, N. FARAONE, *Mercati digitali e DMA: note minime in tema di enforcement*, in *Diritto industriale*, 2022. Please refer also to V. FALCE, N. FARAONE, *Il Digital Markets Act: profili istituzionali*, in G. CAGGIANO, G. CONTALDI, P. MANZINI, *Verso una legislazione europea su mercati e servizi digitali*, Bari, 2021.

[44] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on fair and contestable markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Regulation). The DMA was approved by the European Parliament and the Council on 14 September 2022 and published in the Official Journal on 12 October 2022. The DMA officially entered into force on 1 November 2022 and will be applicable starting from next May 2, 2023. However, the preparatory work was relatively short, albeit troubled. Below we summarize the main approval stages starting from the Pro-

tion of the statute of access and circulation of public and private data, whose compatibility, interoperability and portability are safeguarded (Open Data Directive,[45] Data Governance Act,[46] Regulation on the Data Act[47] and Proposal on interoperability[48]), but also the strengthening of the digital identity and of the rules protecting digital finance instruments (Eidas Regulation[49] and Digital Finance Package); 4. the pursuit of strategic autonomy (the Chips Act, investments and initiatives to solve the dependency on third countries in terms of supply, but also programs and investments in skills and applications); 5. the outline of the European Strategy under the banner of innovation, but also artificial intelligence, security, including cyber security and fundamental rights.

Within this framework, the threshold of attention has been raised in relation to the so-called "killer acquisitions",[50] acquisition operations that

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posal for a Regulation of the European Parliament and of the Council on fair and competitive markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 2020/0374(COD), December 15, 2020. Subsequently, the ed. Internal Market and Consumer Protection Committee ("IMCO") within the European Parliament adopted, on 23 November 2021, with 42 votes in favor, 2 against and 1 abstention, its position on the DMA proposal, then voted on in plenary session on 15 December 2021, confirming the European Parliament's mandate for the negotiations. At the same time, the Council – and, specifically, the "Competitiveness Council (Internal market and industry)" – unanimously approved its position in favor of the adoption of the DMA on 25 November 2021. The multilateral dialogue and negotiations between the co-legislators left at the beginning of 2022. On 24 March 2022, the European Union presented the final (and updated) text of DMA, agreed following the trilateral negotiation between the European Commission, the European Parliament and the Member States (led by the French Presidency of the European Council), which was approved by the representatives of the Member States on 11 May 2022.

[45] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and re-use of public sector information (recast) PE/28/2019/REV/1.

[46] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Regulation) PE/85/2021/ REV/1.

[47] Proposal for a Regulation of the European Parliament and of the Council on harmonized rules on fair access to and use of data (data law), Brussels, 23 February 2022 COM(2022) 68 final 2022/0047(COD) .

[48] Proposal for a Regulation of the European Parliament and of the Council laying down measures for a high level of public sector interoperability across the Union (Interoperable Europe Act), Brussels, 18 November 2022 COM(2022) 720 final 2022/0379 (COD).

[49] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 910/2014 as regards the establishment of a framework for a European digital identity, Brussels, 3 June, 2021 COM(2021) 281 final 2021/0136(COD).

[50] The literature relating to the so-called killer acquisitions is now very large. See, for an initial bibliography, C. CUNNINGHAM, F. EDERER, S. MA, *Killer Acquisitions*, in *Journal of Political Economy*, 129(3), 2021, 649 ff.; OECD, *Start-ups, Killers Acquisitions and Mergers Control* -

involve small and medium-sized newly-established companies (sometimes, actual start-ups) which, due to zero or decidedly limited profits, generally do not reach the turnover thresholds envisaged at national and European level [51] and which, notwithstanding their objective of neutralizing competing innovation, escape scrutiny by both the Member States and the European Commission. [52-53-54]

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*Background Note*; Materials for the Meeting of the Competition Committee on 10-12 June 2020; N. LEVY, H. MOSTYN, B. BUZATU, *Reforming EU merger control to capture "killer acquisitions" – The case for caution*, in *Competition Law Journal*, 19(2), 2020, 51 ff.; T. LECUYER, *Digital Conglomerates and Killer Acquisitions – A Discussion of the Competitive Effects of Start-up Acquisitions by Digital Platforms*, in *Concurrences*, 1, 2020, 42 ff.; C. CAFFARRA, G. CRAWFORD, T. VALLETTI, *"How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions*, in *Antitrust Chronicle*, 2(1) 2020, 1 ff.; D. MELAMED, *Mergers involving nascent competition*, Stanford Law & Economics Olin Working Paper No. 566, 17 January 2022; C. SCOTT HEMPHILL, T. WU, *Nascent Competitors*, in *University of Pennsylvania Law Review*, 168, 2020, 1879 ff. For an informative contribution, please refer to V. FALCE, N. FARAONE, *Killer acquisition sotto la lente nella UE: cosa fa l'Italia, l'attivismo della Germania*, in Agendadigitale.eu – *Il Giornale sull'agenda digitale italiana*, 31 January 2023, available at the following link: https://www.agendadigitale.eu/mercati-digitali/killer-acquisition-sotto-la-lente-nella-ue-cosa-fa-litalia-lattivismo-della-germania/.

[51] Regulation (EC) No. 139/2004 of the Council, of 20 January 2004, relating to the control of concentrations between companies, Official Journal of the European Union L 24 of 29 January 2004.

[52] Communication from the Commission, Commission Guidelines on the application of the referral mechanism under Article 22 of the Merger Regulation for certain categories of cases (2021/C 113/01), 31.3.2021. This publication follows the evaluation of the procedural and jurisdictional aspects of merger control carried out by the Commission itself, which sees competence divided between the latter and the Member States on the basis of criteria related to turnover of the companies involved. See, therefore, Commission Staff Working Document Evaluation of procedural and jurisdictional aspects of EU merger control, SWD(2021) 66 final, 26 March 2021.

[53] Article 22 of Regulation (EC) No. 139/2004, entitled "Referral to the Commission", in paragraph 1 provides: «[...] One or more Member States may ask the Commission to examine any concentration, as defined in Article 3, which has no within the meaning of Article 1 but affects trade between Member States and risks significantly affecting competition in the territory of the State or Member States making the request. The request must be submitted at the latest within 15 working days of the date on which the concentration was notified or, if notification is not required, made known in another way to the Member State concerned [...]».

[54] Speech entitled "The future of EU Merger Control" dated 11 September 2020 on the occasion of the International Bar Association 24th Annual Competition Conference, in which European Commissioner Vestager called for a change of approach. More specifically, this is how he expressed himself on the point: «We plan to start accepting referrals from national competition authorities of vergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves. This won't happen overnight – we need time for everyone to adjust to the change, and time to put guidance in place about how and when we'll accept these referrals».

## 5. The Regulatory Framework

From a legal point of view, the path of self-regulation (and codes of conduct) is flanked by the result-oriented regulation (Regulation on B2B relations), which imposes a canon of conduct (fairness) in the relations and contractual conditions practiced by online platforms and search engines that provide intermediation services. In particular, the Regulation elevates transparency to a statute of market relations (in the drafting of contractual clauses,[55] positioning criteria, differential treatment and access to data).

As to the obligations and prohibitions for the drafting of contractual terms, the Regulation directs the market towards (i) the use of simple and comprehensible language in the prearrangement of clauses; (ii) the easy access to contractual documents at all stages of the contractual relationship; (iii) the express indication within contracts of the reasons justifying the right to suspend, terminate or limit, in whole or in part, the provision of the services of the online platform; (iv) the obligation of the platform operator to communicate unilateral changes to the contractual terms and conditions, with at least 15 days' notice, unless the changes are necessary to comply with a legal obligation or to address an imminent danger related to the protection of the services, consumers and business users against fraud, malware, spam, data breaches or cyber security risks; (v) the obligation to be transparent about the identity of the business user providing the goods or services via the platform; (vi) the prohibition of retroactive application of contractual changes; (vii) the obligation to include information regarding the possibility of termination of the contract by the business user and the existence (or lack thereof) of technical and contractual access to the data provided or generated by the business user and retained by the platform after termination of the contract.

With respect to the obligations concerning ranking criteria, these include: (i) the obligation to include in the contractual documents the main parameters determining ranking and the criteria for balancing these and further parameters for online brokering service providers; (ii) the obligation to describe the main parameters used to determine the ranking and their relationship to any other parameters used by search engines. This de-

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[55] Please refer to Regulation (EU) 2019/1150 of the European Parliament and of the council of 20 June 2019 which promotes fairness and transparency for commercial users of online intermediation services.

scription shall be placed in an easily accessible manner and written in a simple and understandable language.

In relation to the obligations regarding differential treatment, these refer to the mandatory inclusion in the contract of the description of any differential treatment that may be reserved to the products or services offered to consumers through online intermediary services by the service provider itself or by business users controlled by that provider, on the one hand, and other users to the use of data (personal and non-personal), in the possession of the platform or search engine, which are provided by the business user or consumers themselves for the use of the services of the platform or search engine or generated through the use of such services.

Obligations relating to access to data include: (i) the obligation to include in contracts a description of whether or not personal data or other data that are provided or generated by both consumers and business users themself can be accessed; (ii) the obligation to provide specific information, including on the possibility for business users to access the data in aggregate form and whether or not data sharing with third parties is envisaged.

Finally, the regulation on business relations introduces an important novelty concerning the establishment by online platforms of an internal complaint handling mechanism that must be easily accessible and free of charge for business users.

The regulatory drift deepens.

The Copyright Directive strengthens the obligations of online content-sharing platforms, providing that whenever they perform an act of communication to the public or an act of making available to the public without prior authorization from the copyright holder, the limitation of liability under Article 14(1) of the E-Commerce Directive does not apply and that they will therefore be directly liable unless they can prove that they have made best efforts to obtain authorization. The assessment of the (co-)liability of the provider/provider of online content sharing services – and, therefore, of the 'best endeavors' requirement – must be made in the light of the degree of diligence that can be expected of professional operators in the exercise of their economic activity.

With the DMA (Regulation (EU) 2022/1925),[56] Europe pursues digital contestability, regulating certain designated providers of basic intermediary services on the basis of qualitative prerequisites (annual turnover in the

[56] Please refer to V. Falce, N. Faraone, *Spunti di diritto positivo sull'art. 17 della Direttiva Copyright*, in *Rivista di diritto industriale*, 2021.

European Economic Area (EEA) of EUR 7, 5 billion EUR in each of the last three financial years or if its average market capitalization or equivalent fair market value was at least 75 billion EUR in the last financial year and if it provides a basic platform service in at least three Member States; control of a major access for business users to end consumers: more than 45 million active end-users on a monthly basis in the last financial year, established or located in the EU, and more than 10.000 active business users on an annual basis established in the EU) and quantitative (established and long-lasting market position) as gatekeepers (which include social media such as Meta's Facebook, video-sharing platforms such as YouTube, software app shops such as those of Google and Apple, certain messaging applications such as WhatsApp, and online marketplaces such as Amazon), under the assumption of the need for asymmetrical graduated forecasts on the nature, relevance, pervasiveness and impact of the services offered.

To foster contestability and ensure fairness in digital markets, gatekeepers must enable end users to (i) easily uninstall pre-installed software applications or change default settings on operating systems, virtual assistants or web browsers that direct end users to products and services provided by the gatekeeper; (ii) install third-party applications or services that use the gatekeeper's operating system or are interoperable with it; and (iii) cancel subscriptions to basic services on the gatekeeper platform as easily as they can subscribe.

To facilitate access and persistence of competitors on markets, gatekeepers must: (i) allow third parties to be interoperable with the gatekeeper's own services; (ii) provide companies that advertise on their platform with access to their own performance measurement tools and the information necessary for advertisers and publishers to carry out their own independent verification of their own ads hosted by the gatekeeper; (iii) allow commercial users to promote their offers and conclude contracts with their customers outside the gatekeeper's platform; and (iv) provide commercial users with access to the data generated by their activities on the gatekeeper's platform.[57]

To avoid forms of excessive consolidation of power, gatekeepers are prohibited from (i) using the data of commercial users when gatekeepers compete with them on their own platform; (ii) treating the gatekeeper's own products or services more favorably in terms of positioning than those of third parties (iii) requiring application developers to use certain gate-

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[57] Cfr. Article 5, DMA.

keeper services (such as payment systems or identity managers) in order to appear in the gatekeeper application shops; (iv) tracking end users outside the gatekeepers' core platform service for the purpose of targeted advertising, without actual consent.[58]

Without prejudice to coordination and cooperation with national authorities and courts, the European Commission is exclusively competent to ensure compliance with the DMA. It may impose sanctions and fines not exceeding 10 % of the gatekeeper's total worldwide turnover in the preceding financial year and, in the event of recidivism, it may impose fines of up to 20 % of the gatekeeper's total worldwide turnover in the preceding financial year.

With the Digital Service Act, Regulation (EU) 2022/2065,[59] Europe introduces a uniform regulatory framework for online intermediaries (i.e. all digital services that connect consumers with goods, services or content, including online marketplaces and social networks; content-sharing platforms and online travel and accommodation platforms app stores, cloud and hosting web services; collaborative economy platforms), ensuring transparency and traceability of online content, protection of consumers' rights (by guaranteeing them greater security), countering the dissemination of illegal content, manipulation of information, and online disinformation.

Conceived as a unitary system, the main obligations for intermediaries include: (i) measures to tackle illegal online content, including illegal goods and services (the DSA imposes new mechanisms that enable users to report illegal online content and platforms to cooperate with specialized 'alert beacons' to detect and remove illegal content); (ii) new rules to track sellers on online marketplaces, help build trust and prosecute fraudsters more easily (online marketplaces will have to check randomly, based on existing databases, whether the products or services on their sites are compliant; ongoing efforts to improve product traceability through advanced technological solutions); (iii) effective safeguards for users, including the ability to challenge platforms' content moderation decisions based on a new obligation to inform users when their content is removed or restricted; (iv) far-reaching transparency measures for online platforms, including better information about terms and conditions, as well as transparency about the algorithms used to recommend content or products to users; (v) new obli-

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[58] Cfr. Article 6, DMA.

[59] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31 ECB (Digital Services Regulation).

gations to protect minors on any platform in the EU; (vi) a new crisis response mechanism in the event of a serious threat to public health and security crisis, such as a pandemic or war; (vii) bans on targeted advertising on online platforms based on child profiling or on special categories of personal data such as ethnicity, political opinions, or sexual orientation (greater transparency for all advertising on online platforms and commercial communications by influencers); (viii) prohibition of the use of so-called dark paths ("dark patterns") on the interface of online platforms, i.e., misleading elements that manipulate users into making choices they do not intend to make; (ix) new provisions to provide researchers with access to data from key platforms to examine their operation and analyze the evolution of online risks; (x) new rights for users, including the right to complain to the platform, to seek out-of-court solutions, to complain to their national authority in their own language, or to seek redress in the event of a breach of the rules. Representative organizations will also be able to defend users' rights in case of large-scale violations of the law. [60]

Very large online platforms and search engines reaching 45 million users per month (Amazon Store, Apple AppStore, Booking.com, Facebook, Google Shopping, Instagram, LinkedIn, TikTok, Twitter, YouTube; Bing and Google Search) will be subject to a differentiated regime, consisting of (i) meeting obligations to prevent the misuse of their systems by taking risk-based interventions, including oversight of their risk management activities through independent audits; (ii) mitigating risks related to misinformation or manipulation of elections, online violence against women, or harm to online minors (such measures must be carefully weighed in light of restrictions on freedom of expression and are subject to independent oversight). With respect to very large online platforms and very large online search engines, the Commission will have direct supervisory and enforcement powers and, in the most serious cases, may impose fines corresponding to up to 6% of the service provider's global turnover. In addition, recipients of digital services will be able to seek compensation for damages or losses suffered as a result of violations ad works by the platforms.

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[60] Please refer to J. BARATA, *Positive Intent Protections: Incorporating a Good Samaritan principle in the EU Digital Services Act*, Center for Democracy and Technology, 2019; M. HUSOVEC, *Injunctions Against Intermediaries in the European Union: Accountable But Not Liable?*, Cambridge University Press, 2018; S. MICOVA, A. DE STREEL, *Report: Digital Services Act* (CERRE 2020), available at the following link: https://cerre.eu/wp-content/uploads/2020/12/CERRE_DSA_Deepening-the-internal-market-and-clarifying-responsibilities-for-digital-services_Full-report_December2020.pdf.

Oversight of the rules is shared between the Member States and the Commission, which is the main regulatory body for very large online platforms and very large online search engines. Other platforms and search engines will be placed under the supervision of the Member States where they are established.

The Commission will have enforcement powers similar to those it has in antitrust proceedings. An EU-wide cooperation mechanism will also be established between national regulatory authorities and the Commission. At national level, "digital services coordinators", are responsible for overseeing the compliance of services established on their territory with the new rules and participating in the EU cooperation mechanism established by the DSA.

As far as data brokerage services are concerned, the Data Governance Act comes into play, by regulating the reuse of certain data held by public administrations and public bodies and by making access to it subject to specific conditions (if it is personal data, it must be made anonymous; if, on the other hand, it is confidential commercial information (including trade secrets or content protected by intellectual property rights), it must be modified, aggregated or processed in order to safeguard its confidentiality).[61]

However, the DGA contemplates platforms insofar as it deals with the «service that aims to establish, through technical, legal or other means, commercial relationships for the purpose of sharing data between an indefinite number of data subjects and data owners, on the one hand, and data users on the other hand, including for the purpose of exercising the rights of data subjects in relation to personal data», providing for three distinct types of intermediary services. The first one aims to bring together data holders and data users together in order to establish business relationships involving the exchange of data. The action of the intermediary is facilitated through the creation of platforms or databases that also allow the joint use of data, or through the establishment of a specific infrastructure for the interconnection of data holders with data users. The use of these systems is advocated by the DGA as functional to save transaction costs. The second one connects data subjects to make their data (personal and non-personal) accessible with potential data users, facilitating the exercise of rights recognized by the GDPR. In this case, the intermediary's activity

[61] Please refer to the aforementioned Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Regulation).

is aimed at reinforcing the data subject's position, ensuring that he or she has greater control over the data concerning him or her. Indeed, the intermediary assists the data subject in exercising their rights under the GDPR, such as, for example, granting or withdrawing consent to data processing, rectification of inaccurate personal data, deletion, the right to be forgotten, or portability. On the other hand, the intermediary bears the burden of ensuring that the user treats the data subject's data with due diligence, for example, that he or she does not use it for different or unlawful purposes. In order to optimize data protection, it is advocated that the intermediary create a space where processing can take place so that personal data are not passed on to third parties. Such personal data spaces could contain the name, address, and date of birth of the data subject, as well as data generated by the use of an online service or an object related to the internet of things. They could also be used to store verified information about the data subject's identity, such as passport numbers or bank accounts (recital 30). The third includes data cooperative services, with the aim of making the data subject (or any member of the group) informed about his or her rights in relation to certain data, particularly with regard to personal data or other data that enjoy specific protection. Again, the purpose of the intermediary service is to assist the data subject in making an informed choice about the use of his or her data. The intermediary could also be useful in finding common solutions on how to use it, where there are conflicting positions within the same group (recital 31).

Control over the activities of intermediaries is exercised through a system of mandatory reporting to the national competent authority (Article 11) and a series of obligations and requirements placed on intermediaries aimed at preventing misuse of data (Article 12). Specifically, the intermediary must: – ensure that the procedure for access to the service is fair, transparent, and non-discriminatory (including with regard to prices and conditions of service); – ensure an adequate level of security for the storage of data and to prevent fraudulent or abusive practices by those requesting access; – facilitate the exchange of data in the format in which it receives them and convert them to specific formats only for the purpose of improving interoperability, intra- and intersectoral.

The DGA outlines the role of an intermediary, neutral to the parties involved in the exchange, to act as a facilitator of data sharing. Chapter IV of the Regulation disciplines the circulation of data for altruistic purposes. These are either personal data made available by data subjects on a voluntary basis (and in any case after consent to processing has been given) or non-personal data made available by data controllers. The data

made available must be used for purposes of general interest (e.g., protecting public health, improving mobility and public service delivery, combating climate change, supporting scientific research). To this end, it is left to Member States to adopt national policies (e.g., awareness campaigns) to incentivize the collection of data to be used for altruistic purposes.

Article 18 sets out the conditions necessary to increase the confidence of data subjects in making their data available. Therefore, organisations managing data for altruistic purposes must meet specific requirements to ensure their independence (e.g., they must operate on a non-profit basis, they must be legally independent from other entities operating for profit, they must carry out the altruism activity through a structure that is functionally separate from other activities). Control over the activities of data altruism organizations is ensured by a registration system (Article 19) and a set of transparency obligations (Article 20).

The Data Act complements the Data Governance Act, speeding the creation of an open market for data in Europe. The regulation is ruled by different and intertwined trajectories, aimed at pro-actively sponsoring i) access to, circulation and monetization of IoT data ii) IP and privacy balance, iii) data interoperability and portability iv) fair use in data exploitation v) market pluralism and level playing field.

In particular, every user, whether a business or a consumer, is granted the right to access and use data generated by IoT products and services, and to share that data with third parties. Whereas access to data is free, its circulation (within the scope agreed) can be remunerated and a mark-up is acceptable. Nor access nor circulation is unconditional. Both the user and the third party must comply with intellectual property issues and privacy. European small and medium-sized enterprises are protected against unfair commercial contracts and data sharing practices imposed on them by other parties. Data Act leaves each party free to formulate and negotiate its own contracts, while setting certain limits. A list of unfair commercial terms and clauses are included. A clause, in fact, will be considered unfair if: i) It seriously deviates from good business practices in the access and use of data and/or is contrary to good faith; ii) Excludes or limits a party's liability for intentional acts or gross negligence; or excludes contractual remedies against the breaching party; iii) Gives the data controller the exclusive right to verify whether or not the data provided are in accordance with the contract. Besides, a clause will be presumed to be vexatious if, among other things: i) prevents the user from using the data or does not allow the use, collection, access or control of such data or exploit the value

of such data in a proportionate manner; ii) provides unreasonably short notice unless there are serious reasons for doing so.

Users have statutory rights that protect them when switching from one cloud service provider to another. In some exceptional cases and in the public interest, European governments can require companies to share their data with them.

Overall, thanks to this framework Europe responds to data leadership and platformisation [62] with two distinct lines of direction: one (1) centripetal and internal – aimed at modernizing market and competition rules to grasp discontinuity and intercept, when necessary, new anti-competitive phenomena, the other (2) centrifugal and external – aimed at outlining a new digital legal system (if, in the event, capable of offering itself as a reference model on a global scale). [63]

In terms of the system, the choice of direction is clear, tending towards human-centric regulations in imprimatur, neutral and horizontal in application with increased links and coordination with vertical and sectoral regulation.

In terms of technique, the multistakeholder model is affirmed in which maximum harmonization of rules is complemented through forms of self-regulation and codes of conduct.

In terms of institutional and governance, the direction is that of centralization of powers of definition, implementation and enforcement, strengthening of coordination profiles with national authorities and favor towards information exchanges.

As for the contents, these are embedded in a broad framework, the building blocks of which are digital markets and services, data governance, public and private, intelligence, digital identity and digital security, and eventually the data market.

## 6. National *momentum*

The focus on ecosystems is no less at the national level. [64]

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[62] In this regard, V. FALCE (ed.), *Strategia dei dati e intelligenza artificiale. Verso un nuovo ordine giuridico del mercato*, Turin, 2023.

[63] T.E. FROSINI, *L'ordine giuridico del digitale,* in V. FALCE (ed.), *Strategia dei dati e intelligenza artificiale. Verso un nuovo ordine giuridico del mercato*, Turin, 2023.

[64] Many other recent AGCM investigations will not be taken into account here, including, by way of example: AGCM, A552-Google Obstacles to data portability, Order No. 30215 of 5

In terms of enforcement, in the Google/Enel X affair,[65] the antitrust investigation moves from Google's «refusal to make available on the Android Auto platform the JuicePass app (formerly denominated Enel X Recharge), developed by Enel X Italia to provide services related to electric car charging and, in particular, those of charging column search, navigation, charging session booking, charging session management (start, monitoring, conclusion) and payment».

For more than two years, Google allegedly failed to provide Enel X with programming tools for the app for Android Auto, thus preventing the app from being published on the platform and leading the AGCM to conclude that "Google's conduct, consisting in its refusal to publish on Android Auto the app developed by Enel X Italia – refusal understood, in particular, as failure to implement the solutions that would have allowed such publication or in any case a use of the app exclusively through voice commands does not appear to be supported by objective reasons"). For these reasons, in the opinion of the AGCM, such conduct constituted an abuse of dominant position in violation of Article 102 TFEU, ordering Google to immediately put an end to the competition-distorting behavior, and imposing a substantial total administrative fine of €102,084,433.91[66] jointly and severally on the companies Alphabet, Google LLC and Google Italy.

Another investigation that has raised debates regarding the strength of antitrust law is the November 30, 2021 decision in which the AGCM imposed a penalty of €l.3 million on Amazon for abuse of dominant position.[67]

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July 2022, in *Bulletin*, 27, 2022; AGCM, IP278 – WhatsApp – vexatious clauses, Order No. 26734 of 9 August 2017, in *Bulletin*, 33, 2017; AGCM, PS11716 – Amazon-Online Sale Health Emergency, Order No. 28442 of 10 November 2020, in *Bulletin*, 49, 2020; AGCM, AGCM, IP330-Facebook-Collecting User Data Use, Order No. 28562 of 9 February 2021, in *Bulletin*, 8, 2021; AGCM, PS11150 – iCloud, Order No. 29888 of 9 November 2021, in *Bulletin*, 47, 2021; AGCM, PS11I47 – Google Drive – Sweep 2017, Order No. 29890 of 16 November 2021, in *Bulletin*, 47, 2021; AGCM, IP348 – Google Drive – unfair terms, Order No. 30076 of 22 March 2022, in *Bulletin*, 13, 2022.

[65] AGCM, A529 – Google/Compatibility Enel X Italia App with Sistema Android Auto, Order No. 29645 of 27 April 2021, in *Bulletin*, 20, 2021.

[66] With judgment of 18 July 2022 (R.G. No. 10147/2022), the Lazio Regional Administrative Court rejected the appeal brought by Google (Google Italy S.r.l., Alphabet Inc., Google LLC) and confirmed the sanction imposed by the AGCM.

[67] AGCM, A528 – FBA AMAZON, Order No. 29925, *Bulletin*, No. 49 of 13 December 2021. The above-mentioned case (and the correlative sanction imposed) by the AGCM is superimposable, from a factual point of view and of the conduct challenged in the opening of the

In summary, Amazon was challenged for using its own logistics systems ("Fulfilled by Amazon" or also "FBA") which, especially integrated with specific utilities of the sales system, resulted in the compression of logistics alternatives, effectively limiting the ability of third-party operators to intervene on the platform, except under the terms and conditions unilaterally established by Amazon.[68] More specifically, Amazon's conduct consisted of granting a number of non-replicable and exclusive benefits on its Amazon.co.uk platform exclusively to third-party online sellers using its own logistics service for e-commerce sales (precisely the FBA service).

These benefits consisted (i) in the non-inclusion in the measurement of sellers' performance through the set of indicators designed to monitor the level of performance offered by the retailer on the marketplace; (ii) in ob-

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investigation, to the cases initiated by the European Commission Amazon Marketplace (see case AT.40462, Amazon Marketplace, 17 July 2019) and Amazon Buy Box (see case AT.40703, Amazon – Buy Box, 10 November 2020). Also in this case, according to the Commission, the criteria adopted by the algorithm would have rewarded, all other things being equal, products of operators that adhere to the Fulfilment by Amazon (FBA) logistics service, operated by the platform itself. The Buy Box investigation represents, however, an offshoot of the Amazon Marketplace case, in which preferential treatment takes on a broader scope: data on retailers collected by Amazon as an intermediary (upstream) can be used by the latter to calibrate its product offers to consumers. On the parallelism between the two proceedings, the "domestic" one in the hands of the AGCM and those initiated by the Commission, the General Court of the European Union was called upon to give an opinion, which rejected Amazon's appeal on the Commission's decision to initiate investigations, compared to the pre-existing investigation by the AGCM on the same facts (General Court of the European Union (First Chamber), Case T-19/21, Amazon.com *et al.* v. Commission, Order of 14 October 2021). On 21 December 2021, Amazon appealed this order before the Court of Justice (Case C-815/21 P), which, on 14 July 2022, adopted an order authorizing the AGCM to intervene in the case in support of the European Commission's conclusions. Lastly, last 28 October 2022 (G.R. 1364/2022), the TAR Lazio – before which Amazon was appealing against the AGCM's sanction of more than EUR 1 billion – suspended the proceedings until the date of publication of the Court of Justice's decision (Case C-815/21 P). On 14 July 2022, Amazon submitted commitments in the Buy Box and Marketplace investigations, which were then accepted by the European Commission on 20 December 2022, and which seem to replicate the content of the DMA, posing even more urgent problems of coordination with the competition law instruments. Therefore, in summary, the European Commission opened an investigation under Article 102 TFEU against Amazon for facts identical to those already addressed in a parallel Italian investigation opened by AGCM and concluded in November 2021. By delimiting the geographic market to the European Economic Area ("EEA") with the exception of Italy (the latter being a procedural consequence of the previous opening of the Italian investigation), the Commission effectively avoided the AGCM's decision of "non-suit" and the closure of the Italian investigation.

[68] For an initial analysis of the preliminary investigation, see F. GHEZZI, M. MAGGIOLINO, *Considerazioni intorno al provvedimento dell'Autorità Garante della concorrenza nel caso FBA Amazon: nulla di nuovo sotto il sole?*, in *Rivista della regolazione dei mercati*, 2, 2022, 478 ss.; F. PETROCELLI, *Il caso FBA Amazon tra pratica legante e self-preferencing (vorrei ma non posso!)*, in *Mercato Concorrenza Regole*, 2, 2022, 333.

taining the Prime label for its products; (iii) in more possibilities of selection as "Featured Offering" and assignment of the c.d. "BuyBox"; (iv) in the ability to participate in the special events that Amazon organizes several times a year on its marketplace (such as the so-called "Black Friday"); and (v) in the eligibility of one's offerings to obtain "Free Shipping via Amazon". Significantly influencing the dynamics of the logistics services marketplace, these advantages allowed third-party sellers to benefit from increased visibility of their offerings on the Amazon.co.uk platform; which, in turn, led to an improvement in their overall commercial performance and an increase in their sales.

According to the AGCM, making these benefits conditional on subscribing to the service constituted conduct characterized by a clear purpose of self-preferencing of the FBA service,[69] finding no functional link such as to justify the exclusive association between the latter and the aforementioned benefits.[70]

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[69] For an overview on the subject of self-preferencing, let us refer to N. FARAONE, *La pronuncia del tribunale UE nel caso Google Search (Shopping) ovvero la storia della profezia che si auto-avvera: un'anticipazione del futuro mutamento dell'enforcement antitrust nei mercati digitali (anche alla luce del DMA)*, in *Diritto di Internet*, 1, 2022, 77 ff. See, also, B. VESTERDORF, *Theories of Self-Preferencing and Duty Io Deal – Two Sides of the Same Coin?*, in *Competition Law & Policy Debate*, 1(1), 2015, 4 ff.; N. PETIT, *Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf*, in *Competition Law & Policy Debate*, 8, 2015, 2 ff.; B. EDELMAN, *Does Google Leverage Market Power through Tying and Bundling?*, in *Journal of Competition Law and Economics*, 11(2), 2015, 365 ff.; M. LAO, *Search, Essential Facilities, and the Antitrust Duty to Deal*, in *Northwestern Journal of Technology and Intellectual Property*, 11(5), 2013, 292 ff.; J. RATLIFF, D. RUBINFELD, *Is There a Market for Organic Search Engine Results and Can their Manipulation Give Rise to Antitrust Liability?*, in *Journal of Competition law and Economics*, 10(3), 2014, 518 ff.

[70] More particularly, according to the AGCM, Amazon's abusive conduct consists in combining the set of functionalities that are indispensable for the success of the offer on Amazon.co.uk, thanks to the increased visibility and the observed increases in sales, with its FBA logistics service. In this way, Amazon has created an artificial bundling on its marketplace of two actually distinct services (the presence on the platform at remunerative conditions and the FBA service for the fulfilment of orders), in order to create an unlawful incentive to purchase the latter in the absence of alternative ways of accessing the same advantages that do not include the use of FBA. The inducement to join the logistics service, in fact, is not based on a contractual obligation, but rather on having made FBA the only avenue available to retailers to obtain advantages that are indispensable for their success on Amazon.co.uk. According to the AGCM, therefore, Amazon applied differential treatment of the sellers active on its platform, which was not dictated by intrinsic characteristics of the service, was not focused on the performance of the sellers, and could not be justified by efficiency objectives in the management of the Amazon.it platform, pursuing on the contrary an impermissible anti-competitive end. Moreover, the unjustified combination of the exclusive benefits on the Amazon.co.uk platform and the adhesion to the FBA service has not only influenced the choice of sellers as to the logistics service to be

For the purpose of this case, the AGCM identified two potentially relevant markets, namely that of marketplace intermediation services and that of e-commerce logistics services. Although the latter has specific characteristics that allow to distinguish e-commerce logistics from the broader set of logistics services, the AGCM found that Amazon had dominant position only in the market for marketplace intermediation services, the effects of which, however, have also spilled over into the market for e-commerce logistics services. This is supported by several indicators such as, among others, (i) the large market share, in terms of revenues earned and held by Amazon over the years, (ii) the weak competitive pressure from actual competitors, and (iii) the significant barriers to entry for potential competitors due to network effects, brand recognition, and costumer loyalty strategies.

Nonetheless – and leaving aside the perplexities expressed by several parties in relation to the case of self-preferencing as a conduct in its own right, as such assessable in its unity, or necessarily ascribable to the genus of abuse of dominant position ex Article 102 TFEU[71] –, the AGCM's investigation showed how the business model adopted by Amazon is that of a complete ecosystem, precisely because of the different "roles" played: di-

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adhered to for their products marketed in the e-commerce channel, leading them to decide on the basis of considerations unrelated to the cost-effectiveness and efficiency of Amazon's service compared to those of its competitors, but it has also altered the competitive dynamics in both the relevant markets, of logistics for e-commerce and of intermediation services on marketplaces. In the market for e-commerce logistics, in fact, the abusive bundling of the FBA service with exclusive benefits on Amazon.co.uk has deprived Amazon's competitors of a significant part of the demand for e-commerce logistics services by retailers operating on Amazon.co.uk. In the marketplace brokerage services market, on the other hand, the adherence to the FBA service has discouraged sellers on Amazon.co.uk from adopting a multi-homing strategy, i.e. from being present on multiple marketplace platforms, which, in turn, has significantly undermined the operators of competing platforms by impairing their ability to compete with Amazon.

[71] According to F. GHEZZI, M. MAGGIOLINO, *Considerazioni intorno al provvedimento dell'Autorità Garante della concorrenza nel caso FBA Amazon* cit., 478 ff., «[...] the AGCM describes the conduct of Amazon with words, expressions and references that would be equally suited to a conduct of tying, to a thing of essential facility, or to a hypothesis of self-preferencing». More specifically, according to the authors, «the FBA Amazon decision stands out for an abundance of qualifying words that lead one to wonder what was the abstract factual species actually contested in Amazon. A first hypothesis for an answer to the formulated question is that, in the view of the Authority, Amazon has fallen foul of the prohibition laid down in Article 102 because it has engaged in discriminatory conduct, to be considered as a separate case apart from the abstract case of exclusionary and anti-competitive abuse. An alternative hypothesis is that the AGCM has instead intended to refer only to this second category, while at the same time attempting to frame Amazon's conduct in one of the existing patterns of conduct which, on the basis of the effects-based theory, define the conditions for conduct to fall within the prohibition of abuse of a dominant position».

rect competitor on the platform (Amazon retail), manager of the same (marketplace) and provider of complementary services (among the main ones, the services of logistics, advertising, payment, after-sales, cloud).[72] So that the multiplicity of services offered increases the popularity of the platform among consumers and their degree of loyalty (including through the creation of specific programs such as Prime) thus generating "switching costs", which diminish the incentive to use competing platforms. Therefore, the number of potential consumers using Amazon.co.uk resulted in an indirect network effect, as it increases the seller's interest in being present on the platform, at the expense of competing marketplaces. From a competitive perspective, the structuring of the business model as an ecosystem result in a weakening of the competitive abilities of competitors already in the market, which have seen their own weight gradually reduced.

The same trend can be seen in the Google case, in which video ads are used. In the field of display advertising, the matching of demand and supply of advertising space is mainly done through programmatic advertising, i.e., the buying and selling of online advertising space in real time through automated technological platforms that connect buyers and sellers of advertising space. Such platforms are optimizing the process of selling and buying display advertising space, allowing fully personalized advertising content to be shown to a user at the exact moment he or she wants to see it.[73]

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[72] AGCM, FBA AMAZON, § 614 ff.

[73] In particular, in order to proceed with the sale of advertising space, the concessionaires and publishers/operators offering advertising space use technological sales platforms (the so-called 'Supply Side Platforms' or 'SSPs') connected to the ad exchanges, through which they can submit requests for offers for their advertising space (ad inventory). SSPs are therefore active players in the provision of technological tools that allow publishers to proceed with the sale of their advertising space according to an automated allocation mechanism. On the demand side of advertising space, advertisers and media agencies make use of technological platforms for buying advertising space (so-called 'Demand Side Platform' or 'DSPs'), in order to bid for ad impressions selected according to predefined criteria. SDRs are therefore companies that provide technological tools that enable media agencies and advertisers to access the negotiation of advertising space in an automated way. Through DSPs, advertisers can define the main planning criteria of a display advertising campaign such as, among others, targeting, budget, timing, maximum price to be spent per ad impression, advertisements to be broadcast, sections of greatest interest on a website, ad placement, and display frequency. These two platforms interact via display advertising campaign automation technologies ('ad exchanges'). Ad exchanges operate in the program advertising ecosystem in a similar way to the trading platforms used in stock markets; they are in fact 'places', figuratively speaking, where the exchange between supply and demand of online advertising space takes place. The technical functions for the delivery of advertising are performed by ad servers, which are hardware and software systems dedicated to the management, distribution and reporting of the advertising origin, which operate both as a link between the publisher side/supply of advertising space (Publisher Ad Server), and the

The AGCM was based on the assumption that Google, as a vertically integrated company present in the various markets that compose the online advertising supply chain and as a provider of the services identified above that enable the acquisition of data relevant for the "targeting" of display advertising campaigns, had engaged in business conduct that is likely to hinder its non-integrated competitors and to maintain and further strengthen its market power in display advertising, as well as in the individual markets into which it can be segmented.[74]

Regardless of the fact that the investigation ended prematurely, the AGCM having declared a nonsuit,[75] it is noteworthy that the digital adver-

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advertiser side/supply of advertising space (Advertiser Ad Server). Ad servers are instrumental in ensuring that the campaign – previously stored on the platform – is delivered to a specific device of the user (web browser or app), displaying the ads or videos on websites according to parameters defined by the advertiser. Ad servers evaluate each individual ad impression also taking into account various qualitative parameters, and also make it possible to monitor the progress of an advertising campaign. In concrete terms, every time a user clicks on an Internet address of a page with advertising space available in the ad exchange (virtual marketplace, meeting between DSP and SSP), the publisher owning that page, via the SSP, alerts the advertisers or media agencies that a user with certain characteristics is going to access its web page. The SSP auctions the advertising space to all interested SDRs in a negotiation process (which takes place within a few moments). The SDRs collect all offers that meet the requirements defined by the publisher and enter them into the auction mechanism through which the price is formed. The ad server executes the transaction, instantly sending the advertisement of the successful advertiser to the user. The sales process of online display advertising is based on a crucial element: the availability of the largest possible amount of profiling data of the advertising recipients and the relevance of this data for determining the consumption orientations of potential recipients. These elements make it possible to plan an online display advertising campaign and must be available in real time to the operators concerned, giving this form of advertising different characteristics compared to traditional advertising in other media. With regard to the availability and quality of data, Data Management Platforms ('DMPs') are technological platforms that allow advertisers, publishers and other market players to collect, sort, aggregate and analyze in real time their own and third parties' data on the behavior of online users, in order to better target them.

[74] According to the AGCM, Google has engaged in conduct constituting internal/external discrimination, consisting in refusing to supply the decryption keys for the Google ID and in excluding the possibility of tracking third-party pixels, against the simultaneous use, by its own internal divisions, of tracking tools which enable Google's DSP services, SSP services and AD servers to achieve a targeting capacity which other competitors who are just as efficient are unable to replicate. Such conduct is likely to lead to restrictive effects on competition, insofar as the refusal to provide such tools leads to an unjustified competitive advantage. Thanks to the use of the real-time context information that DMPs are able to offer, advertisers can obtain a higher audience profiling and thus refine their targeting strategies.

[75] On 22 June 2021, the European Commission opened proceedings under Article 102 TFEU against the Google group (AT.40670 – Google – AdTech and Data-related practices) and, in consideration of the fact that the conduct assessed by the Commission in the proceedings coincides with the conduct examined by the AGCM when initiating the investigation and considering that, pursuant to Article 11(6) of Regulation (EC) No 1/2003, the initiation of a

tising sector has repeatedly been the subject of in-depth consideration by the competition authorities of the Member States.[76] To the point that, among others, the French competition authority ("Autorité de la concurrence")[77] and the U.S. Department of Justice ("DoJ")[78] have in parallel launched investigations in the digital advertising sector, setting a precedent and a "model" for conduct that can also be prosecuted by other competition authorities as well.[79]

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proceeding by the Commission deprives the competition authorities of the Member States of the competence to apply Articles 101 and 102 TFEU, the AGCM considered that the AGCM's competence had ceased.

[76] Please refer to Competition and Markets Authority ("CMA"), Online platforms and digital advertising market study, Market study final report, 1 July 2020, a Bundeskartellamt, Press release: Bundeskartellamt launches sector inquiry into market conditions in online advertising sector, 1 February 2018, Autorité de la concurrence, Opinion No. 18-A-03 of 6 March 2018 on data processing in the online advertising sector and Australian Competition & Consumer Commission ("ACCC"), Digital advertising services inquiry-final report, 28 September 2021.

[77] Autorité de la concurrence, Décision n° 21-D-11 du 7 Juin 2021 relative à des pratiques mises en œuvre dans le secteur de la publicité sur Internet. The French competition authority ruled that Google had violated Article 102 TFEU and equivalent provisions of French competition law through anticompetitive conduct in the ad-tec/z sector, imposing a C220 million fine on Google and making binding a series of commitments proposed by Google. The decision was adopted in the context of a so-called "transaction procedure" typical of antitrust proceedings in France, under which Google agreed not to contest the Authority's findings, without, however explicitly admitting its guilt. The decision is the culmination of an investigation initiated in response to a complaint filed by News Corp just two years ago, in June 2019 (along with two other publishers, namely Le Figaro and Group Rossel, which filed a complaint in September 2019). According to the Authority, Google committed two abuses: (a) it used its dominant publisher ad server DoubleClick for Publishers ("DFP") to favor its AdX ad exchange; and (b) conversely, it used its AdX ad exchange to favor its DFP publisher ad server.

[78] First, on December 16, 2020, the State of Texas and nine other states in the United States filed an antitrust lawsuit in the District Court for the Eastern District of Texas (Case 4:20-ev-00957) regarding Google's conduct in the ad-tech industry. The dispute concerned various practices of Google in the ad-tech world, where publishers monetize their ad inventory and advertisers commercialize their products with the help of ad-lech providers such as publishers ad servers, ad exchanges, and DSPs. See also, most recently, U.S. District Court for the Eastern District of Virginia, Google, Case 1-23-cv-00108, Complaint, January 24, 2023 and U.S. DoJ, Justice Department Sues Google for Monopolizing Digital Advertising Technologies, Press release, January 24, 2023.

[79] Suffice it to say that the CMA, on January 7, 2021, opened an investigation (later closed with commitments last February 11, 2022) regarding Google's decision to remove third-party cookies from its Chrome browser in early 2022 and to substitute them with a set of proposals known as the Privacy Sandbox. The investigation – initiated under Chapter Il of the Competition Act 1998 (the English equivalent of Article 102 TFEU) – follows complaints, including one from Marketers for an Open Web Limited, a group that approached the CMA last November with a request for interim measures. The Privacy Sandbox has long been in the crosshairs of the CMA, which in its report on online platforms and digital advertising raised a number of con-

Again, an investigation has been launched against Apple, in the course of which the Antitrust Authority intends to ascertain whether the different treatment in terms of privacy policy applied to third-party app developers compared to that practiced within its own ecosystem is justified or qualifies as an abusive discriminatory conduct: capable as such, on the one hand, of hindering the ability of competitors to enter or remain in the app development and distribution market and, on the other hand, of unfairly favouring its own apps and, consequently, Apple's mobile devices and iOS operating system.

As for regulatory choices, an initial rush of reform (report sent on March 23, 2021 by the AGCM to the government under Articles 21 and 22 of Law Number 287/1990 (S4 143)), and the implementation of the Copyright Directive with the acceptance of maximum efforts such as the Statute of Conduct for Content Sharing Platforms, was followed by the approval of the Annual Competition Market Law 2021 (Law No. 118 of August 5, 2022).

Article 16, paragraph 1-bis, of Law No. 287/1990, introduced by Article 32 of the Law, gives the AGCM the power to require, upon the occurrence of certain conditions, the notification of so-called "sub-threshold" merger operations: these are mergers that do not meet the requirements – expressed in terms of turnover thresholds of the companies involved (see Article 16, paragraph 1, in Law No. 287/1990) – in the presence of which a transaction is by law subject to prior notification and examination at the national level. More specifically, the AGCM's new power covers transactions for which the following three cumulative conditions are met: (i) only one of the two turnover thresholds specified in Article 16(1) is exceeded, or the total worldwide turnover achieved by the set of enterprises concerned and exceeding EUR 5 billion; (ii) there are concrete risks to competition in the domestic market or in a relevant part thereof, also taking into account the detrimental effects on the development and dissemination of small enterprises characterized by innovative strategies; and (iii) the transaction has been finalized not more than six months ago.

Article 16, paragraph 1-bis, further remits to the AGCM the task of defining, by its own measure and in accordance with the European Union system, appropriate procedural rules aimed at the application of the newly

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cerns about its potential impact, including that it could undermine publishers' ability to generate revenue and undermine competition in digital advertising by strengthening Google's market power.

introduced provision. The AGCM, precisely in view of the aforementioned regulatory change, has defined, in accordance with the European Union legal system, procedural rules for the application of the aforementioned Article 16, paragraph 1-bis, and provided some clarifications on the relative temporal and substantive scope of application.

Also, as part of national activism, in the same competition law, the shadow cone of the discipline on the abuse of economic independence has been widened. Specifically, by introducing a rebuttable presumption of dependence in the case of a company that use intermediation services provided by a digital platform that plays a decisive role in reaching end users or suppliers, including in terms of the income effects of data availability.

In addition, through a list of practices that may constitute an abuse of economic dependence such as: refusal to sell or buy, imposition of unjustifiably burdensome or discriminatory contractual conditions, including retroactive ones, arbitrary termination of existing business relations, application of objectively different conditions for equivalent services, provision of insufficient information or data regarding the scope or quality of the service provided, and demand for undue unilateral benefits, not justified by the nature or content of the activity performed.

Specifically, Article 32 introduces a presumption (relative, i.e., rebuttable by providing proof to the contrary) of the subordination for businesses that must rely on the digital platform as an intermediary to reach the end consumer, taking into account factors such as "network effects" and "data availability" within the platform. In addition, the rule supplements the (non-exhaustive) list of abusive practices, enriching it with hypotheses that are formulated in general terms, but which seem to be suggested by the experience of the relationships between large digital platforms and businesses that use their intermediary services.

It is an intervention that aims to adapt to the digital decade the spirit and purpose of the discipline, which, as it is pacific, «gives prominence not to the dominant position of an enterprise in the market, but to the abuse and imbalance of enterprises in the context of a negotiating relationship» with both private and public competence.

The technique chosen for this purpose is to balance the need to facilitate access to justice with respect to practices in the digital ecosystem (through presumption) with the need to guarantee the right to defense and respect for the adversarial process (through proof of the absence of the state of economic dependence of the party that turns to the platform with

predominant position, for example, due to accessibility to alternative sources in the market).[80]

## 7. Conclusions

At least two leading guidelines emerge from the overall characteristics.

The first shifts the focus from subject to activity: «same activity, same risk, same rules and oversight». Activities, in short, are graded on the basis of the risks they raise with respect to homogeneous goods, regardless of who and through what modes the services are offered. This is true in every sector and applies to every activity. For digital markets and services (the subject of European regulations: DMA and DSA), the rule applies according to which what is lawful offline, is lawful online, and what is unlawful offline, is also unlawful online, because the same activities that raise the same risk must be followed by the same rules.[81]

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[80] Of course, one could dispute that the new provision harms the market and businesses by introducing a discipline and presumption that is unparalleled in European competition law. And one could add that, with the approval of new European rules on digital markets, the new arrangement is unnecessary. However, from a technical point of view, the presumption is not a mostrum but a legal technique that already exists and is also applied in European antitrust law, in particular-and with the greater force of the absolute presumption-in the case of violations of the late payment discipline (it therefore does not hold the objection of contrariety with European law and 117 Const.). Moreover, in digital, there are similar national previsions also or specifically toward large platforms. In Germany, for example, a new form of economic dependence has been introduced in two-sided markets: a company that provides essential intermediation services is also subject to the prohibition of discrimination if there are no alternative possibilities and operators to replace the intermediation service originally provided. More generally, presumption is a technique that facilitates the protection of a right but only if that right exists and has been infringed. In this sense, the new article is a formidable incentive to adopt virtuous behaviour toward businesses, thus strengthening their accountability. As for the other objection, that with the new European rules on digital markets there is no longer a need to strengthen the discipline on the abuse of economic dependence, it should be pointed out that digital markets act and economic dependence are different disciplines that pursue different ends. not only is the DMA aimed at only a few gatekeepers, but especially in the case of violations, end-users enjoy no protection, because the DMA is a public law discipline and not a private law one. in short, the institution of dependency complements DMA rather than overlapping with it (somewhat like class action with respect to antitrust tort), allowing access to civil or administrative justice if a right exists and it has been violated. Nor, finally, is there any over-positioning or formal contrast, because the DMA makes it clear from the outset (as a matter of course) that EU regulation does not affect, nor interfere with, national regulation, much less that protecting competition and abuse of dependence. In these terms, V. SICKLE, *Asymmetrical business-to-business relations and pro-competitive solutions*, in *Rivista di diritto industriale*, 2021, 189.

[81] Most recently, on this topic, S. ARAMONTE, W. HUANG-A. SCHRIMPF, *DeFi risks and the decentralisation illusion*, accessible at https://www.bis.org/publ/qtrpdf/r_qt2112b.pdf.

The second broadens the scope of activities without shifting the axis of responsibility: «outsourcing is good, immunity is bad».[82] Outsourcing is a differential opportunity to widen the market, never a shield from responsibility. Regardless of the recourse to a technological entity alongside or as a substitute in the creation and provision of services, in short, firm is the imputation of relationships and responsibility for actions is firm. Even in the form of co-responsibility.

This is how the contours of the European data market (open, free, contestable and, as such, fair and competitive) are drawn, in which rules recognize, legitimize and empower, as a matter of law, the new market actors.

[82] EBA, EBA *Guidelines on outsourcing arrangements*, EBA/GL/2019/02, accessible at https://www.eba.europa.eu/activities/single-rulebook/regulatory-activities/internal-governance/guidelines-outsourcing.

Valeria Falce

# Structural challenges and Pro-innovation Solutions

SUMMARY: 1. Introduction. – 2. Past and present. – 3. The European response. – 4. The national revival. – 5. The knots of effectiveness in the European forum. – 6. The risks of uncertainty of national choices. – 7. Conclusions.

## 1. Introduction

The innovations introduced at the European level on the subject of merger control (through the revisiting of Article 22 of Regulation (EC) No. 139/2004), in one with the new discipline inaugurated by the Competition bill of 2021 (and approved by Law No. 118 of August 5, 2022) suggest a renewed reflection on the so-called killer acquisitions i.e., operations so defined for their ability to interfere, especially in digital ecosystems, on the innovativeness of a market through the acquisition of current or potential competitors that, despite their size, are characterized by innovative strategies. Indeed, it is commonly believed that through "killer acquisitions" [1]

[1] The expression is due to a successful article by C. CUNNINGHAM, F. EDERER, S. MA, *Killer Acquisitions*, in *Journal of Political Economy*, 129(3), 2021, 649 ff. The A.'s, in their paper, report a total of 855 acquisitions by Google, Amazon, Facebook, Apple and Microsoft from the inception of each firm and through August 2020. It has, moreover, been noted that the median age of firms acquired by Google is 4 years, a value that drops to 2½ years for firms acquired by Facebook (see E. ARGENTESI, P. BUCCIROSSI, E. CALVANI, T. DUSO, A. MARRAZZO, S. NAVA, *Merger Policy in Digital Market: An Ex-Post Assessment*, in *Journal of Comp. Law & Econ.*, 2021, 17, 95-140). Lastly, empirical investigations confirm that when looking at large digital platforms, in most of the cases examined, the entities being acquired were closed or liquidated within a year of the completion of the transaction. See, on this, A. GAUTER, G. LAMESCH, *Merger in the Digital Economy*, in *Information Economics and Policy*, 54, 2021, who report the following data: out of 175 companies acquired between 2015 and 2017 by the so-called GAFAMs (Google, Amazon, Microsoft, Apple and Facebook), 105 were closed, liquidated or their brands

the pathways of innovation[2] and future or nascent competition[3] can be

and trademarks no longer used in less than a year. It is not surprising, therefore, that, for these firms, turnover is not, therefore, a good indicator of their current and potential size and strength in the relevant market. According to J. FURMAN *et al.*, *Unlocking digital competition*, Report of the Digital Competition Expert Panel (the "*Furman Report*"), 2019, 91, «over the past decade, Amazon, Apple, Facebook, Google and Microsoft together have made over 400 acquisitions globally. [...] This pace is not slowing, with nearly 250 acquisitions in the past five years. In this period, none of these mergers have been voluntarily notified to the CMA, and none have been investigated [in the UK], either at the stage 1 level or at the more serious stage 2 level. This means that during this period none of these mergers were blocked or even approved on terms set by the CMA». For a look at the literature, see K.A. BRYAN, E. HOVENKAMP, *Startup Acquisitions, Error Costs, and Antitrust Policy*, in 87 *The University of Chicago Law Review*, 331 (2020); R. WHISH, *Killer Acquisitions and Competition Law: Is There a Gap and How Should It Be Filled?3*, in 34 *Nat4e L. Sch. India Rev.*, 1 (2022).

[2] It should be noted that an approach based on competition in innovation, also extrapolating the notion of "innovation space/market", has already been suggested in the Report by J. CRÉMER, Y.A. DE MONTJOYE, H. SCHWEITZER, *Competition Policy for the Digital Era*, Final Report for the EU Commission (the "*Crémer Report*"), 2019. In several cases (Novartis/GlaxoSmithKline, GE/Alstom, Dow/DuPont, and Bayer/Monsanto), the Commission identified restrictions of competition at an early stage, that is, at a time when competition had not yet unfolded and before any anti-competitive effects could materialize in the relevant market. In terms of the theory of harm, it would be necessary to show that the target firm is pursuing a tangible innovation goal (i.e., the creation of a product potentially competing with another in an adjacent market) and has the potential to perfect it. In this regard, it would not matter whether the product under development ends up actually competing with the existing product, because the object of protection would be the parties' incentive to innovate, i.e., the innovation process itself. See European Commission, Decision of January 28, 2015, case COMP/M.7275, Novartis/GlaxoSmithKline Oncology Business; decision of 8 September 2015, case COMP/M.7278, General Electric/Alstom; decision of 27 March 2017, case COMP/M.7932, Dow/DuPont; decision of 21 March 2018, case COMP/M.8084, Bayer/Monsanto. See also W. KERBER, *Competition, Innovation, and Competition Law: Dissecting the Interplay*, in *Joint Discussion Paper Series in Economics*, 2017, 42, 15-16; J.G. SIDAK, D.J. TEECE, *Dynamic Competition in Antitrust Law*, in *Oxford Journal of Competition Law and Economics*, 5(4), 2009, 614 ff. D.H. GINSBURG, J.D. WRIGHT, *Dynamic Analysis and the Limits of Antitrust Institutions*, in 78 *Antitrust L.J.*, 1 (2012); N. PETIT, D.J. TEECE, *Innovating Big Tech Firms and Competition Policy: Favoring Dynamic over Static Competition*, in 30 *Industrial and Corporate Change*, 1168 (2021); M.G. JACOBIDES, I. LIANOS, *Ecosystems and Competition Law in Theory and Practice*, in 30 *Industrial and Corporate Change*, 1199 (2021); W.E. KOVACIC, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, in 19 *Geo Mason L. Rev.*, 1097 (2012). See also M. BOURREAU, A. DE STREEL, *Big Tech Acquisitions – Competition and Innovation Effects and EU Merger Control*, in *CERRE Issue Paper*, February 2020, 15 ff.; ID., *Digital Conglomerates and EU Competition Policy*, University of Namur, 2019, 9; D. PÉREZ DE LAMO, *Assessing "Killer Acquisitions": An Assets and Capabilities-Based View of the Start-Up*, in *CPI Antitrust Chronicle*, may 2020. For a discussion of the difficulties of predicting effects on innovation, R.J. GILBERT, A.D. MELAMED, *Innovation under Section 2 of the Sherman Act*, in *Antitrust Law Journal*, 84(1), 2021; ID., *Innovation: A Bridge to the New Brandeisians*, in *Competition Policy International* (February 21, 2022). For a domestic law perspective, see A. OTTOLIA, *Big data and Computational Innovation*, Turin, 2017, *passim*; M. BERTANI, *Big data, intellectual property and financial*

unjustifiably suppressed or altered according to variable-geometry patterns, forms and modes", [4] thus prompting increasing attention from authorities and research centers [5] and calls for concrete "actions" (including legislative proposals" [6-7-8]) from international, European and national

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*markets*, in V. FALCE, G. GHIDINI, G. OLIVIERI, *Information and Big data between innovation and competition*, Milan, 2017.

[3] On the topic of "nascent" competitors, see C. SCOTT HEMPHILL, T. WU, *Nascent Competitors*, in *University of Pennsylvania Law Review*, 2020, 168, 1879 ff.; D. MELAMED, *Mergers involving nascent competition*, in *Stanford Law & Economics Olin*, Working Paper No. 566, 17 January 2022; J.M. YUN, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, in *The Global Antitrust Institute Report on the Digital Economy*, 2020, 18, 653 ff.

[4] See on this point C. CAFFARRA, G. CRAWFORD, T. VALLETTI, *'How Tech Rolls': Potential Competition and 'Reverse' Killer Acquisitions*, in CPI ANTITRUST CHRONICLE, May 2020; O. LATHAM, I. TECU, N. BAGARIA, *Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How Can It Be Assessed?*, *ibid*.

[5] A part from the Crémer Report and the Furman Report, the following contributions should be cited: GEORGE J. STIGLER - CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE (2019), *Report of Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee*, The University of Chicago Booth School of Business ("*Stigler Report*"). Furthermore, various contributions followed from Australia (ACCC, *Digital platforms inquiry* – Final Report, July 2019); Belgium, Holland and Luxembourg (*Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world*, 2019); the BRICS countries (*BRICS in the digital economy: Competition policy in practice*, 2019); France (G. LONGUET *et al.*, *Report at the French Senate on digital sovereignty*, 2019); Germany (M. SCHALLBRUCH, H. SCHWEITZER, A. WAMBACH, *A new competition framework for the digital economy: Report by the Commission 'Competition Law 4.0'*, 2019).

[6] In addition to the contributions cited above, in the United States, the House Antitrust Subcommittee Report also suggested the introduction of a «presumption against acquisitions of start-ups by dominant firms» and the FTC reaffirmed its rarely exercised power to dissolve mergers that have already been perfected. See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMM. ON ANTITRUST, HOUSE COMMITTEE ON THE JUDICIARY, 116th Cong. (originally published Oct. 2020, final version July 19, 2022), paras. 33, 38. See also J.B. BAKER *et al.*, *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets*, in *Congressional and other Testimony* 18, 1-6 (2020). See M.A. LEMLEY, A. MCCREARY, *Exit Strategy*, in 101 *B.U. L. Rev.*, 2021, 1, 7-8; S.C. SALOP, *Potential Competition and Antitrust Analysis: Monopoly Profits Exceed Duopoly Profits*, in *Note for OECD Roundtable on the Concept of Potential Competition*, 12-16.

[7] Cf. P. RÉGIBEAU, *Killer Acquisitions? Evidence and Potential Theories of Harm*, in I. KOKKORIS, C. LEMUS (eds.), *Research Handbook on the Law and Economics of Competition Enforcement*, 2022, 300, 322-323. According to the author, the data suggest that potentially 'killer' acquisitions in digital markets are more frequent and more numerous, while those in the pharmaceutical sector are fewer but larger. Therefore, we can conclude that there is no perfect overlap between the two sectors and that, although this phenomenon takes place in the context of dynamic industries, it occurs with relative certainty only in the pharmaceutical sector.

[8] M. BOURREAU, A. DE STREEL, *Big Tech Acquisitions*, cit., 8-13.

institutions [9] (FTC [10] and OECD [11]).

Starting from the assumption that incentives to innovation in general, and in the sub-segment of start-ups [12-13] in particular, are necessary to ensure the openness of markets and the plurality of innovative paths, the objective of these brief notes is to contribute to the debate, analyzing the reasons, identifying the expected consequences and prospecting some limitations arising from the renewed role "played" by the merger regulation in the broader context of digital ecosystems, and then proposing some correctives from a positive law perspective that, either at the interpretative level or through soft law tools, can help safeguard the rate and diversification of development processes, containing the technical discretion of the guarantor authorities and safeguarding the legitimate expansive strategies of market players.

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[9] Cfr. THE WHITE HOUSE, EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY (July 9, 2021), which intends to investigate «the challenges posed by […] the rise of the dominant Internet platforms, especially as these stem from serial mergers, the acquisition of nascent competitors […]». Think, among others, of the speech entitled "The future of EU Merger Control" dated 11 September 2020 on the occasion of the International Bar Association 24th Annual Competition Conference, in which European Commissioner Vestager called for a change of approach. See also Margrethe Vestager, Speech of European Commissioner for Competition 'Refining the EU Merger Control System' (10 March 2016).

[10] In early 2020, the FTC requested technology companies (which we will summarise with the acronym 'GAFAM') to provide the FTC with all necessary information regarding acquisitions completed since 2010 that fell below the 'relevant' reporting thresholds in the United States with respect to turnover (and thus may not have been examined by (and notified to) the FTC). See FEDERAL TRADE COMMISSION, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020).

[11] OECD, Start-ups, killer acquisitions and merger control – Note by the European Union by Chris Pike, DAF/COMP/WD (2020) 24, 11 June 2020.

[12] Whose business consists precisely in creating new products and services and whose access to capital is usually particularly difficult, especially in the absence of public funding and venture capital investments. See P. RÉGIBEAU, *op. cit.*, 312 ff; C. FUMAGALLI, M. MOTTA, E. TARANTINO, *Shelving or Developing? The Acquisition of Potential Competitors Under Financial Constraints*, in *CEPR Discussion Paper*, No. DP15113, 2020; T.S. PRADO, J.M. BAUER, *Big Tech Acquisitions of Start-ups and Venture Capital Funding for Innovation*, in *Information Economics and Policy*, 2022, 59(1).

[13] M. BOURREAU, A. DE STREEL, *Big Tech Acquisitions*, cit., 8 ff.; T. VALLETTI, H. ZENGER, *Increasing Market Power and Merger Control*, in *Competition Law and Policy Debate*, 2019, 40(5).

## 2. Past and present

Merger control is expressed, as is well known, through an *ex-ante* assessment,[14] the terms and conditions of which were outlined at the Euro-

[14] See, among others, M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, Milan, 2014, 343 ff.; M. D'OSTUNI, M. BERETTA, *Il diritto della concorrenza in Italia*, Turin, 2021, 975 ff.; ID., *Il sistema del controllo delle concentrazioni in Italia*, Turin, 2017, 47 ff.; L.C. UBERTAZZI, *Commentario breve alle leggi su proprietà intellettuale e concorrenza*, Padova, 2019, 3015 ff. The European approach differs, in fact, from American antitrust law, which has introduced merger control rules in a progressive manner and has experienced an uneven trend in its practical application (the original text of the Sherman Act punished only *ex-post* mergers with monopolistic effects, with exceptional and traumatic interventions, such as the split imposed on Standard Oil in 1911; the first specific rules of generalised *ex-ante* control date back to the Clayton Act of 1914, a quarter of a century after the Sherman Act, and were limited to transfers of share capital. It was not until the Celler-Kefauver Act of 1950 that there was complete authorisation control over mergers. Since then, there has been a period of stringent control followed by a more permissive orientation beginning in the 1970s-1980s), in Europe, the initial legislative policy direction went in the direction of fostering the growth processes of companies, also through concentration operations. It was not a question of protecting so-called 'national champions'- because, on the contrary, the 'strategic' objective of the integration of the internal market was moving in the opposite direction – but, rather, the growth in size of European companies was considered, in principle, as a phenomenon worthy of encouragement in view of a broader industrial policy objective, i.e. enabling European companies to compete globally, in the face of American multinationals (and Japan, which, in the second half of the last century, was asserting itself as a growing industrial power). The legislative policy approach stemmed from the widespread awareness that, in an economic context characterised by the presence of several independent companies, the merger or concentration of two or more companies would favour the emergence of an entity capable of exerting greater competitive pressure on the entire reference market. This basic choice was called into question when the adverse effect of this legislative option was realised, namely that the freedom to concentrate could benefit not only growing European companies, but also American multinationals acquiring control of European companies (as shown by the 1973 Continental Can and Philip Morris cases of 1973 and 1973). See Court of Justice, Judgment of 21 February 1973, Case 6/72 – Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities, ECLI:EU:C:1973:22 and Court of Justice, Judgment of 17 November 1987, Joined Cases 142/84 and 156/84 – British American Tobacco Company Ltd and R. J. Reynolds Industries, Inc. v. Commission of the European Communities. In this sense, national merger control regulations can be seen as instruments of economic regulation used by states to influence the shape of domestic markets and achieve domestic objectives to the detriment of common ones. See Already, from this point of view, L. MCGOWAN, M. CINI, *Discretion and Politicisation in EU Competition Policy: The Case of Merger Control*, in 12 *Governance*, 1999, 176-200. On the natural contrast between competition and industrial policy, in various jurisdictions, see J. FINGLETON, *Competition Policy and Competitiveness in Europe*, in A.M. MATEUS, T. MOREIRA (ed.), *Competition Law and Economics*, Chapter 19, Edward Elgar, 2010, in whose view, ultimately, *"industrial policy threatens consumer welfare"*. On the relationship between the enforcement of European merger rules and the protection of European industry interests, see A. BRADFORD, R.J. JACKSON jr., J. ZYTNICK, *Is EU Merger Control Used for Protectionism? An Empirical Analysis*, in *Journal of Empirical Legal Studies*, 2018, 15, 165-191, who conclude that: «Our analysis of the more than 5,000 mergers

pean level in an initial (EC Reg./4064/1989,[15] in which the possibility of denial of authorization was limited only to cases in which the transaction led to the formation of absolute dominant positions) and then in a second Regulation (EC) No. 139/2004[16] (henceforth, the "Merger Regulation" or the "Regulation No. 139/2004"), which is still in force today (in which authorization can be denied when the concentration achieves a "significant impediment to effective competition in the common market").[17]

At the same time, in Italy,[18] pursuant to Article 16(1) of Law No. 287/1990 (henceforth, "Antitrust Law"), mergers are subject to an obliga-

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reported to the Commission between 1990 and 2014 reveals no evidence that the Commission has systematically used its authority for protectionist purposes. If anything, our findings suggest that the Commission is less inclined to contest transactions involving non-EU buyers»; D.D. Sokol is, however, of a different opinion, D.D. SOKOL, *Tensions between Antitrust and Industrial Policy*, in *Geo. Mason L. Rev.*, 2015, 1257-1258.

[15] Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

[16] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('EC Merger Regulation').

[17] Article 2(3) of the Merger Regulation. If a transaction qualifies as a concentration and meets the turnover thresholds set out in Article 1 of Regulation 139/2004, it has a Community dimension and must be notified to the European Commission. In such a case, under Article 21, exclusive competence to hear, assess and decide on the transaction is triggered, while the authorities of the Member States cannot adopt their national competition laws on the same merger (this is referred to as the 'one-stop shop principle'). If, on the contrary, the turnover is not such as to meet the thresholds defining the Community dimension, the transactions may possibly fall within the scope of one or more national competition laws. Without prejudice to the work necessary to assess referral requests under Article 4(4) of the Merger Regulation (reasoned requests for referral to a Member State, addressed to the Commission by undertakings required to notify, where the concentration is likely to significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State) or Article 9 (where the concentration threatens to affect significantly competition in a market within that Member State presenting all the characteristics of a distinct market; or affects competition in a market within the said Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market), the assumption of application (i.e. the use of turnover thresholds (instead of market share thresholds), above which prior scrutiny and notification of the proposed concentration takes place, meets the need to provide an objective parameter that is easy to verify) but which broadens the objective scope of assessment. See the reconstruction in L. BRITTAN, *The Law and Policy of Merger Control in the EEC*, in *Eur. L. Rev.*, 1990, 351-357, as well as in E. SCHWARTZ, *Politics as usual: the history of European Community Merger Control*, in 18 *Yale Journ. Int'l Law*, 1993, 607, where it is stated that the grid of thresholds contained in Article 1 and the two-thirds rule were the most laborious and complex aspect of the regulation on which the Member States focused their discussion.

[18] Cf. E. MOAVERO MILANESI, *Antitrust and Concentrations between Enterprises in Community Law*, Milan, 1992; A. TOFFOLETTO, *Le concentrazioni nel diritto comunitario antitrust*, in *Giurisprudenza commerciale*, 1990, I, 488-489, where references are made to the positions of

tion of prior notification to the Autorità Garante della Concorrenza e del Mercato (henceforth, "AGCM") upon the occurrence of quantitative thresholds, also expressed by the turnover of the companies involved[19] and anchored to a substantive assessment symmetrical to the European one.[20-21]

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Italy, which in view of the lack of domestic legislation had required rather low thresholds; Germany and England, which required much higher thresholds, as well as the French delegation, in compromise.

[19] See AGCM Decision No. 30507 of 14 March 2023 (Bulletin No. 12/2023). The turnover thresholds that make the notification of a concentration mandatory are as follows: (i) the total turnover achieved at national level by all the undertakings concerned exceeds € 532 million; and (ii) the total turnover achieved at national level by at least two of the undertakings concerned exceeds € 32 million). Thus, a threshold scheme has been established that covers three types of acquisitions. Firstly, acquisitions of companies operating in Italy, including medium or medium-large companies (with a domestic turnover of up to € 532 million), by multinationals not operating, even indirectly, in Italy (provided that such transactions do not fall under the exclusive jurisdiction of the European Commission, should the thresholds of the Merger Regulation be met). Secondly, the acquisition of companies – in general – of small size (i.e. with a domestic turnover of less than €32 million) by companies, whether domestic or foreign, even large ones, and, lastly, the concentration between companies of medium size with respect to the turnover achieved in Italy (companies that individually achieve a turnover of more than €32 million), with the sum of the turnovers achieved in our country not reaching € 532 million.

[20] Article 32, paragraph 1, lett. a) of Law No. 118/2022 replaces Article 6 of the Antitrust Law by amending the criterion of assessment and control to be used in order to appreciate the competitive impact on the markets, replacing the criterion linked to the creation or strengthening of a dominant position on the national market so as to eliminate or substantially and durably reduce competition (the so-called "dominance test") with the criterion based on the significant obstacle to effective competition on the national market (in particular, due to the creation or strengthening of a dominant position) with the criterion based on the significant obstacle to effective competition on the national market (in particular, due to the creation or strengthening of a dominant position). dominance test) with that based on the significant impediment of effective competition on the national market (in particular, due to the creation or strengthening of a dominant position). Continues L. No. 118/2022 that «[t]his situation must be assessed by reference to the need to preserve and develop effective competition, taking into account the structure of all the markets concerned and actual or potential competition, as well as the market position of the participating undertakings, their economic and financial power, the choice of suppliers and users, their access to sources of supply or market outlets, the existence in law or in fact of barriers to entry, trends in supply and demand for the products and services in question, the interests of intermediate and ultimate consumers, and technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition».

[21] Secondly, Article 32(1)(c) of Law No. 118/2022, moving on from the notion of concentration, amends Article 5 of the Antitrust Law and, consequently, the concept of joint ventures and the treatment of joint ventures performing on a lasting basis all the functions of an autonomous economic entity. Paragraph 3 of Article 5 is replaced by the following wording: «Where the object or effect of the operation to set up a concentrative joint venture is to coordinate the behaviour of independent undertakings, such coordination shall be assessed in accordance with the parameters adopted for the assessment of restrictive agreements in order to determine

Market developments suggest rethinking, or at least modernizing, the architecture.

In systems of high innovation,[22] and particularly in the platform economy, there is, in fact, an exponential increase in concentrative processes, which often escape the meshes of competitive assessment and, even when they fall within the scope of antitrust enforcement, not only highlight the limitations of the available instrumentarium, but above all frustrate, rather than impart, an acceleration of innovative processes.[23]

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whether the operation entails the consequences referred to in Article 6. In this assessment, the Authority shall take into account, in particular, the significant and simultaneous presence of two or more parent undertakings on the same market as the joint venture, or on a market which is upstream or downstream of that market, or on a neighbouring market closely related to this market, as well as the possibility afforded to the undertakings concerned, through their coordination resulting directly from the creation of the joint venture, of eliminating competition in respect of a substantial part of the products and services in question».

[22] See footnote 4 and the Commission's decisions cited therein in Novartis/GSK Oncology Business (where the Commission assessed the level of competition in potential innovation between products in clinical development) and in Dow/DuPont (concerning the question whether the transaction had reduced "the level of competition in innovation" within a number of markets).

[23] See, for some considerations on this point, M. BOURREAU, A. DE STREEL, *Big Tech Acquisitions*, cit., 15 ff.; ID., *Digital Conglomerates and EU Competition Policy*, cit., 9; OECD, *Roundtable on Conglomerate Effects of Mergers*, 2020, 23 ff.; G. PARKER, G. PETROPOULOS, M. VAN ALSTYNE, *Platform mergers and antitrust*, in *Industrial and Corporate Change*, 30(5), 2021, 1307 ff.; A. OTTOLIA, *Il governo dell'algoritmo, in AIDA-Annali del diritto d'autore, della cultura e dello spettacolo*, 2022, 301 ff. In data-driven mergers, in fact, competitive constraints may not originate from the relationship of substitutability (or 'rivalry') between goods and services, which, on the contrary, proves to be an inadequate criterion, and the absence of the monetary price highlights the limits of the enforcement activity of the authorities, which are mainly focused on this parameter. By way of example, with regard to the topic of the relevant market, in June 2017, the German legislator made important adjustments through the ninth amendment to the German Antitrust Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB): Section 18(2)(a) of the GWB confirmed that a 'relevant market'- in the sense relevant for competition law – can also exist when products and/or services are provided free of charge. This clarification follows an initiative of the Bundeskartellamt aimed at addressing competition issues in digital markets, which started with the publication in June 2016 of a Working Paper entitled 'Market Power of Platforms and Networks'. Textually, Section 18(2)(a) of the GWB reads as follows: «The assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge». More generally, so-called zero-price markets (or even so-called multisided markets) are now regularly examined under the lens of competition law. For example, in its decision on Google Shopping (Case AT.39740, decision of 27 June 2017, Google Search (Shopping), para. 158 ff.), the European Commission delineated a relevant market for a zero-price service, namely that of general online search. According to the Commission, this was justified by the fact that users 'paid with their data' when using Google's search engine. Moreover, free for users was an integral part of the business model of Google's platform and price was not the most important competitive parameter in general online search. More recently, see also Eu-

The result is, on the one hand, an enforcement gap, if not an under-enforcement, laid bare by transactions such as Facebook/WhatsApp,[24-25]

ropean Commission, Decision of 17 December 2020, Case COMP/M.9660, Google Fitbit. In such cases, a relevant qualitative element is the protection of user data by the service. The European Commission has also come to recognise data protection as a qualitative competition parameter, and other competition dimensions are therefore relevant: innovation and quality of service, which includes user data protection, choice and pluralism in the market. See European Commission, Microsoft/WhatsApp case (see below), according to which, in paragraph 87, the protection of privacy and personal data is counted among the increasingly important features of instant messaging applications for consumers; European Commission, decision of 6 December 2016, Case M.8124 Microsoft/LinkedIn, paragraph 350.

[24] European Commission, Decision of 3 October 2014, Case M.7217, Facebook/WhatsApp. In 2014, the European Commission, at the time of Facebook's acquisition of WhatsApp for £19 billion, did not have jurisdiction to review the merger, despite the fact that Facebook was a global player and the transaction value paid for the target company left no doubt that it was a naturally significant merger that would have merited antitrust scrutiny. However, as mentioned, merger control in the EU is a formal and 'dual' exercise: either the turnover thresholds are met or they are not, no alternative scenario is given. And, in this case, under Article 1(2) of the Merger Regulation, WhatsApp's turnover did not reach the € 250 million threshold to trigger a notification obligation. The Commission nevertheless succeeded in having the case assigned to it thanks to the peculiarities of national merger control regimes and their dialectical interaction with the European system: only by virtue of lower (or more flexible) turnover thresholds, three Member States (presumably Cyprus, Spain and the United Kingdom) imposed a notification obligation on Facebook, which, in turn, led the latter to request, pursuant to Article 4(5) of the Merger Regulation, that the merger be assessed by the Commission instead of by three national antitrust authorities. Indeed, according to Article 4(5) of the Merger Regulation, '[w]ith reference to a concentration, as defined in Article 3, which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission, by means of a reasoned submission, that the concentration should be examined by the Commission. The Commission shall transmit the request to all Member States without delay. Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receipt of the reasoned submission, express its disagreement with the request to refer the case. Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall without delay inform all Member States and the persons or undertakings concerned of cases where a disagreement has been expressed. Where no Member State has expressed its disagreement in accordance with the third subparagraph within 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such cases, no Member State shall apply its national competition law to the concentration'. See also European Commission, Decision of 17 May 2017, Case COMP/M.8228, Facebook/WhatsApp (proceedings ex Article 14.1 proc.), which imposed a fine on Facebook, pursuant to Article 14(1) of Regulation (EC) 139/2004, for providing incorrect or misleading information.

[25] The Staff Working Document published by the European Commission on 26 March 2021, summarising the results of the evaluation of the procedural and jurisdictional aspects of EU merger control (SWD(2021) 66 final), acknowledges a statistical analysis conducted by

Facebook/Instagram (acquired for £1 billion in 2012) and Oculus (acquired for £2 billion in 2014);[26] on the other hand, an uneven and spotty push for the introduction of alternative metrics (transaction value instead of company turnover) as a requirement for the applicability of the discipline[27] (a criterion, moreover, not without its criticalities[28]).

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Bloomberg according to which in the years 2015-2019, high-value mergers were subject to Commission control in estimated percentages between 10% and 13% of total transactions exceeding the € 1 billion threshold, and between 18% and 29% of total transactions above € 5 billion (para. 100).

[26] The acquisition of Kustomer represents the only merger by Facebook (or Meta) analysed by the European Commission until 2022 (based on a referral request by Austria and other Member States), European Commission, decision of 27 January 2022, COMP/M.10262, Meta/Kustomer, paras. 5-6. This trend was confirmed in the acquisition of Giphy by Meta (blocked in the UK and Austria) and now of Within and the virtual reality fitness app by Meta. See UK Competition & Markets Authority, 6 December 2021, ME/6891/20-II – Meta/Giphy; UK Competition Appeals Tribunal [2022] CAT 26, 14 June 2022; Austrian Kartelloberger-icht, 23 June 2022, 16 Ok 3/22k and 16 Ok 4/22g – Meta/Giphy and Federal Trade Commission, Plaintiff v. Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc., Defendants (FTC Matter/File Number 221 0040), 27 Julu 2022. A further acquisition is currently being analysed and under scrutiny by the CMA. See Competition & Markets Authority, Microsoft/Activision Blizzard, Final Report of 26 April 2023, Order of 22 August 2023).

[27] This substitution has been adopted in Austria and Germany. See Sect. 35(1a) GWB (Germany) and Sect. 9(4) KartG (Austria). See also Bundeskartellamt/Bundeswettbewerbsbehörde, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification, July 2018 (Section 35(1a) GWB and Section 9(4) KartG,). In the United States, the Federal Trade Commission ("FTC") in 2022 set the size-of-transaction-test at £101 million under Section 7A of the Clayton-Act. See FTC, Revised Jurisdictional Threshold, 24 January 2022, E 6750-01-P. Other Member States, such as Spain, have a market share threshold in addition to a turnover threshold. This means that a small but successful target in a niche market may entrench the jurisdiction of the national competition authority. The market share threshold is set at 30%, unless the target has a turnover not exceeding EUR 10 million, in which case the market share threshold is set at 50%.

[28] According to the Crémer Report (pp. 114-116), it would be necessary to wait and evaluate the functioning of the mechanism introduced by the Austrian and German systems, as well as to make sure that the alleged "gap" of protection left by the Merger Regulation is actually such as to require a rethinking of the *ex-ante* notification system. On this point, however, see also the position of M. BOURREAU, A. DE STREEL, *Big Tech Acquisitions*, cit., 15 ff. according to which, in most cases, an over-enforcement would not occur in practice as the value of the merger tends to be aligned with the turnover of the firms involved. For a contribution to the more recent discussion, see the merger between Facebook and Kustomer, when the Higher Regional Court of Düsseldorf (Oberlandesgericht) highlighted the major critical issues related to the transaction value criterion. See OLG Düsseldorf, Meta/Kustomer, November 23, 2022, Case Kart 11/21 (V). There has been no shortage, however, of alternative proposals. From calling on the Commission to place less emphasis on market definition analysis and more emphasis on theories of harm and identification of anti-competitive strategies (see Crémer Report, 5-6) to recommending that mergers, especially conglomerate mergers, be assessed in light of the new notion of the "digital ecosystem". Going through the proposal for a priority "track" for notifications of trans-

## 3. The European response

The European response is biphasic.

First of all, it passes through a "system" change that affects Article 22 of Regulation No. 139/2004 (henceforth, "Article 22 of the Merger Regulation" or, more simply, "Article 22"), through special "Guidelines".[29-30]

This is the provision that, promoting a balance between centralized European competence and decentralized enforcement, deals with the possibility that the competition authorities of one (or more) Member State(s) may request, under certain conditions, the Commission to examine a merger transaction that, since it does not integrate the (high) turnover thresholds set by the Merger Regulation, does not have a Community dimension.[31]

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actions in digital markets and a balanced approach that takes into account the likelihood of harm in merger cases involving the fact of potential competition and harm to innovation (see Furman Report, 94 ff. It has also been proposed that "dominant" platforms should be designated as having Strategic Market Status ("SMS"), what would entail greater scrutiny, reversal of the burden of proof, and subjection to *ex-ante* regulatory obligations). And going so far as to call, from several quarters, for a merger clearance process that takes greater account of technological developments, even going so far as to suggest prior notification of planned acquisitions in innovation-intensive industries (see Lear (2019), *Ex-post Assessment of Merger Control Decisions in Digital Markets – Report to the Competition Market Authority*). For a more recent contribution of ideas, please refer to V.H.S.E. ROBERTSON, *Merger Review in Digital and Technology Markets* (2022); ID., *Digital Merger Control: Adapting Theories of Harm*, nota OCSE DAF/COMP/WD(2023)59.

[29] Commission Notice, Commission Guidelines on the Application of the Referral Mechanism of Article 22 of the Merger Regulation for Certain Categories of Cases, 3/31/2021 (2021/C 113/01). The reform builds on the need for a comprehensive assessment of the effectiveness of reattribution systems in enabling merger scrutiny in innovative markets (including, but not limited to, digital markets). Reallocation mechanisms governed by the Merger Regulation and, more specifically, by a Commission Notice on Merger Referral, which introduce correctives to the rigidity of the system based on predetermined criteria relating to the turnover of the companies involved. See Commission Notice on Merger Referral, 5.3.2005 (2005/C 56/02). There are two scenarios for the referral of the case from the Member States to the Commission, which can take place, respectively, before notification at the request of the parties to the transaction or after notification at the initiative of one or more Member States. In the first case, provided for in Article 4(5) of the Merger Regulation, it is required that the transaction, falling under the definition of a concentration in Article 3 and not having a Community dimension pursuant to Article 1 thereof, can be «examined under the national competition laws of at least three Member States», appearing, therefore, to be capable of assuming cross-border impact that can be better assessed by the Commission.

[30] Commission staff working document – executive summary of the evaluation of procedural and jurisdictional aspects of EU merger control, Brussels, 26.3.2021 SWD(2021) 67 final.

[31] The prerequisites for a referral request are that the concentration affects trade between Member States and is likely to significantly affect competition in the territory of the Member

The original rationale of the rule (to be found in the objective of protecting the competitive structure of markets even in those Member States without their own merger control legislation[32]) and the practice stratified over time (aimed at discouraging requests for referrals of sub-threshold transactions, given their inability, in principle, to generate a significant impact on the structure of the EU market or a relevant part of it, with the consequent possibility of devolution and treatment of the issue at the national level) has been followed by a revirement of approach.

In the new Guidelines, the Commission warns that market developments have led to «a gradual increase in mergers involving firms that play a significant competitive role in the market(s) in question, or could play one, while generating little or no turnover at the time of the merger».[33]

Faced with the potential impact of such transactions, the Commission changes pace, encouraging and accepting, in certain circumstances, refer-

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State or states making such a referral request. See, for an introduction to the topic, K.J. CSERES, *Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities*, in *Journal of European Competition Law & Practice*, 2023; N. LEVY, A. RIMSA, B. BUZATU, *The European Commission's New Merger Referral Policy: A Creative Reform or Unnecessary End to "Brightline" Jurisdictional Rules?*, in *European Competition and Regulatory Law Review*, 2021, V, 369-371; A. LOOIJESTIJN-CLEARIE, C. RUSU, M. VEENBRINK, *In Search of the Holy Grail? The Commission's New Approach to Article 22 of the EU Merger Regulation*, in *Maastricht Journal of European and Comparative Law*, 2022, 29, 550 ff.; E. HYE KIM, M. MARQUIS, *Illumina/GRAIL: Chapter 1L the Unexpectedly Broad Merger Control Powers of the European Commission*, in *European Competition Law Review*, 2023, 44, 152 ff.; F. GHEZZI, M. MAGGIOLINO, *La nuova disciplina di controllo delle concentrazioni in Italia: alla ricerca di una convergenza con il diritto europeo*, in *Rivista di diritto societario*, 2023, I, 32 ff.; R. PODSZUN, *Thresholds of Merger Notification: The Challenge of Digital Markets, the Turnover Lottery, and the Question of Re-Interpreting Rules*, in P.L. PARCU, M.A. ROSSI, M. BOTTA (eds.), *Research Handbook in Competition & Technology*, Edward Elgar Publishing, 2024.

[32] This provision is also known as the "Dutch clause" ("Dutch clause"), introduced back in Regulation (EC) No. 4064/89, later replaced by the current Regulation No. 139/2004, due to the then absence in some Member States, including the Netherlands, of national merger control regulations. Over the years, such regulations have gradually been adopted in all EU states, currently with the sole exception of Luxembourg.

[33] According to the EUROPEAN COMMISSION, *Guidelines*, cited above, para. 9, «*[t]he developments appear particularly significant in the digital economy sector, where services are regularly promoted with the aim of building up a significant user base and/or commercially viable data inventories, before seeking to monetize the business*». At the same time, the Guidelines continue again in point 9, «*in sectors such as pharmaceuticals and other industries where innovation is an important parameter for competition, there have been transactions in which innovative firms that carry out research and development projects and have strong competitive potential have participated, even if these firms have not yet materialized, let alone commercially exploited, the results of their innovation activities. Similar considerations apply to firms that have access to or impact on assets of competitive value such as raw materials, intellectual property rights, data or infrastructure*».

rals even where the requesting Member State does not have original jurisdiction over the case.[34] To this end, and from the perspective of the impact on intra-EU trade, elements such as, among others, «the location of (potential) customers, the availability and supply of products or services [...] the collection of data in several Member States or the development and implementation of research and development projects whose results, including intellectual property rights, if successful, may be commercialized in more than one Member State» are valued.[35]

Taking, then, into consideration additional factors, other than those already contained in the 2005 Referral Notice,[36] which serve as a further "guiding compass" for directing a referral case, the Commission expressly recalls the possibility of «transactions in which the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential»,[37] including instances where one of the parties is a start-up or a new entrant with a small turnover, or a highly innovative firm, or, again, one that has access to particularly valuable competitive assets such as, for example, data, or provides products/services essential to other productions.

In addition, the Commission offers valuable guidance on the exercise of discretion in granting or rejecting a referral request. Without prejudice to the need for an assessment anchored in the specific circumstances of the case, the Guidelines reiterate that the fact that the transaction has been concluded does not prevent a Member State from submitting a referral request to the Commission (limiting, in Article 22(4), the applicability of the obligation to suspend the merger under Article 7 of the Merger Regulation

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[34] *Ibid.*, point 11.

[35] *Ibid.*, point 14. As for the presumption of significant interference with competition in the territory of the states requesting the referral, it relies on «*the creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a new or future entrant or the merger between two important innovators the reduction of competitors' ability and/or incentive to compete, including by making it more difficult for them to enter or expand in the market or by hindering their access to supplies or markets; or the ability and incentive to exploit a strong market position in one market to strengthen its position in another through tying or bundling or other exclusionary practices*». See EUROPEAN COMMISSION, *Guidelines*, cited above, para. 15.

[36] The aforementioned 2015 Referral Notice, in paragraph 45, refers in particular to economic factors to be considered for a referral request, identifying among the appropriate cases for this purpose those where the merger gives rise to competition concerns in markets with a geographic scope wider than a national territory, or where more than one national market is involved and consistent and unified treatment is appropriate.

[37] EUROPEAN COMMISSION, *Guidelines*, cited above, point 19.

to cases where it has not yet been implemented[38]). Nonetheless, an indicative time limit of six months from the implementation of the concentration is identified within which the Member State should request referral.[39] Remaining, however, well possible even a late referral, because of «the magnitude of the potential competition problems and the potential negative effect on consumers»,[40] reference is made, as a circumstance that may lead the Commission not to accept the referral, to the notification of the concentration in one or more Member States that have not then made an Article 22 referral request or acceded to a request already made.[41]

From the point of view of procedural profiles, the Guidelines focus attention on the need for close cooperation between the Commission and the competition authorities of the Member States,[42] as well as between

[38] According to the Guidelines, Section 31, this standstill obligation ceases if the Commission ultimately decides not to proceed with the merger review.

[39] EUROPEAN COMMISSION, *Guidelines*, cited above, point 21. According to the Guidelines, where the implementation of the merger is not public knowledge, this period runs from the time when the material facts relating to the merger have been made public in the EU.

[40] *Ibid.*

[41] *Ibid.*, point 22. In this regard, it should be recalled that the eventual acceptance of the referral entails the assignment of jurisdiction to the Commission limited to the jurisdictions of the requesting (or acceding) Member States, with the possibility of a parallel examination of the transaction, both by the Commission itself and by the guarantor authorities at the national level not involved in the original referral, on the basis of different regimes from the point of view of procedures and timing.

[42] The referral mechanism is based, as mentioned above, on close and constant cooperation and collaboration between the Commission and the competition authorities of the Member States, similar to the European Competition Network formed for the application of Articles 101 and 102 TFEU under Regulation No. 1/2003 where the competition authorities of the Member States and the Commission form a network of public authorities. This means that while the Guidelines require close cooperation between the guarantor authorities and the Commission, it also leaves the former with a wide margin of discretion in deciding whether or not to refer the case. This overlap raises the question of whether the same principles of Regulation No. 1/2003 should be applied to Article 22 referrals. In Sped-Pro (Judgment of the General Court (Tenth Chamber, Extended Composition), Feb. 9, 2022, Case T-791/19, Sped-Pro S.A. v. Commission), the Court of Justice addressed the question of law whether a national competition authority is able to effectively enforce competition law and adequately protect the rights of third parties. In Sped, which concerns the principles of case allocation between the Commission and NCAs, the General Court confirmed that respect for the fundamental values of Article 2 TEU applies to the Union's competition enforcement mechanisms under Articles 101 and 102 TFEU. In this judgment, the Tribunal established for the first time a direct link between systematic deficiencies in a Member State's legal system and the ability of the competition authority to investigate and take enforcement action under Union law and to adequately protect the rights of the complainant. Enforcement authorities remain subject to a number of core obligations under Union law. Member States must use their prerogatives to facilitate the application

them and each other, in order to identify transactions eligible for referral under Article 22, based on the substantive requirements analyzed above.[43] To this end, information on a merger may be submitted voluntarily by the parties, prior to its implementation, but also by third parties, provided it qualifies as «sufficient information to make a preliminary assessment of whether the criteria for referral are met».[44] Again, in a spirit of loyal cooperation between the parties involved, the Guidelines hope that the firms involved in the transaction may consider delaying its implementation if they are informed by the Commission that a request for referral is being considered, although they are not formally bound to take any such action or refrain from implementing the merger.[45]

In setting the maximum deadline of 15 working days for submitting the request for postponement (in the absence of any notification obligation) starting from the moment in which the concentration was "made known" to the Member State,[46] the Guidelines gloss on this final definition, which,

of Articles 101 and 102 TFEU. The principle of effectiveness, which is a central element of Regulation No. 1/2003 and Directive No. 2019/01, requires Member States not to make the application of Union law excessively cumbersome. In addition, they must ensure that the "internal" rules they establish or apply do not undermine the effectiveness of the application of Articles 101 and 102 TFEU, and is the legal basis for the establishment of independence requirements in Union law regarding competition authorities and other regulators, as reflected in Directive (EU) 2019/1 (so-called ECN+). Accordingly, even if the formal independence of competition authorities is guaranteed, Member States should refrain from adopting legislative or other measures that effectively undermine the independence of their authorities. By analogy, given the principles of cooperation under Regulation No. 1/2003 and the judgment of the General Court in Sped-Pro, one could argue in favor of overlapping between the principles underlying Article 22 and Regulation No. 1/2003. See K.J. CSERES, op. cit., 10 ff.

[43] Some Member States' competition authorities have long had a clear policy of not making referrals when they themselves do not have jurisdiction to review a merger, and it appears that this approach will be held firm. But other authorities have been more open to the use of this tool. In 2022, Article 22 led to a duplication of merger review in the Meta/Kustomer case, where the Austrian authority sought a referral of the acquisition by Meta, while Germany refrained from doing so. As a result, the Commission and the Bundeskartellamt examined the merger in parallel, since the referral to Austria did not imply exclusive jurisdiction for the Commission. This may weaken the one-stop-shop principle, but it poses a challenge to the coherence of merger control systems in Europe. See European Commission, Decision of January 27, 2022, COMP/M.10262, Meta/Kustomer (cited above in footnote [-]) but also Bundeskartellamt, Meta/Kustomer (B6-37/21, December 9, 2021).

[44] *Ibid.*, point 25. Given this broad wording, paragraph 25 highlights the full discretion in the hands of the Commission and the Member States' guarantor authorities as to what, if any, subsequent action should be taken, including limiting the use of this communicated channel, however activated by third parties unrelated to the merger transaction.

[45] *Ibid.*, point 27.

[46] *Ibid.*, point 28. The Guidelines, in the wake of Article 22, paragraph 3, first paragraph,

similarly to what is indicated in the 2005 Communication on the referral of cases, can result in the «*making available of sufficient information for a preliminary assessment of the existence of the requirements for evaluating the referral*» [47] (provided for by Article 22).

In a subsequent phase, the European response is enriched (integrating the overall framework) with the Digital Markets Act ("DMA"), which aims to ensure contestable and fair markets in the digital sector and applies to those large online platforms qualified as "gatekeepers", i.e. companies that provide "basic platform services". [48]

Article 14 of the DMA requires gatekeepers to inform the Commission of any proposed merger «if the merging entities or the target of the merger provide basic platform services or any other service in the digital sector or enable the collection of data». [49]

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recall, in point 30, that the Commission may, at the latest within 10 working days from the expiry of the 15 days within which the Member States can comply with the request for referral, decide to examine the concentration if it considers which affects trade between Member States and risks significantly affecting competition in the territory of the requesting State or Member States. If the Commission does not take a decision within that period, it is deemed to have decided to examine the concentration in accordance with the request.

[47] *Ibid.*

[48] Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 14, 2022 on fair and contestable markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Regulation). The DMA was approved by the European Parliament and Council last September 14, 2022 and published in the Official Journal the following October 12, 2022. The DMA officially entered into force last November 1, 2022 and will be applicable as of next May 2, 2023. Last December 9, 2022, the European Commission published a draft implementing regulation on the implementation of the DMA, on which interested parties could submit their comments until last January 6, 2023. However, the preparatory work was relatively short, if troubled. The main stages of approval are summarized below, starting with the Proposal for a Regulation of the European Parliament and of the Council on Fair and Contestable Markets in the Digital Sector (Digital Markets Act), COM(2020) 842 final, 2020/0374(COD), December 15, 2020. Subsequently, the so-called Internal Market and Consumer Protection Committee ("IMCO") in the European Parliament adopted its position on the DMA proposal on November 23, 2021, with 42 votes in favor, 2 against, and 1 abstention, which was then voted in plenary on December 15, 2021, confirming the mandate of the European Parliament for the negotiations. In parallel, the Council – and, specifically, the "Competitiveness Council (Internal market and industry)" – unanimously endorsed its position in favor of adopting the DMA on November 25, 2021. The multilateral dialogue and negotiations among the co-legislators started in early 2022. On March 24, 2022, the European Union presented the final (and updated) text of DMA, agreed upon as a result of the trilateral negotiations between the European Commission, the European Parliament, and the Member States (led by the French Presidency at the European Council), which was endorsed by the representatives of the Member States on May 11, 2022.

[49] In addition, the Commission may prohibit for a limited period of time gatekeepers from initiating a merger regarding basic platform services or other services provided in the digital

This is an obligation independent of the recurrence of the application requirements of the Merger Regulation or national merger rules. In addition to this, Article 14 obliges the gatekeeper to provide the Commission with detailed information regarding the intended merger,[50] which can be used for the review process regarding the status of individual gatekeepers, to adjust the list of basic platform services provided by gatekeepers, and to monitor broader trends in contestability in the digital sector, representing, in addition, a useful factor to be considered in the context of market investigations under the DMA.[51] Article 14 concludes, in the last two paragraphs, by providing that the Commission shall inform the competent national authorities of the Member States of planned concentrations that have been notified to it[52] and, at the same time, by allowing the same guarantor authorities of the Member States to use this information for the purpose of scrutinizing acquisitions at the national level,[53] as well as to refer proposed concentrations to the Commission pursuant to Article 22 of the Merger Regulation[54-55].

The new provision is to be read in conjunction with Article 18 of the DMA, whereby, in the case of systematic noncompliance with the DMA,

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sector or services that enable the collection of data in the case of systematic violations under Article 18(1) of the DMA.

[50] According to Article 14(2) of the DMA, «*[t]he information provided by the gatekeeper [...] shall at least describe the undertakings concerned by the concentration, their annual turnovers in the Union and worldwide, their sectors of activity, including activities directly related to the concentration, and the transaction value of the agreement or an estimate thereof, together with a summary relating to the concentration, including its nature and rationale, and a list of the Member States concerned by the concentration*».

[51] See Recital 71 of the DMA, which adds that «*the Commission should make the Member States aware of this information, given the possibility of using it for national merger control purposes and because, in certain circumstances, it is possible that the competent national authority may refer such acquisitions to the Commission for review for merger control purposes*» and that «*[t]he Commission should [...] publish annually a list of acquisitions of which it has been informed by the gatekeeper*».

[52] See Article 14(4) of the DMA.

[53] See Article 14(5) of the DMA.

[54] See again Recital 71 and Article 36 of the DMA.

[55] After all, the opportunity to establish a level of cooperation between different authorities at the national and Union level is not a hypothesis foreign to the application of European competition law, being able to leverage a new legislative framework aimed at strengthening the prerogatives and guarantees of independence of national competition authorities, with a view to ensuring further convergence of the procedures and instruments provided at the national level. Reference is made to the process of decentralization of European competition enforcement, implemented with Regulation (EC) No. 1/2003 that introduced the European Competition Network and further developed with Directive (EU) 2019/1 (so-called ECN+).

the Commission may adopt a decision providing for behavioral and structural remedies and, in particular, that the gatekeeper be precluded from completing further acquisitions in the digital sector for a limited period.[56] However, before the Commission can impose such remedies, the gatekeeper must have been subject to three previous noncompliance decisions in the previous eight years.[57] While not of immediate interest to gatekeepers, Article 18 of the DMA testifies to and confirms the general impression that the European legislature would "ill tolerate" mergers in the digital sector that have not been subject to prior scrutiny.

The scenario is, therefore, quite multifaceted, with such sharing of information among multiple institutional levels (between Member State authorities and the Commission) expected to broaden the range of mergers subject to the "guillotine" of the merger control regime provided in the Union.[58]

## 4. The national revival

The European motion is matched by a parallel "domestic" reform triggered by an AGCM Report to the Government pursuant to Article 47, paragraph 2, Law No. 99/2009, in which, for the purpose of the preparation of the annual bill for the market and competition,[59] it is pointed out that the «notification system based on the current size of companies [rectius, on turnover] risks being inadequate in capturing the development in

[56] See Article 18(2) of the DMA.

[57] See Article 18(3) and Article 29 of the DMA.

[58] F. SCHÖNING, F. VON SCHREITTER, *Showcases and showstoppers: the DMA's impact on merger control in digital markets*, in *Competition Law & Policy Debate*, 7(3), 2022, 121-129; V.H.S.E. ROBERTSON, *The future of digital mergers in a post-DMA world*, in 44 *European Competition Law Review*, Issue 10, 2023, 447 ff.; R. PODSZUN, *op. cit.*, 1, 13. However, neither (the likely) increase in referrals under Article 22 of the Merger Regulation nor the promotion of information exchange among authorities under Article 14 of the DMA are likely to "disrupt" the substantive standards for merger review within the Union, which, in fact, remain in force and applicable (with the related "traditional" case history on the Merger Regulation that has been layered over the years).

[59] AGCM, Report S4143, Proposals for competitive reform, for the purposes of the Annual Market and Competition Law, year 2021, sent to the Prime Minister on March 21, 2021. This Notice pointed its attention to a plurality of areas and markets in which it advocated an intervention to open markets to competition and, as far as it is of interest here, it also proposed certain amendments and additions to the general framework of the provisions on the control of mergers between companies.

perspective of the companies involved in merger operations as well as in preventing the formation of local monopolies».[60]

This resulted in DDL 2469 – Annual Market and Competition Law 2021 ("DDL Competition 2021"), which was merged into Law No. 118 of August 5, 2022 (henceforth, "L. No. 118/2022"), which, in Article 32 under the heading "Mergers", affects the foundations of the substantive and procedural domestic merger regulation.

Building on the experience of other systems,[61-62] in which it was intended to complement the current mandatory system of notification by companies, it provides for the competition authority to require, by giving reasons, the notification of sub-threshold mergers of which it has become aware, circumscribing the time frame within which it can screen transactions after they have been implemented.

More specifically,[63] Law No. 118/2022 closes, in the last sentence of Article 6, Paragraph 1, with an addition "in principle", by virtue of which the AGCM may assess the anti-competitive effects arising from the acquisi-

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[60] The Report continues, on p. 53, recalling that «[t]he challenge comes, for example, from the digital economy-where there is an increasing phenomenon of large market players acquiring potential future competitors-but it also affects traditional industries, where some mergers may have a significant impact on local geographic markets, but the turnover of the companies involved does not exceed the thresholds for notification».

[61] On January 18, 2021, the tenth amendment to the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) came into force, which aims to reform the previous framework in order to produce a discipline proactively aimed at the digital sector. This amendment repealed the transaction value criterion-among the solutions provided for assessing problematic transactions prospectively that may escape the mandatory notification system based on turnover thresholds-to replace it with the recognition of a power in the Bundeskartellamt to require notification of sub-threshold transactions from companies in certain economic sectors when it has objective evidence that further mergers may have a negative impact on competition. In such cases, regardless of the general turnover thresholds under the mandatory notification system, the Bundeskartellamt may require notification of mergers based on certain conditions regarding the turnover and market shares of the companies involved. The Bundeskartellamt may exercise this power but only after completing a formal sectoral investigation covering at least one of the economic sectors affected by the merger. In addition, decisions requiring notification can be appealed by firms.

[62] In the U.S., the Hart-Scott-Rodino Act (HSR Act) specifies the thresholds under which notification is mandatory (based on the value of the transaction and the economic capacity of the natural persons traceable to the parties). However, the U.S. merger regime is flexible in that it allows the FTC or DOJ to investigate and challenge even completed merger transactions if they are likely to result in a substantial lessening of competition. Therefore, the FTC or DoJ can intervene, even if the transaction has already been concluded and even if the transaction does not meet the mandatory notification thresholds.

[63] Changes not covered in this commentary include the introduction of a new concept of turnover for banking and insurance companies in Article 16 of the Antitrust Law.

tion of control over small companies characterized by innovative strategies, including in the field of new technologies.

Thus, with a new paragraph 1-*bis* to Article 16 of the Antitrust Law, it is stipulated that in parallel with the traditional obligation of prior notification for merger projects between companies that meet certain thresholds in terms of turnover, the AGCM is given the power to require, under certain conditions, the notification of so-called 'sub-threshold' merger transactions,[64] for which the following three cumulative conditions are met: (i) only one of the two turnover thresholds indicated in Article 16(1) of the Antitrust Law is exceeded, or the total worldwide turnover achieved by the set of companies concerned is more than five billion euros; (ii) there are concrete risks for competition in the national market or in a relevant part thereof, also taking into account the detrimental effects on the development and diffusion of small enterprises characterized by innovative strategies; (iii) the transaction has been finalized not more than six months.[65]

In this regard, the legislature refers to the AGCM calling it to define with a general measure the procedural rules for the application of the same Article 16, paragraph 1-*bis*.[66]

Lastly, Article 35 of Law No. 118/2022 introduces Article 16-*bis*, which allows the AGCM to request information and documents regarding mergers between companies from any company that has them in its possession, both within the scope of investigations and also outside of the investigative activity. An obligation, the latter, aimed at gathering information on sub-threshold merger operations, either in progress or already completed, that could fall within the scope of Article 16, paragraph 1-*bis*.

In addition to the time limit within which it would be possible to request notification of the transaction,[67] the December 13, 2022 Notice lin-

[64] Pursuant to Article 16, Paragraph 1 of Law No. 287/1990 (as amended by Article 1, Paragraph 177 of Law No. 124/2017 – "Annual Law for the Market and Competition" and Article 32 of Law No. 118/2022, mergers must be notified in advance to the AGCM when (i) the total turnover achieved at the national level by the set of companies concerned exceeds € 492 million; and (ii) the total turnover achieved at the national level by at least two of the companies concerned exceeds € 30 million. These thresholds are increased each year by an amount equivalent to the increase in the gross domestic product price deflator index.

[65] The legislature stipulates that the AGCM is to be called upon by the legislature to define the procedural rules for the application of the new Article 16, paragraph 1-*bis*, by its own general measure, in accordance with the European Union legal system.

[66] AGCM, December 13, 2022, Notice on the application of Article 16, paragraph 1-*bis*, of Law No. 287 of October 10, 1990, in *Bulletin*, 46, 2022. The draft had been published on the AGCM website on October 27, 2022.

[67] The AGCM notes that a concentration «*is understood to be perfected when the effect of ac-*

gers on the substantive scope of the power to request notification and specifies that it can be exercised if «there are concrete risks to competition in the national market, or in a relevant part of it, also taking into account the detrimental effects on the development and diffusion of smaller firms characterized by innovative strategies»,[68] distinguishing between sub-threshold transactions that could lead to detrimental effects (likely, especially in niche or local markets) and transactions involving firms whose turnover is not yet indicative of a competitive constraint. As for the former, the AGCM, taking its cue from the Commission's Guidelines on the assessment of concentrations of a horizontal[69] and non-horizontal (hence vertical or conglomerate) nature,[70] opts for a more operational solution and, in general, one that is part of the antitrust practitioner's "cultural" baggage, namely to identify concentrations that, in principle, do not raise particular risks rather than to define, in the positive, which operations give rise to concrete risks to competition.[71]

Alongside these elements, the Guidelines identify two 'tolerance values' related to market power, although the Notice merely states that, below these thresholds, it is 'unlikely' that the Authority will require notification because it considers there to be a real risk to competition. With regard to mergers with horizontal effects, the first threshold is the market share, in the context of which a maximum threshold of 25 percent has been set (an identical percentage is indicated both in the Commission's Guidelines and in the recitals preceding Regulation No. 139/2004) below which the

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*quiring control is produced. In light of this general criterion, where a concentration is carried out through a complex sequence of negotiations, the maximum time limit within which it would be possible to request notification to the Authority of a concentration transaction is six months from the date of the conclusion of the final contract (so-called closing), i.e., from when the transfer of control takes place*». See Notice, para. 2(i).

[68] See Communication, para. 2(ii).

[69] See EU Commission, Guidelines on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU 2004, C31, February 5, 2004, 5, §§ 76-88.

[70] EU Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJEU, C265, October 18, 2008, 6, §§ 12-14.

[71] First, according to the AGCM, certain factors of a general nature that pertain to the first constraint on the exercise of market power (which identifies the current power relations in the relevant markets) will need to be taken into account, such as (i) the structure of the markets; (ii) the characteristics of the players involved; (iii) the nature of the activity carried out by the firms involved and its relevance to consumers and/or other firms; (iv) the relevance of the innovative activity being carried out; and (v) the competitive constraint exerted by one or more firms beyond market share.

AGCM is unlikely to require notification of a horizontal merger. The second value is the Herfindahl-Hirschman index ("HHI"): [72] to assess whether a merger raises competitive risks, it is necessary to calculate the absolute value of the post-merger index and the increase it has undergone as a result of the merger. [73]

Relative to mergers of a vertical and/or conglomerate nature, sub-threshold transactions should not raise significant competitive concerns (and, therefore, not be subject to possible scrutiny by AGCM) if the merged firm's market share in the affected markets is less than 30 percent and the HHI value remains below 2,000 points.

In addition to sub-threshold transactions, the second category of potentially competitively critical transactions are those for which turnover is not indicative of the size and competitive strength or potential of the firms involved in the transaction. Most relevantly, the Notice calls for taking into account the value of the consideration received by the seller, if high relative to the acquired firm's current turnover, but adds additional parameters, namely that a firm: «(i) [is] a start-up or a new entrant with significant competitive potential that has yet to develop or adopt a business model that generates significant revenues (or is still in the early stages of implementing such a model); (ii) [is] a major innovator or is conducting potentially important research; (iii) [is] an important current or potential competitive force; (iv) [has] access to competitively significant assets (such as raw materials, infrastructure, data, or intellectual property rights); and/or (v) provides products or services that are key inputs/components for other industries». [74]

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[72] The Herfindahl-Hirschman Index (HHI) is a market concentration index calculated as the sum of the squared values of the market shares of each corporate group. It takes values between 0 (perfect competition) and 10,000 (monopoly). Values below 1,000 are commonly considered to represent competitive markets. Values above 2,000 are considered indicative of a critical competitive dynamic, while values between 1,000 and 2,000 highlight situations that also need to be evaluated with more information and analysis than just the level of the HHI.

[73] Rephrasing slavishly the three scenarios found in the Commission's Guidelines, it suffices to mention that the lower the post-merger HHI and the smaller the change in this index, the smaller the impact of the transaction on the structure of the relevant market and the negligible the resulting competitive concern. It is stated in the Notice, para. 2(ii) that «[it is] unlikely that, in the context of a merger of a horizontal nature, the Authority would consider a concrete risk to competition to exist: 1. in a market where, after the merger, the HHI index is less than 1. 000; 2. if, after the merger, the HHI index is between 1,000 and 2,000 and the delta is less than 250; 3. if, after the merger, the HHI index is greater than 2,000 and the delta is less than 150, unless special circumstances are present».

[74] All the factors listed are a repetition of what has already been reported in the Commission's Guidelines on the Application of the Referral Mechanism in Article 22 of the Merger Regulation.

In addition to bringing back further considerations in relation to the scope of the power to require the notification of transactions ratione loci, which is traditionally exercisable, according to Article 16, paragraph 1-*bis*, of the Antitrust Law, only where there are concrete risks to competition in the national market or in a relevant part of it, the AGCM takes, however, a step further and also examines the hypothesis in which none of the companies involved in the concentration operation realizes sales in Italy. The school case is that of a large company (with a turnover of more than 5 billion euros), which entirely realizes its sales outside Italy and finds itself acquiring control of an Italian company, which, in turn, does not (yet) realize any turnover. This is likely to be the situation where the object of the acquisition is a company that: (i) has recently started business and has not yet begun the phase of production and marketing of goods and services (think of pharmaceutical start-ups about to be granted the right to the industrial exploitation of a new process through a patent) or (ii) has decided to distribute its goods and services at a zero price in order to build its initial "customer base" and only later initiate the phase of marketing the service, selling advertising, or selling the data collected and processed, depending on the chosen business model.[75]

Having clarified the temporal and substantive scope, the second part of

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[75] In order to "anchor" the transaction "to the national market" (or a relevant part thereof), the Notice proposes to consider, by way of example: the diffusion in Italy of the activities concerned among the users/consumers of the services of the companies involved, even if they are services that are not provided for monetary consideration (the Notice continues that if they are services that are not provided for monetary consideration, reference may be made to the daily or monthly number of users of such digital services residing in Italy or to the number of accesses of individual users residing in Italy to a given website); the location in the national territory of the company's headquarters, production facilities and/or research or experimentation laboratories the conduct of R&D activities potentially relevant to the national market (according to the Communication, it could be relevant, by way of example, that the results of the research are marketable in the national territory, the ownership of a particular patent or having started the approval process for a drug that can be distributed in the national territory); the existence of a plan to enter the domestic market (the Notice alludes to the prospect of opening production plants, of the occurrence or imminent hiring of personnel, of the processes of obtaining authorizations to trade or of the expectation of concluding sales contracts, again in Italy); and, finally, any other significant link with the domestic market or a relevant part thereof that emerges from the characteristics of the transaction. It will not escape one's notice that there is nothing to be found to bring these transactions back into the group of those potentially likely to have a significant impact on domestic competition. There is, in fact, a lack of any impact on market share and the degree of concentration, even taking into account that the criteria just listed, far from being illustrative of any element of competitive criticality of the operation, serve, rather, as prospective (and, consequently, irrelevant) criteria about the entry and future impact of a concentration in the national territory.

the Notice deals with procedural aspects. Preliminarily, it has already been mentioned above that the deadline of six months from the completion of the concentration transaction is the time window-limit within which the AGCM can exercise its power to request notification to the companies concerned in a reasoned manner.[76]

As for the procedural aspects, the Notice, in addition to not clarifying whether the notification request is deliberated by the College or adopted by the AGCM Offices, informed the College, failed to highlight a crucial point, which relates to the timing of the notification request.

The provision of a deadline of six months from the completion of the transaction as the maximum time limit for the exercise of the AGCM's power remains a source of great uncertainty for companies. It should be considered that, in addition to this time limit, there are the thirty days within which the addressee of the request must make the notification and the additional thirty days ('Phase I') within which the AGCM can initiate the investigation, if it considers that the concentration is likely to be prohibited, as well as to follow the forty-five days for the conclusion of any in-depth examination ('Phase II'). The overall duration that the process can theoretically reach affects the planning and risk allocation requirements that characterize merger policies among firms and the definition of the related contracts.[77]

Well, in addition to the power to act ex officio and upon notification of

[76] It is interesting to note that Law No. 118/2022 does not, on the other hand, provide for a deadline for sending the request from the moment when the AGCM has acquired the elements regarding the existence of the requirements of Article 16, paragraph 1-*bis* (as is the case for the request by the Member States to the Commission under Article 22 of the Merger Regulation, in order to allow the latter to assess sub-threshold mergers).

[77] In order to mitigate the problem, in keeping with the principles of legal certainty and good administration, it would have been preferable to adopt a criterion that, even at the cost of greater vagueness, would have been under the banner of greater celerity. For example, the criterion could have been invoked of the AGCM's transmission without delay to the companies concerned of the notification request, once sufficient information had been acquired to assess the existence of the conditions for the application of Article 16, paragraph 1-*bis*. The Notice points out that, in order to ascertain the existence and scope of a concentration transaction relevant under Article 16, paragraph 1-*bis*, the AGCM may make use of the investigative powers under Article 16-*bis*, paragraph 1, i.e., it may at any time request companies or entities in its possession to provide information and produce relevant documents. In the event that the AGCM has availed itself of this power (most likely with reference to transactions in the public domain/disseminated through the press, or reported by third parties), the receipt of the requested information and documents should constitute the moment at which sufficient knowledge can be said to be integrated to assess whether the conditions for the application of Article 16, Paragraph 1-*bis* are met. Therefore, it is with respect to this moment that, in this alternative proposal, the AGCM should without delay request notification of the transaction.

third parties or of the interested parties themselves, the Notice examines the new Article 16-*bis*, paragraph 1, in the mind of which the AGCM may at any time (and thus even before initiating proceedings) request companies and entities in its possession to provide information and produce useful documents. This power, which constitutes, therefore, the "gateway" for the purpose of identifying the cases to be subjected to the notification request, is assisted by severe sanctions, in case of failure to comply within the (reasonable) time limits set by the AGCM.[78]

Upon receipt of the request, the notification of proposed concentrations must be made within thirty days[79] in the manner provided in the case of mandatory prior notifications and using the form prepared by the AGCM and published in the Bulletin, in which the information, attachments and elements necessary for the assessment are requested.

But more relevantly, the general provisions on the assessment of merger transactions, as well as the relevant provisions of Presidential Decree No. 217 of April 30, 1998, apply to transactions notified under Article 16, Paragraph 1-*bis*. In addition to the publicity for the request for disclosure of sub-threshold transactions (with related publication on the AGCM's website of the notice of the notification), the AGCM issues a measure of non-initiation of the investigation where it considers that the transaction does not pose a risk to competition[80] and, on the contrary, in the event that it considers that the communicated concentration transaction is likely to be

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[78] By order of the AGCM, parties who are requested to provide or exhibit items are subject to the administrative pecuniary sanctions set forth in Article 14, paragraph 5 of the Antitrust Law if they refuse or omit to provide the information or exhibit the requested documents, or if they provide untruthful information or exhibit untruthful documents, without justification. It is necessary to give the requested companies a reasonable period of time, also in view of the complexity of the information in question, however, not exceeding sixty days, renewable by reasoned request, to respond to the requests for information made.

[79] If notification is not made within the specified time limit, the sanctions referred to in Article 19, paragraph 2, of the Antitrust Law are imposed on the recipient of the request. In one of the few points in which the finally approved Notice differs from the draft, it is specified that the AGCM nevertheless reserves the right, in exceptional cases, and on the basis of a reasoned and timely application by the companies concerned, to extend the aforementioned deadline by an additional thirty days.

[80] For mergers that do not hinder competition, Article 18, paragraph 2, of the Antitrust Law becomes applicable, according to which «where in the course of the investigation no elements emerge that would allow an intervention against a merger operation, it shall provide for the closure of the investigation, and shall immediately notify the enterprises concerned and the Minister of Industry, Commerce and Handicrafts of its conclusions on the matter. Such action may be taken at the request of the enterprises concerned, which prove that they have eliminated from the original concentration project any elements that may distort competition».

prohibited under Article 6 of the Antitrust Law, the AGCM must initiate the investigation within thirty days of receipt of the complete notification.

Finally, the AGCM Notice points out that the possible formulation of the request under Article 16, paragraph 1-*bis* does not preclude the exercise of the power of referral to the Commission under Article 22 of the Merger Regulation, if the conditions are met.

## 5. The knots of effectiveness in the European forum

The first judicial "test case" of the new European regulatory framework was not long in coming.

We are referring to the Illumina/Grail case [81] and, more specifically, to the action for annulment brought before the General Court of the Union on April 28, 2021 by the U.S. pharmaceutical company Illumina following the Commission's decision to accept a referral under Article 22 of the Merger Regulation to examine that company's acquisition of competitor GRAIL, also based in the U.S. [82]

This was a transaction that did not meet the thresholds of Community dimension, nor had it been notified in any Member State, but it was the subject of a referral request proposed by the French competition authority [83] and upheld by the Commission, arguing that the merged entity could produce foreclosure effects against GRAIL's competitors active in cancer genomic testing and noting how GRAIL's competitive potential was not matched by its limited turnover. [84]

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[81] See J. MULDER, W. SAUTER, *A new regime for below threshold mergers in EU competition law? Le sentenze Illumina/Grail e Towercast*, in *Journal of Antitrust Enforcement*, 2023, 00, 1-11.

[82] European Commission, Decision of April 19, 2021, Case COMP/M.10188, Illumina/Grail.

[83] The antitrust authorities of Belgium, the Netherlands, Greece, Iceland and Norway had also later joined this request.

[84] It is worth noting that, in parallel, the merger examination procedure between Illumina and GRAIL was underway: the opening of the so-called Phase II due to the possible anticompetitive effects of the transaction (see European Commission, Decision of July 22, 2021, Case M.10188, Illumina/GRAIL), was unexpectedly followed by its implementation by the companies, in violation of the suspension obligation under Article 7 of the Merger Regulation. In parallel, as communicated on August 20, 2021, the Commission will continue to investigate whether Illumina and GRAIL's decision to implement their transaction pending the Commission's assessment of the merits of the merger constitutes a violation of European rules that could trigger the imposition of a fine. Hence, the Commission's subse-

In this case, therefore, for the applicants, Article 22 of the Merger Regulation could not be invoked, since, functionally speaking, the purpose of the rule would only be to allow a Member State that did not have a merger control system to make a referral request in order to prevent a transaction affecting its territory from remaining unscrutinized. On the other hand, if a Member State had its own merger legislation, it could well have exercised its jurisdiction to control acquisitions without a European dimension. It would not, therefore, be possible for the member State to invoke Article 22 to subject to Commission scrutiny a Merger that the Member State itself deemed not worthy of scrutiny under its own domestic legislation.

Well, the Tribunal's analysis [85] moves from the breadth of the tenor of the provision, as Article 22 refers to "any concentration" that may be reviewed by the Commission at the request of Member States. [86] Although the original Dutch clause was originally aimed at Member States without their own merger control legislation, subsequent legislative amendments and the general structure of the Merger Regulation suggest, in the Tribunal's view, that Article 22 can be applied to other case. [87] Without prejudice to the fact that the main criterion for determining the scope of application of the Merger Regulation and the extent of the Commission's powers, the Tribunal continues, «is whether the turnover thresholds defining the Community dimension are exceeded, other referral mechanisms play a "hinge" role in the architecture of merger control». [88]

Ultimately, the purpose of the Merger Regulation is, according to the Tribunal, to enable effective control of all mergers that significantly affect competition within the Union, and the referral mechanism of Article 22

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quent adoption of interim measures under Article 8(5) of the same Regulation in order to restore conditions of effective competition during the pendency of the proceedings (see European Commission, Decision of October 29, 2021, Case M.10493, Illumina/GRAIL). On September 6, 2022, the Commission prohibited Illumina's acquisition of GRAIL on the grounds that the merger diminished the level of innovation and reduced choice in the emerging market for blood-based early cancer detection tests and that Illumina had not offered sufficient remedies to address these competitive concerns. See European Commission, Decision of September 6, 2022, Case M.10188, Illumina/GRAIL and related press *release Mergers: Commission prohibits acquisition of GRAIL by Illumina*, IP/22/5364, September 6, 2022, *found online*.

[85] EU General Court (Third Chamber, Extended Composition), judgment of July 13, 2022, Case T-227/21, Illumina Inc. v. Commission.

[86] *Ibid.*, §§ 89 ff.

[87] *Ibid.*, §§ 97-117 e 123-124.

[88] *Ibid.*, §§ 123-124.

operates as a corrective mechanism in this regard.[89] All of the Tribunal's "dimensions" of analysis, the literal, historical, contextual and teleological, leaned in the same direction, namely that of confirming the Commission's jurisdiction.

The Tribunal, moreover, rejected Illumina's argument that the referral request was untimely. As mentioned, Article 22 specifies that Member States must refer a case to the Commission within 15 working days of the notification of the merger, or from the time the merger was otherwise "made known" if notification is not required. Illumina argued that the merger was announced in September 2020, several months before the referral. However, the General Court interpreted the phrase regarding the cognizability of the transaction to mean the pro-active transmission of information to the Member State concerned, which would enable it to assess whether the necessary conditions for referral had been met. It was held that it is not knowledge about the existence of the merger, but rather the Commission's letter of invitation that allows the national guarantors to make the necessary preliminary assessment as to the conditions for the application of Article 22. Since the letter was dated February 19, 2021, and the referral request was submitted on March 9, 2021, the latter communication took place within the 15 working day period, thus satisfying the Commission's invitation letter the "making aware" requirement of Article 22(1).[90]

The Tribunal noted, however, that the Commission must, in any case, meet reasonable deadlines in the context of the additional grievances alleging violation of the principles of legal certainty and good administration. The Tribunal found a 47-day delay between the complaint and the letter of invitation unreasonable, while confirming that this procedural irregularity had not affected Illumina's ability to defend itself effectively.[91]

The appellant could not invoke the recalibration of the Commission's policy on this point, and the Tribunal, therefore, rejected the request to annul the Commission's decision.

While waiting for the appeal before the Court of Justice to "come to maturity",[92] the debate has been enriched in recent months by the findings

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[89] *Ibid.*, §§ 165 e 177.

[90] *Ibid.*, §§ 200 ff.

[91] Note that Item 21 of the Guidelines on Article 22 establishes a general deadline of 6 months from the closing of the transaction for acceptance of a referral.

[92] Court of Justice, Appeal brought on September 30, 2022 by Grail LLC against the judgment of the General Court of July 13, 2022 (Case T-227/21, Case C-611/22 P, Illumina Inc. v.

of a further ruling, that of the Towercast case, which has addressed an issue that has long remained under the radar, namely whether Article 102 TFEU can be applied to the latter, to European (and national) merger control rules. The starting assumption is that the European Union has been built on a rigid division of competences, based on two distinct legislative frameworks with regard to the behavioral and structural effects of the rules set up to protect competition, and Article 21(1) of Regulation No. 139/2004 confirms this by providing that the latter applies only to mergers, as defined in Article 3, and consequently Regulation No. 1/2003 concerning the application of Articles 101 and 102 TFEU is outside the perimeter of application to mergers. At stake in the Towercast case is the interpretation of this "division of labor", which goes back, in effect, to the Continental Can case, in which the Court of Justice had ruled, for the first time, that the Commission could legitimately apply Article 102 TFEU to mergers between undertakings.[93] What triggered the push for systematic *ex-ante* merger control in order to supplement and complement the enforcement of Articles 101 and 102 TFEU.[94]

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Commission). Most recently, by Order of the President of the Court dated March 10, 2023, Biocom California's right to intervene was recognized.

[93] The 1973 Continental Can case is often seen as the starting point for the introduction of a Europe-wide *ex-ante* merger control system based on turnover thresholds. See Court of Justice, Judgment of February 21, 1973, Case 6/72 Euroemballage and Continental Can v. Commission.

[94] The fact that the issue is fiercely debated can also be deduced by looking at domestic administrative jurisprudence, in which doubts have continued to be raised as to whether the other rules protecting the proper functioning of the markets could apply to certain categories of "below-threshold" transactions, such as the prohibition of agreements and the prohibition of abuse of a dominant position. And, in fact, part of the administrative jurisprudence has, for example, stated that, if the concentration operations were subject to analysis by the competition authorities outside the specific regulations, «the system of protection would be irremediably compromised prepared there also in the interests of businesses. In fact, in violation of the principle of legal certainty and freedom of economic initiative, the effects of the concentration operations could be jeopardized or even overwhelmed, years after the Authority became aware of them, because they were subsequently deemed capable of hindering the relevant market in an anticompetitive manner». In other words, it would be an "artificial disapplication of the regulations on concentrations". See, in this sense, TAR Lazio, sentence of 24 March 2022, n. 3334, with reference to AGCM, A523 – TicketOne/Exclusionary conduct in the sale of tickets, Provv. n. 28495 of 22 December 2020, in Bull. n. 4 of 25 January 2021. On the other hand, the Council of State, with sentence of 28 October 2022, n. 3494, while confirming the annulment of the AGCM provision, did not share the approach of the Lazio TAR, recalling that, on the basis of European jurisprudence, the applicability of the articles is not excluded. 101 and 102 TFEU to concentration operations that do not fall within the scope of application of the Merger Regulation. Textually, according to the Council of State (point 11), «However, a clarification appears to be necessary in reference to the TAR's assumption, which deemed the provision's approach to be incompatible "with the Euro-unitary regulations on concentrations, and specifically with

The case originated from a preliminary reference from the Cour d'appel de Paris to the Court of Justice concerning questions relating to the interpretation of the aforementioned Article 21(1) of the Merger Regulation.[95] The reference for a preliminary ruling stem from Towercast's challenge to a decision of the Autorité de la concurrence that had failed to act on its complaint that the acquisition by Télédiffusion de France ("TDF") of their common competitor, Itas, constituted an abuse of a dominant position. Towercast, TDF and Itas were active in the wholesale digital terrestrial television broadcasting market in France, and the acquisition transaction was below the turnover thresholds set by the Merger Regulation and the French national merger control provisions, which, in this case, were not applied. The same applies to the Article 22 referral to the Commission, which was absent in that case (unlike in the Illumina/Grail case).

Well, through the preliminary reference it was a question of whether Article 102 TFEU plays an integrative role of a lacuna with respect to national merger control rules. This meant ruling on the following question, namely, whether Article 21(1) of the Merger Regulation limits the assessment of mergers and thus excludes the parallel or subsequent application of Article 102 TFEU. In other words, the question is whether Article 102 is still applicable in the event that, during the evaluation of the concentration, anti-competitive conduct emerges that is distinct from the analysis of the acquisition itself.

Advocate General Kokott's Conclusions focus on the primary Union law status of Article 102 TFEU and its direct applicability, as opposed to the (source of) secondary law status of the Merger Regulation.[96] According to Advocate General Kokott, the «[R]egulation [Mergers] does not equate

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article 21, paragraph 1, of Regulation (EC) No. 139/2004 which expressly excludes the applicability of article 101 and 102 of the TFEU". In this regard, the appellants' proposition is in fact confirmed by the jurisprudence of the Court of Justice, according to which, in general terms, it must be considered that if the merger does not fall within the scope of preventive control (since it is below the threshold) it can well be assessed with ordinary instruments (see Court of Justice, case C-248/16, Austria Asphalt GmbH) [...] This does not mean that for merger operations – given their nature and the resulting effects – a screening process must be considered preferable estimate, as made possible by article 22 of Regulation No. 139/2004, according to which in cases where the aggregation is not subject to the obligation of prior notification, it is possible to activate a mechanism to evaluate, and if necessary comply with, the acquisition operations should they affect the competitive structure of the market».

[95] Court of Justice, request for a preliminary ruling from the Cour d'appel de Paris (France) on 21 July 2021, case C-449/21, Towercast v. Competition Authority, Ministère de l'Economie.

[96] Court of Justice, Opinions of the Advocate General Juliane Kokott of 13 October 2022, case C-449/21, Towercast v. Competition Authority, Ministère de l'Economie.

with Articles 101 and 102 TFEU in terms of the hierarchy of norms, nor is it capable, by reason of its implementing character, of modifying, much less limiting, the scope of application of those rules of reference», and «the thresholds provided for in Article 1 of the Merger Regulation or the corresponding national rules, like Article 21(1) of the Merger Regulation, cannot limit or exclude the direct applicability of Article 102 TFEU».[97]

Accordingly, the Advocate General believes that if the turnover thresholds are not met, this simply means that the merger does not require *ex-ante* control, but does not preclude the application of *ex-post* control under Article 102 TFEU. Instead, as a residual power, the further application of Article 102 TFEU, such as that of Article 22 of the Merger Regulation, contributes to the effective protection of competition in the internal market. Regarding the relationship between *ex-post* control and a merger already examined *ex-ante*, the Conclusions note that, in such a case, the principle of *lex specialis derogat generali* applies. The Advocate General interprets Continental Can jurisprudence in light of the Merger Regulation to point out that, in the absence of *ex-ante* control, subsequent scrutiny of a merger still remains possible and, conversely, there is no *ex-post* scrutiny of the acquisition if there has been prior scrutiny. So that the case of dual (and parallel) application of the two regulatory plexuses will not arise.

In the subsequent ruling, the Court of Justice essentially retraces the path traced by the Advocate General, rejecting the argument that the direct applicability of a provision of primary law can be excluded by the adoption of an act of secondary law.[98] Reaffirming, on the one hand, that the wording of Article 21(1) of the Merger Regulation is the only procedural instrument applicable to the prior and "centralized" review of mergers, this does not mean, on the other hand, according to the Court of Justice, that the Union legislature intended to deprive the national guarantor authorities of the possibility of screening a merger according to the parameters of Article 102 TFEU. Therefore, the Merger Regulation will apply only to mergers with a Community dimension, and it is accepted that some mergers that escape *ex-ante* control may be subject to subsequent scrutiny.[99]

Lastly, the ECJ addresses "head-on" the question why the Merger Regulation expressly excludes the application of Regulation No. 1/2003 to mergers. It points out that the prohibition in Article 102 TFEU is directly

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[97] *Ibid.*, §§ 35 e 37.

[98] Court of Justice (Second Chamber), judgment of 16 March 2023, case C-449/21, Towercast v. Autorité de la concurrence, Ministre chargé de l'économie, §§ 43-45.

[99] *Ibid.*, §§ 40-41.

effective, sufficiently clear and precise, to the point that it does not require a direct secondary act regulating or authorizing its application by national guarantor authorities (or courts).[100] The ECJ concludes, therefore, that Article 21(1) of the Merger Regulation does not prevent a national competition authority from treating a merger as an abuse of a dominant position within the meaning of Article 102 TFEU in light of the structure of a national market, if (i) such a merger does not have a Community dimension; (ii) it is below the national threshold for prior authorization; and (iii) it has not been referred to the Commission under Article 22.[101] And it will be for the requested supervisory authority to verify whether the acquirer, which holds a dominant position in a given market and has taken control of another firm in that market has, through such conduct, substantially impeded competition in that market.[102]

Wanting to draw some summary remarks, one cannot help but recall that, in the Illumina/Grail case, the outcome of an appeal to the Court of Justice must still be awaited, although the foreseeable outcome may have already been foreshadowed and anticipated by the Towercast ruling. Similarly, the facts of the case underlying the Towercast case will have to be [re]examined by the French Autorité de la concurrence at the outcome of the preliminary reference in order to assess the existence (or not) on the merits of conduct constituting an abuse of a dominant position within the meaning of Article 102 TFEU. However, this does not mean that nothing has changed. As evidence of this, we have already witnessed, no more than 6 days after the judgment, the first application of the Towercast ruling by the Belgian competition authority.[103] And, for that matter, the relative strengthening of Article 102 TFEU that resulted from the Towercast ruling has already been reflected in the recent proposal to amend the Commis-

[100] *Ibid.*, § 51.

[101] *Ibid.*, § 53.

[102] *Ibid.*, § 52. The Court of Justice notes that the simple observation of the strengthening of the position of a company is not sufficient to accept the classification of abuse, it must be demonstrated that the degree of domination thus achieved represents a substantial obstacle to competition, in the sense of allowing only companies dependent, due to their behavior, on the dominant company. In this regard, the Court of Justice also cites the Continental Can case cited above, § 26 and the ruling of the Court of Justice of 16 March 2000, joined cases C-395/96 P and C-396/96 P, Compagnie maritime belge transports and others. c. Commission, § 113.

[103] Belgian Competition Authority ("BCA"), Press Release No. 10/2023, 22 March 2023, «The Belgian Competition Authority opens an ex officio investigation into a possible abuse of dominance by Proximus in the context of the takeover of edpnet, in application of the Towercast case law».

sion's Guidelines on the Application of Article 82 of the EC Treaty (now Article 102 TFEU),[104] which seems to pave the way for an (even) more extensive application of the institution of abuse of a dominant position.

Moreover, the "red thread" drawn by Illumina/Grail and Towercast, insofar as it is based on a literal reading of Article 22(1) of the Merger Regulation and the supremacy of Article 102 TFEU as primary law of the Union, may rightly appear simplistic if not declined in the perspective of the "revolutionary" effects of these pronouncements. Above all, because, for the first time since the introduction of the merger control discipline in the Union in 1989, Illumina/Grail and Towercast "overturned" the traditional "architecture" of prior control based on turnover thresholds. So that, even through the "revival" of the Article 22 referral mechanism, perceived gaps in merger control in the Union are being filled and the emphasis is being placed on "substantive" issues of potential competition rather than formal quantitative criteria.

## 6. The risks of uncertainty of national choices

In the face of very good intentions, risks of uncertainty are inherent in the new system.

While it is true, in fact, that the request to notify the transaction may occur even after (but within six months of) the completion of the transaction, in a scenario whereby the integration between the companies involved has already taken place or is in progress, it is equally true that the related uncertainty is incompatible with an architecture that in promoting innovation aims to ensure predictability of behavior and the conscious assumption of the related risks and consequent responsibilities.

The uncertainty is accompanied by the unpredictability of the outcome and the related costs, because the measure ascertaining whether the merger is contrary to the Antitrust Law in the case of sub-threshold transactions must be supplemented with the prescriptions necessary to restore conditions of effective competition, eliminating the restrictive or distorting effects of competition, with extensive application of Article 18(3), which makes all costs related to the implementation of the measures and pre-

[104] Communication from the Commission – Amendments to the Communication from the Commission, Guidance on the priorities of the Commission in the application of Article 82 of the EC Treaty to the abusive conduct of dominant undertakings aimed at the exclusion of competitors, 27 March 2023, C/2023/1923 final.

scriptions contained in the measure fall on the companies that have proceeded to implement a prohibited concentration.[105]

It certainly does not facilitate legal and business certainty that the cost of restoring conditions of effective competition should fall on firms that have carried out transactions that, in principle, are not subject to mandatory reporting.[106]

Potentially disruptive is, however, the indication contained in the Notice that affected firms assessing a merger as potentially falling within the scope of Article 16, paragraph 1-*bis*, will have the opportunity to voluntarily inform the AGCM, prior to its completion.[107] Indication that the postponement of the proceedings will likely lead to a spiral of increased costs for the parties and for AGCM itself and to postpone the closing of the transaction until AGCM's response about its intention to request notification or, if such notification is eventually requested, until the outcome of the proceedings to evaluate the transaction.

Hence a further level of uncertainty arises from the power to request examination that Article 22 attributes, in principle, to the AGCM (or, in general, to the guarantor authorities of the Member States) even for mergers for which the latter authority would lack jurisdiction. On the one hand, the AGCM will be able to require notification, even *ex-post*, of sub-threshold transactions, within the limits set by Article 16, paragraph 1-*bis*. On the other hand, transactions that do not even meet the more restrained thresholds now introduced by Article 16, paragraph 1-*bis*, could also be the subject of a request for referral to the Commission. If, in fact, the transaction did not fall within the scope set by the new L. No. 118/2022 and was capable of affecting trade between Member States and could, likewise, result in significant structural effects in the national market, the AGCM could nonetheless have recourse to the power of referral to the Commission under Article 22 of the Merger Regulation.

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[105] The Article 19, paragraph 1 of the Antitrust Law details the case of failure to comply with the provisions, for which the AGCM can impose administrative fines of no less than one percent and no more than ten percent of the turnover of the business activities subject to the concentration.

[106] In F. GHEZZI, M. MAGGIOLINO, *op. cit.*, 32 ff., the Authors suggest distinguishing the two cases in the concrete application of the measures and prescriptions, on the basis of the principle of proportionality, that in which companies have carried out a prohibited operation, omitting a notification that the law makes mandatory precisely to avoid the costs of an *ex-post* intervention from the one in which the companies have communicated within the timescales required by law operations not subject to the obligation of notification, as they are below the threshold.

[107] The AGCM specifies that the parties must have already reached an agreement regarding the essential elements of the transaction, in order to allow a complete evaluation.

This is an inexorable process of flexibilization of merger control that makes plausible the scenario whereby all acquisitions could potentially become subject to Commission scrutiny.

A central issue, for the proper functioning of the system, relates to the identification of the elements that the AGCM takes into account in assessing whether to exercise the power arising from Article 16, paragraph 1-*bis*.[108]

Well, the perimeter of application of the rule should be as circumscribed as possible, so as to allow companies to carry out the self-assessment with reasonable effectiveness and to avert for most sub-threshold transactions (which are devoid of real significance in terms of competition) the risk of a possible request for notification. And, on this, not even the AGCM Notice was, in our opinion, able to quell all the perplexities that the breadth of such legislative wording naturally generated.[109] Add to this the fact that the AGCM's power under Article 16 paragraph 1-*bis* should be of an exceptional nature. If not, it is likely that the voluntary disclosure of sub-threshold mergers will become the ordinary channel (and not limited to actually dubious cases) to which companies will resort to solicit an assessment by the AGCM. A scenario that would result in a burdening of the system and would require an increase in the resources that AGCM devotes to handling merger cases.[110]

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[108] For an in-depth examination of the topic, see F. GHEZZI, M. MAGGIOLINO, *op. cit*., 32 ff.

[109] Probably, it would have been appropriate to "design" the AGCM Communication with a clear objective to guide it: to identify even more clearly the boundary between the hypotheses in which it is possible to exclude the possibility of notification being requested and those which may prima facie give rise to concrete risks for competition. Among other things, the additions to the text aimed at: (i) providing, albeit by way of example, an order of magnitude regarding the disproportion between the value of the consideration received by the seller and the current turnover of the the acquired company, which may be relevant in the evaluation; and/or (ii) provide that, in the event that none of the companies affected by the concentration generates a turnover in Italy, the possibility of a notification request concerns concentrations intended to "significantly" affect competition in the national market or in a significant part of it (therefore, with a quid pluris in terms of competitive impact compared to the mere existence of concrete risks for competition).

[110] Not to mention that the contradiction with respect to the logic underlying Legislative Decree No. would be evident. 185/2021 which, in strengthening the independence and powers of the AGCM, has, among other things, assigned it the power to define its intervention priorities for the purposes of applying the Antitrust Law (as well as Articles 101 and 102 TFEU), so as to encourage effective use of resources and direct the Authority's action towards combating the conduct that most distorts competition in the internal market. See Legislative Decree 8 November 2021, n. 185 – Implementation of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, which gives the competition authorities of the Member States more effective enforcement powers and which ensures the correct functioning of the internal market.

In this regard, it might be useful to look at the experiences of other Member States and competition authorities. The school hypothesis is that of Germany, whose Ministry of Economic Affairs, last September 26, published and submitted for consultation the draft relating to the 11th amendment to the national competition law (Gesetz gegen Wettbewerbsbeschränkungen – GWB), later revised and approved by the federal government last April 5, 2023, and by Parliament last July 6, 2023 (only the final approval of the Bundesrat is missing), which contains interesting insights.[111]

The Bundeskartellamt will be able to impose a merger notification requirement (even if sub-threshold) on certain companies, provided there are «objectively verifiable indications that potential future acquisitions could significantly impede effective competition in Germany in one or more economic sectors». The relevant addition for our purposes is that the sui generis notification requirement (which would extend for a renewable three-year period) applies to potential acquisitions where the acquirer generated a turnover in Germany in the last financial year of not less than € 50 million and the acquired company (or target company), on the other hand, a turnover of at least €1 million.

This German experience (and, more specifically, the provision of such de minimis thresholds) goes in the direction of specifying and circumscribing the cases in which it would be necessary prima facie to notify the prospective acquisition.

Second, it has been argued in several quarters that Law No. 118/2022 would be an opportunity to bring domestic merger law in line with European law, which still differ in several respects.[112]

The dissimilarities certainly do not pertain to the general structure as much as to the procedural mechanism, which, also in terms of sanctioning impact, is looser and more disorganized than the European system. In the system of domestic law, if following a prohibition order the parties equally carry out the merger transaction, the sanction is essentially pecuniary.[113] Whereas, on the contrary, the Merger Regulation, in Article 8, explicitly

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[111] 11th Amendment to the ARC, Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und otherer Gesetze, July 5, 2023.

[112] Please refer to F. GHEZZI, M. MAGGIOLINO, *op. cit.*, 32 ff.

[113] As the art reminds us. 19, paragraph 1, of the Antitrust Law, if companies carry out a concentration operation in violation of the prohibition referred to in Article 18, paragraph 1, the AGCM imposes administrative fines of no less than one percent and no more than ten percent of the turnover of the business activities subject to the concentration.

provides, for such cases, measures to dissolve the merger, in particular through the dissolution of the merged entity or the sale of all the shares or parts of the assets acquired, so as to restore the situation that existed before the merger was carried out. [114]

Similarly, our legal system not only does not automatically provide for the suspension of the implementation of competition from the time of the notice and until the conclusion of the proceeding, but, under Article 17 of the Antitrust Law, allows the AGCM to impose the stand-still obligation only "in taking place of the investigation". [115]

But the main issue relates to the timeframe available to the AGCM to complete the actual investigation phase, which is initiated when it is deemed that the transaction may actually significantly impede effective competition and which must be concluded, pursuant to Article 16, paragraph 8, of the Antitrust Law, within the peremptory deadline of forty-five days. [116] A particularly short timeframe that the AGCM, in its Report to the

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[114] Again, apparently no sanction can be imposed in the event that the AGCM authorizes the concentration operation, prescribing the necessary measures in order to prevent a significant obstacle to competition, and the parties do not comply, when, instead, the European control of concentrations prescribes, in Article 6, paragraph 3, the revocation of the authorization decision in case of failure to comply with the obligations associated with the Commission's decision.

[115] With a view to aligning our sanctioning discipline with the Euro-unitary one – continue F. GHEZZI, M. MAGGIOLINO, *op. cit.*, 32 ff. –, the AGCM should be given the power to suspend the execution of the operation as soon as the notification is received, if significant risks for competition could be glimpsed from the outset (although almost all of the operations examined by the AGCM are considered not worrying, therefore closing within 30 days of the first evaluation phase).

[116] According to the AGCM's Report (paragraph VII, point B), «[t]he brevity of the forty-five-day deadline within which the investigation must be concluded affects the Authority's ability to delve into all the relevant aspects of the concentration in question of notification, also through the use of the most appropriate analysis tools. Consider, for example, how such a short term makes it particularly difficult, and in some cases actually impossible, to resort to market investigations to acquire useful elements for defining the relevant markets and evaluating the effects of the concentration. Furthermore, these difficulties would be exacerbated if the desirable alignment with the European legislation on the substantive test and the treatment of joint ventures illustrated above was carried out. It is therefore proposed to extend the deadline currently foreseen for "phase 2" of the concentration operations to ninety days. This would have a positive impact not only on the degree of in-depth analysis carried out by the Authority during the preliminary investigation activities, but also on the ability of the parties to carry out their own investigations in turn and to produce useful elements for the evaluation of the operation. It is highlighted that the modification of this term has no consequences for the evaluation of concentrations that do not give rise to critical issues of a competitive nature and which therefore do not require in-depth investigation. These concentrations, which are analyzed in phase 1, represent almost all of the notified concentrations (92% during 2020) and would continue to be authorized within thirty days».

Government, had proposed to extend up to ninety days and is contrary to the Merger Regulation.[117]

## 7. Conclusions

Merger control operates through relatively clear "filter" mechanisms that are based on (i) turnover-based thresholds that can be easily and simply applied; (ii) a clear division of powers between the Commission and NCAs; and (iii) *ex-ante* notification and review of mergers.

The new policy of referring transactions to the Commission under Article 22 – followed by Law No. 118/2022 – derails from these tracks, fueling some perplexity.

Adopting an interpretive act to supplement existing legislation (which follows in the wake of a well-established direction of European legislative policy, which tends to favor, especially in recent years, the adoption of soft law acts)[118] is open to different assessments and remains, in any case, widely debated: it is quite clear that the greatest limitation found in this change of approach lies in the «considerable margin of totally discretionary manoeuvre» that the Member States and the Commission enjoy, respectively, in activating the referral mechanism and in deciding whether or not to agree to examine the case, as noted by the Guidelines themselves.[119]

There is a lack of an unambiguous criterion indicating when these transactions give rise to concrete risks to competition in the domestic mar-

[117] At the Euro-unit level, pursuant to Article 8 of the Merger Regulation, the in-depth evaluation phase by the Commission ends in ninety working days. The deadline is increased to 105 working days if the interested companies offer to make commitments, in accordance with the Article 8, paragraph 2, to make the concentration compatible with the common market, unless such commitments have been proposed within 55 working days of the start of the proceeding. The deadline is also suspended in the period between a possible request for information and the moment in which such information reaches the Commission.

[118] G.M. BORCHARDT, K.C. WELLENS, *Soft Law in European Community Law*, 14 *Eur. L, Rev.*, 1989, 267, 270; H. COSMA, R. WHISH, *Soft Law in the Field of EU Competition Policy*, 14 *Eur. Bus. L. Rev.,* 2003, 25, 50; L. SENDEN, *Soft Law and its implications for Institutional Balance in the EC*, 1 *Utrecht L. Rev.*, 2005, 79, 93; D. TRUBEK, P. COTTRELL, M. NANCE, *Soft Law, Hard Law, and European integration: Towards Theory of Hybridity* 1, 3 (Univ. of Wis. Legal Studies, Working Paper No. 1002, 2005). See also Court of First Instance (Fourth Chamber), judgment of 20 March 2002, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri A/S v. Commission of the European Communities, para. 209-11.

[119] Guidelines, point 3.

ket, which leads to great uncertainty about the timing and feasibility of mergers and a potential negative impact on the propensity of large foreign firms to acquire Italian firms.

The picture is complex because it takes into consideration a very large number of parameters and factors, which could differently combine with each other and, therefore, lead to a request to notify a transaction even if, for example, market shares and concentration ratios were lower than those specified in the Guidelines. This complexity is exacerbated by the still burgeoning debate on killer acquisitions, the fact that Article 14 of the DMA will soon come into effect, and that a general trend toward lowering the notification thresholds (as reported in Germany with a flattening of the thresholds from € 400 million to € 200 million) could lead to a widening of the number of cases that are notified and, therefore, potentially "referred" to the Commission.

In other words, the European and national reforms seem to define the set of transactions that do not give rise to competitive risks in such a vague and restrictive way that the power to require notification has been delineated in such a way as to be anything but exceptional (as it really should be). So that no concentration would be entirely exempt from the possible burden of notification and subsequent assessment.

**Valeria Falce**

# Contractual asymmetries and Market solutions

SUMMARY: 1. Introduction. – 2. The origins of economic dependence between bargaining and market imbalances. – 3. The public-law turn. – 3.1. Recent novelties. – 4. Private-law enforcement. – 4.1. The nature of the relationship. – 4.2. The molecular state of economic dependence. – 4.3. A non-exhaustive list of abusive conduct. – 5. The public-law enforcement. – 6. Conclusions.

## 1. Introduction

The regulation on the abuse of economic dependence is not European. It is in fact National and in Italy it has been over time enriched on the range and scope front.

Traditionally framed in the private-law perspective of negotiating imbalances,[1] in Italy it has been supplemented with a public component, which now also allows competition authorities to imprint market relations

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[1] For all, P. RESCIGNO, *L'abuso del diritto*, Bologna, 1998. The systematic considerations of M. BIANCA, *Diritto civile*, IV, *L'obbligazione*, Milan, 1997; L. BIGLIAZZI GERI, *Buona fede nel diritto civile*, in *Digesto civile*, 1988; A. DI MAJO, *Le modalità delle obbligazioni*, Bologna-Rome, 1986; A. DI MAJO, *L'adempimento dell'obbligazione*, Bologna, 1993; M. GIORGIANNI, *Obbligazione diritto privato*, in *Novissimo Digesto italiano*, 1965; R. NICOLÒ, *Adempimento diritto civile*, in *Enciclopedia del diritto*, 1958; P. RESCIGNO, *Obbligazioni nozioni*, in *Enciclopedia del diritto*, 1979 e *Manuale di diritto privato*, Milan, 506, 2000; S. RODOTÀ, *Diligenza diritto civile*, in *Enciclopedia del diritto*, 1964; S. ROMANO, *Buona fede diritto privato*, Milan, 1959; R. ROVELLI, *Correttezza*, in *Digesto civile*, 1989; P. SCHLESINGER, Il *pagamento al terzo*, Milan, 1961. Sulle evoluzioni europee e nazionali in tema di fairness e trasparenza, V. FALCE, *Appunti in tema di disciplina comunitaria sulle pratiche commerciali sleali*, in *Rivista del diritto commerciale*, 2009; V. FALCE, G. GHIDINI, *Antitrust and Consumer Protection: The New Regime on Unfair Commercial Practices*, in *Intellectual Property Law Economic and Social Justice Perspectives*, 2010; V. FALCE, *Abuse of economic dependence and competition law remedies: A sound interpretation of the Italian Regulation*, in *European Competition Law Review*, 2015 and, more recently, V. FALCE, *The Italian regulation against the abuse of economic dependence at crossroads*, in F. DI PORTO-R. PODSZUN, *Abusive Practices in Competition Law*, Edward Elgar Publishing, 2018, 14.

with respect to the criteria of "fairness" and transparency as corollaries of the principle of diligence).

At the same time, the regulation tends to expand in terms of the typification of the case and conduct. So that, independently from the attributive framework, the exercise of a right that verifies an unjustified disproportion between the benefit of the holder and the sacrifice to which the other party is subjected, qualifies as illegitimate in specific compartments and sectors.[2]

The ongoing evolutionary process can be explained in systematic terms. The constitutional value of "private economic initiative" connects to the competing "duty of solidarity" in inter-subjective relations, enshrined in Article 2 Const. which in turn accedes to the general principle of objective good faith and fairness as a limit to credit claims.[3]

Within this framework, although in the absence of a specific normative provision, significant value is accorded to the obligations of good faith and fairness enshrined in Articles 1175 and 1375 of the Civil Code, thus reaching the elaboration of a general principle according to which one cannot abuse their rights in order to achieve ends which are substantially detrimental to broader interests or arising from special contractual agreements, that transcend those protected by the norm.[4]

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[2] European jurisprudence has recognized that individuals cannot fraudulently or abusively avail themselves of Union rules. Hence, it has made the incorporation of a practice conditional on the use of a twofold element, one objective consisting of the failure to achieve the purpose pursued, despite formal compliance with the conditions laid down in Union law) and the other subjective relating to the intention to obtain an undue advantage deriving from Union law by artificially creating the conditions necessary for its attainment). Finally, it elevated the prohibition of abuse of rights to an external limitation on the exercise of Union rights, gradually broadening the spectrum of application, thus qualifying it as a general principle. More. European law has made it clear that the theory of abuse of rights applies irrespective of and independently of the connection with competition law and principles, and thus irrespective of the existence of the relevant conditions of applicability. Corresponding to these reconstructive lines is a national development, which, while developing along autonomous lines, is now fully in accordance. In fact, the theory of abuse of right has long been investigated by doctrine, first from the perspective of the functionalization of the right of property both to claim its nature as an internal limitation and then to recognize its exceptional character) and then as a general category with the aim of verifying whether and under what conditions the exercise of a right, while conforming to the relevant model, in essence – according to the "true law" – constitutes a deviation from it, contrary, in its ultimate purpose, to the principles of the system. For an application, *L'insostenibile leggerezza delle regole sulle banche dati dell'unione dell'innovazione*, in *Riv. dir. ind.*, 2018, H77.

[3] Cass., September 24, 1999, n. 10511.

[4] In essence, in our system, «conducting oneself in a legal relationship without respecting fairness/good faith, may integrate precisely the malleable case of abuse of right, since the right of those who so conduct themselves is not exercised taking into account the solidarity due to the interests of the other party».

The drift ongoing at the national level, on the other hand, is not isolated.[5] While in the Union the Data Act attempts to codify the statute of fairness in relations between parties, in other Member States public competences are intersecting with private ones, and the institution of economic dependence is being directed toward specific sectors (such as digital markets), thus intercepting behaviors that leverage situations of negotiating imbalance.[6]

The developments that can be glimpsed at the European and national levels can be traced back to unity according to mutually consistent normative and jurisprudential guidelines, which are the subject of these brief notes.

## 2. The origins of economic dependence between bargaining and market imbalances

In Italy, the abuse of economic dependence is not regulated as such. Having emerged the ineffectiveness of private rules to deal with unbalanced bargaining relationships, the legislature enumerated in the 1998 Subcontracting Law No. 192/1998)[7] "market relationships" characterized by contractual and economic discrepancies.

The normative premise is unquestionable: although subcontracting takes the form of a pro-competitive scheme that can offer concrete development opportunities for small and medium-sized enterprises,[8] the underlying business relationship can unveil a "pathological" side[9] when one party is exposed to excessive "economic pressure" at the hands of the contractual counterpart.

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[5] V. FALCE, *Abuse of economic dependence and competition law remedies*, cit., 2015.

[6] Belgium has recently adopted new provisions prohibiting the abuse of economic dependence: in particular, a law of April 4, 2019, which came into force on August 22, 2020, introduced Article IV.2/l in the Belgian Code of Economia Law Code of Economia Law – "CEL"). Also in France, abuse of economic dependence is expressly covered in Article L 420-2 of the French Commercial Code French Commercial Code – "FCC").

[7] M. LIBERTINI, *Posizione dominante individuale e posizione dominante collettiva*, in *Rivista di diritto commerciale*, 2003, 557; M.S. SPOLIDORO, *Riflessioni critiche sul rapporto fra abuso di posizione dominante e abuso dell'altrui dipendenza economica*, in *Riv. Dir. Ind.*, 1999, 203.

[8] R. CASO, *Subfornitura industriale: analisi gius-economica delle situazioni di disparità contrattuale*, in *Rivista critica del diritto privato*, 1998, 248.

[9] F. DENOZZA, *Imprese artigiane e decentramento produttivo*, in *Giurisprudenza commerciale*, 1976, 810; A. MUSSO, *Concorrenza ed integrazione nei contratti di subfornitura industriale*, Milan, 1993, 11.

This is a dysfunction that can recur when one of the contracting parties makes substantial investments in specialized assets to meet the needs of the counterparty, [10] thus transforming them into an unrecoverable cost, which are likely to lose all or most of their respective value in the event of a sudden break in the relationship. [11]

The consequences are obvious: in the presence of a serious imbalance, the party from being contractually weak becomes economically captive, i.e., a prisoner of a relationship that it is unable to replace and from which it is unable to free itself. [12] The threat of re-solution, to which it remains exposed, ends up forcing the defeated party to accept opportunistic behavior that is difficult to agree through traditional legal remedies.

The solution is offered by the Subcontracting Law: [13] Article 9 contemplates a specific private enforcement rule applicable to those behaviors that prospect an abuse of relative dependence, meaning that it insists *intra muros*, within the scope and limits of the store between the parties. The conditions of applicability are strict.

First, for a situation of dependence to exist, one enterprise [14] must be able to determine, in the relationship with the other, an excessive imbal-

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[10] R. NATOLI, *L'abuso di dipendenza economica. Il contratto e il mercato*, Naples, 2004, 112. Consider those types of contracts that, by giving rise to specific investments that are difficult to reconvert, end up weakening the party directly involved, since the latter is unable to find viable alternatives in the market.

[11] G. DE NOVA, *La subfornitura: una legge grave*, in *Rivista di diritto privato*, 1998, 449; A. CATRICALÀ, E. GABRIELLI (eds.), *Prefazione*, in *I contratti nella concorrenza*, Turin, 2011, XX-XI.

[12] M.R. MAUGERI, *Abuso di dipendenza economica e autonomia privata*, Milan, 2003, 1 ff.

[13] 1. Abuse by one or more enterprises of the state of economic dependence in which a customer or supplier enterprise is, in its or their regard, is prohibited. Economic dependence is considered to be the situation in which an enterprise is able to bring about an excessive imbalance of rights and obligations in its business relations with another enterprise. Economic dependence shall also be assessed taking into account the real possibility for the abusive party to find satisfactory alternatives on the market. 2. Abuse may also take the form of refusal to sell or refusal to buy, imposition of unjustifiably onerous or discriminatory contractual conditions, arbitrary termination of existing business relations. 3. The pact through which the abuse of economic dependence is realized is void. The ordinary court of competent jurisdiction shall hear actions on abuse of economic dependence, including actions for injunctive relief and for damages.

[14] Court of Turin, Sec. Specializzata Impresa, June 6, 2017, n. 2952: the addressee of the discipline is the enterprise understood as an "economic unit as a whole", in accordance with the definition envisaged by competition law, which disregards the formal distinction between individual companies belonging to the same group. In doctrine R. NATOLI, *L'abuso di dipendenza economica*, cit., 105; V. PINTO, *L'abuso di dipendenza economica «fuori dal contratto» tra diritto civile e diritto antitrust*, in *Rivista di diritto civile*, 2000, 402; PH. PINTO, *Abuso di dipendenza economica*, in A. CATRICALÀ, E. GABRIELLI (eds.), *I contratti della concorrenza*, cit., 100.

ance of rights and obligations. Second, the rule prohibits not only the continuation of the situation of subordination or dominance, but also the exploitation of such "relative" power, insofar as the conduct is relevant to the parties directly involved, without producing any lasting effect on the market. [15]

The final effect is noticeable: through the case in point, the legislator first removes from the principle of the free will of the parties the relationships between companies characterized by contractual imbalance (and, by return, the set of typically vertical agreements and not only those put in place between buyer and subcontractor), and then grants the weaker counterparty legal protection of a private-law nature, under the double assumption that the requirements for enforceability are met [16] and that the conduct exhausts its effects within the contractual bond.

Benefiting the regulatory choice is the flexibility of the definition of dependence and the concept of abuse, which allows the court to ensure the institution's resilience over time, adapting it to changes in technology and market practices. [17]

## 3. The public-law turn

As conceived by the Subcontracting Law, [18] the system revolves around

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[15] See, inter alia, A. BERTOLOTTI, *Il contratto di subfornitura*, Turin, 2000. Even more recently, jurisprudence has held that in the context of supply contracts, abuse of economic dependence takes place upon the occurrence of two certain prerequisites. *In primis*, the existence of a situation of "economic dependence". The mere asymmetry of rights and obligations between the parties, in fact, is not a necessary and sufficient condition; rather, it is also necessary to examine the extent of this imbalance and whether the latter is unreasonable. Second, with special reference to abuse, in the opinion of case law it will be appropriate to ascertain arbitrary conduct contrary to good faith, or «the intentionality of harassment perpetrated on the other firm, with a view to ends outside the lawful commercial initiative governed by an appreciable interest of the dominant firm». See also Court of Vicenza, Sec. I, July 5, 2021, n. 1385. See, for completeness, Cass. civ., Sec. I, January 21, 2020, n. 1184.

[16] A. CATRICALÀ, E. GABRIELLI, *Prefazione*, in A. CATRICALÀ, E. GABRIELLI (eds.), *I contratti nella concorrenza*, cit., XX-XI.

[17] Cass. civ., Sec. I, January 21, 2020, n. 1184: «On the subject of supply contracts, the abuse of economic dependence, referred to in Art. 9 of 1. No. 192 of 1998, is an indeterminate notion whose ascertainment postulates the enucleation of the concrete cause of the singular operation that the overall negotiation regulation carries out, according to a teleological criterion of evaluation, in a factual way, of the lawfulness of the interest in view of which the conduct was held ...)».

[18] Court of Lecce, Sec. I, November 12, 2018, n. 2964: It is important to emphasize how this law is part of a regulatory legal framework designed to protect the weaker party to the relation-

two fixed points: one, the institute has purely private relevance jurisdiction is in the civil court, the relevant actions are injunctive and compensatory ones [19], no scope of intervention is reserved for the specialized sections [20] or the Competition and Market Authority; [21] two, which is its immediate consequence, the institute assumes that the conduct reverberates within the relationship, with no residual market effects. [22]

This approach has been supplemented by significant innovations. [23] First of all, with Law No. 57/2001, the legislature added paragraph 3-*bis* to Article 9, Law No. 192/1998, attributing to the Autorità Garante della Concorrenza e del Mercato (also c.d. AGCM) a specific competence in the matter, where "beyond" the antitrust enforcement and "regardless" of the ability to prove the prerequisites, the conduct nevertheless produces "relevant" effects on the market. [24]

Second, ten years later, with Law 180/2011, conduct that violates late payment legislation qualifies as abuse of superior bargaining power whenever the violation is generic and continuous. More specifically, «in the case of widespread and repeated violation of the regulations set forth in Legislative Decree No. 231 of October 9, 2002, carried out to the detriment of companies, with particular reference to small and medium-sized ones, the abuse is configured regardless of the establishment of economic dependence». Responsibility for enforcing the aforementioned rule is *de iure* as-

ship, limiting the relative contractual autonomy in the case of «obvious disparity in the strength of the contracting parties».

[19] E. CAPOBIANCO, *L'abuso di dipendenza economica. Oltre la subfornitura*, in *Concorrenza e Mercato*, fasc. 0, 2012, 619 ff.

[20] Either in the event that the claim is for the establishment of conduct of so-called pure unfair competition in which the possible infringement of reserved rights is not, in whole or in part, an essential and constituent element of the very infringement of the right to fair competition, which requires the *incidenter tantum* examination of the privative rights at stake; or in the event that the claim for compensation is proposed because of or corresponding to an assumption of abuse of economic dependence of an enterprise.

[21] Cass. civ., Sez. VI, September 28, 2017, n. 22747; Cass. civ., Sez. VI, November 4, 2015, n. 22584.

[22] V. FALCE, *Abuse of economic dependence and competition law remedies*, cit., 71; M.R. MAUGERI, *Abuso di dipendenza economica e autonomia privata*, cit., 1 ff.; V. FALCE, M. MAUGERI, *Indotto, concorrenza e mercato: il caso della subfornitura*, in *Analisi giuridica dell'economia*, 2011, *passim*. C. OSTI, *L'abuso di dipendenza economica*, in *Mercato Concorrenza Regole*, 1999, 18.

[23] On this point, see M.S. SPOLIDORO, *Riflessioni critiche sul rapporto fra abuso di posizione* dominante, cit., 193; G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti. Un'analisi economica e comparata*, Turin, 2004, 4.

[24] P. FABBIO, *L'abuso di dipendenza economica*, Milan, 2006, 425 ff.

signed to the Antitrust Authority, which, as such, is fully entitled to investigate such misconduct, applying traditional antitrust tools and remedies.

While the 2001 Law is part of renewal of antitrust powers for the protection of fairness in relations (a renewal in which the powers on unfair commercial practices are also inscribed), the 2011 novelty is specifically oriented to support small and medium-sized companies, using the antitrust toolbox and giving trade associations special legitimacy to act e.g., Article 4, Law No. 108/2011). In the systemic perspective, the AGCM is given a new area of intervention, which passes through the existence of specific subjective requirements (being aimed at companies especially small and medium-sized ones) and standardized objective-behavioral conditions (consisting of continuous late payments), but not also through the ascertainment of the requirement of dependence, which is derived presumptively from the behavior itself.[25]. On the contrary, «in the case of widespread and repeated violations» of the rules on late payment by an enterprise «to the detriment of other enterprises, with particular reference to small and medium-sized ones, an abuse occurs regardless of the finding of economic dependence».

In other words, the 2011 novelty provides an *ex se* antitrust violation based solely on the finding of a "widespread and repeated" violation of the discipline on late payment, so that the tort arises in the presence of widespread and prolonged dilatory conduct (the existence of which is proven essentially by its occurrence), whose effects on the market are triggered by the continued failure to comply with payment terms (thus characterized by the dilatory conduct against which the weaker party has no alternative but to succumb). In other words, it is sufficient to show that provisions on the timing and manner of payment have been widely and repeatedly violated, to qualify the conduct as unlawful.[26]

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[25] V. FALCE, *Abuse of economic dependence and competition law remedies*, cit., 71.

[26] Supporting this interpretation is the *sedes materiae* of the new law, the provision being placed not to complement the paragraph devoted to the conditions of the state of economic dependence, but to the one focusing on the intervention of public law, which is always conditioned on the establishment of market inferences. In such a context, an interpretation other than the one given, whereby the rule would be exclusively aimed at overcoming the mere requirement of dependence by deeming it presumed, would presuppose a double limitation. In particular, it would come up against a formal limitation in that it would be able to release the rule from its collocation, that is, Paragraph 3 of Article 9, failing to consider that the new hypothesis is located within the provision dedicated to the powers attributed to the AGCM. It would end up colliding, moreover, with a limitation of a substantive nature, in that the state of negotiating imbalance would not be able to attract antitrust jurisdiction unless an assessment-independent-of the impact of the conduct on the market. In this sense, it would frustrate the

Third, Article 62 of Decree Law No. 1/2012 now repealed),[27] leveraged on the "vulnerability indices"[28] of the agribusiness supply chain,[29] to respond to the need for protection of SME suppliers or producers of agricultural products in their relations with large-scale organized distribution GDO),[30] attributing specific powers to the AGCM.[31]

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intention of the legislature, resulting in the futility of the intervention, as it would not prospect positive content regarding the conditions that must be met to justify public law jurisdiction.

[27] A.M. MANCALEONI, *Le pratiche commerciali nella filiera agroalimentare e la tutela civilistica della parte deboli: riflessioni alla luce dell'esperienza francese*, in L. SCAFFARDI, V. ZENO ZENCOVICH (eds.), *Cibo e diritto, una prospettiva comparata*, in *Consumatori e Mercato*, 2020, 341-342.

[28] E. LEONARDI, *La direttiva sulle pratiche commerciali sleali e la funzione di controllo nella tutela della vulnerabilità dell'impresa agricola*, in *Diritto e Giurisprudenza Agraria Alimentare e dell'Ambiente*, riv. 5, 2019, available on-line at: https://www.rivistadga.it/wp-content/uploads/2019/09/Leonardi-La-direttiva-sulle-pratiche-commerciali-sleali.pdf.

[29] G. BIFERALI, *Nullità a tutela dell'impresa «dipendente» e filiera agroalimentare*, in *Europa e diritto privato*, fasc. 4, 2015, 608 ff.; F. ZECCHIN, *La tutela del produttore agroalimentare fra tentativi di riequilibrio del potere contrattuale e misure di sostegno*, in *Europa e diritto privato*, fasc. 4, 2017, 1407 ff.; A. ARGENTATI, *La disciplina speciale delle relazioni commerciali nel settore agroalimentare. Riflessioni sull'art. 62 1. n. 27 del 2012*, in *Giustizia civile*, 2023, 441 ff.

[30] A. ARTOM, *L'indagine conoscitiva dell'AGCM sul ruolo della GDO nella distribuzione agroalimentare*, in *Rivista di diritto alimentare*, 2010, 1 ff. Among the leading exponents of the legal-economic literature who believe that Article 62 represents an additional piece of protection for the so-called weak enterprise see S. MAZZAMUTO, *Il contratto di diritto europeo*, Turin, 2020, 170 ff.; R. PARDOLESI, *I contratti funzionali alla circolazione e alla gestione di beni e servizi*, in G. GITTI, M.R. MAUGERI, M. NOTARI (eds.), *I contratti per l'impresa*, I, Bologna, 2012, 120; G. BISCONTINI, *Contratti agroindustriali ed art. 62 d.l. n. 1 del 2012: luci ed ombre*, in *Comparazione e diritto civile*, 2012, 1 ff.; A.M. BENEDETTI, F. BARTOLINI, *La nuova disciplina dei contratti di cessione dei prodotti agricoli e agroalimentari*, in *Rivista di diritto civile*, 2013, 641 ff.; C. BEDOGNI RABITTI, *Il controllo del potere di mercato nella filiera dei beni di consumo*, Relazione per l'Assemblea annuale Centromarca, 2012, l ff.; L. COSTANTINO, *L'integrazione verticale per contratto nel settore agro-alimentare: fattispecie giuridica e disciplina applicabile*, in *Contratto e* Impresa, 2013, 1448 ff.; S. PAGLIANTINI, *Il pasticcio dell'art. 62 L. 221/2012: integrazione equitativa di un contratto parzialmente sullo ovvero responsabilità precontrattuale da contratto sconveniente?*, in *Persona e mercato*, 2014, 39 ff.; BIRD&BIRD, *Pratiche commerciali sleali nei rapporti tra imprese nella filiera agricola e alimentare. Verso l'attuazione in Italia della Direttiva UE 2019/633*, 2021, available at: https://www.twobirds.com/-/media/pdfs/italy/bird-bird-alert-pratiche-commerciali-sleali.pdf. The mandatory written form is apt to ensure full protection of the weak link in the supply chain, see A. JANNARELLI, *La strutturazione giuridica dei mercati nel sistema agro-alimentare e l'art. 62 della L. 24 marzo 2012, n. 27: un pasticcio italiano in salsa francese*, in *Rivista di diritto agrario*, 4, 2012, 590; S. PAGLIANTINI, *Il "pasticcio" dell'art. 62 L. 221|2012*, cit., 27 ff.; F. ZECCHIN, *La tutela del produttore agroalimentare*, cit., 1406 ff.; A. ALBANESE, *I contratti della filiera agroalimentare Ira efficienza del mercato e giustizia dello scambio*, in *Annuario del contratto 2015*, 2016, 3 ff.; L. PETRELLI, *L'art. 62 dopo le ultime decisioni*, in *Rivista di diritto alimentare*, 2014, 14 ff.; A. ARGENTATI, *La disciplina speciale delle relazioni commerciali nel settore agroalimentare*, cit., 446 ff.; R. PARDOLESI, *Nuovi abusi contrattuali: percorsi di una clausola generale*, in *Danno e Responsabilità*, 2012, 1 ff., available at: http://www.law-economics.net/

## 3.1. Recent novelties

As the shadow of the principle of fairness continues to widen, it now includes Article 29 of DDL 2469, under consideration in Parliament, which proposes to supplement the institution in two distinct respects. First, through the inclusion of a surmountable presumption of dependence in the case of a firm using intermediary services provided by a digital platform that plays a decisive role in reaching end users or suppliers, including

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workingpapers/L&E-LAB-LAW-44-2012.pdf; C. DESOGUS, *L'estensione della "regola di convergenza" europea alle norme nazionali sulle condotte unilaterali*, in *Giurisprudenza commerciale*, 2014, 149 ff.; F. ALBISINNI, *Cessione di prodotti agroalimentari o alimentari?): ancora un indefinito movimento?*, in *Rivista di diritto alimentare*, 2012, 37 ff.; A.M. BENEDETTI, F. BARTOLINI, *La nuova disciplina dei contratti di cessione dei prodotti agricoli e agroalimentari*, cit., 656 ff., in whose opinion, although there was a peculiar "affinity" with the abuse of economic dependence, for the application of Article 62 it would not have been necessary to verify the existence of economic dependence, but rather the unfair nature of the conduct carried out to the detriment of the weaker contractor; A. ARGENTATI, *op. cit.*, 450, according to which there would be a complementary relationship between the two cases, since Article 9, Law n. 192/1998 is applied only and exclusively when there is a hypothesis of economic dependence, an aspect that marks the limit of operation of Article 62; otherwise, paragraph 2 of Article 62 would operate where until the prohibition of abuse of economic dependence is applied. See also S. PAGLIANTINI, *op. cit.*, 41; G. BIFERALI, *Nullità a tutela dell'impresa "dipendente" e filiera agroalimentare*, in *Europa e diritto privato*, fasc. 4, 2015, 616 ff.

[31] There were multiple positions on this point in the doctrine. One first held that the violation of the prohibitions established simply would not result in any kind of invalidity, since the only sanctions that would apply would be the administrative pecuniary sanctions predisposed *ex lege*. Put another way, following the intervention by the legislature, the burden of form, previously established *ad substantiam*, would constitute a mere *ad probationem* requirement. See A. A. JANNARELLI, *La strutturazione giuridica dei mercati nel sistema agro-alimentare e l'art. 62 della L. 24 marzo 2012, n. 27*, cit., 381; A.M. BENEDETTI, F. BARTOLINI, *La nuova disciplina dei contratti di cessione dei prodotti agricoli e agroalimentari*, cit., 648 ff. In the opinion of others, however, this approach cannot be accepted, since the violation of the requirements of form and content, in the absence of further provision, would have resulted in the application of Article 1418, co. 1 and 2, Civil Code. According to further interpretation, the elimination in the original text of the rule of the reference to nullity would only have resulted in a change from textual nullity to nullity for violation of a mandatory rule Article 1418, paragraph 1, Civil Code). According to a still different approach, the omission of the nullity part from11 the original text of Article 62 would have entailed the application of the discipline of absolute nullity. From the preceding, albeit concise, considerations it emerges how the issues revolving around the identification of the discipline on nullity and the legitimacy to enforce the defects, is not resolved, but is only posed. For further discussion, M. GIUFFRIDA, *La nullità di protezione del contratto di cessione dei prodotti agricoli e alimentari*, in *Rivista di diritto alimentare*, 2014, 48 ff.; A. ALBANESE, *Non tutto ciò che è "virtuale" è razionale: riflessioni sulla natura della nullità del contratto*, in *Europa e diritto privato*, 2012, 230 ff.; S. ZORZETTO, *La nuova disciplina delle relazioni commerciali e dei contratti di cessione di prodotti agricoli e agroalimentari. Note a prima lettura*, in *Ricerche giuridiche*, 2013, 28 ff.; G. BIFERALI, *Nullità a tutela dell'impresa «dipendente» e filiera agroalimentare,* cit., 620 ff.

in terms of network effects or data availability. In addition, through a list of practices that may constitute an abuse of economic dependence, such as: refusal to sell or buy, imposition of unjustifiably burdensome or discriminatory contractual conditions, including retroactive ones, arbitrary termination of existing business relations, application of objectively different conditions for equivalent services, provision of insufficient information or data regarding the scope or quality of the service provided, demand for undue unilateral benefits, not justified by the nature or content of the activity performed.[32]

Specifically, Article 29 introduces a presumption (which can de defined as "relative", meaning that it is surmountable by providing proof to the contrary) of the subalternity of businesses that must rely on the digital platform as an intermediary to reach the end consumer, taking into account factors such as "network effects" and "data availability" within the platform. This is an intervention that aims to adapt to the digital decade the spirit and purpose of the discipline, which, as is well established, «gives prominence not to the dominant position of an enterprise in the market, but to the abuse and imbalance of enterprises in the scope of a negotiated relationship»,[33] with both private,[34] and public[35] competence.

The technique chosen for this purpose consists in balancing the exigence of facilitating access to justice with respect to practices in the digital

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[32] Against, F. DE BENEDETTI, *Quella presunzione di dipendenza che ci isola in Europa*, in *Il Sole 24 Ore*, 10 November 2021, available at http://www.francodebenedetti.it/quella-presunzione-di-dipendenza-che-ci-isola-in-europa/. For a favorable position, V. FALCE, *L'abuso di dipendenza economica nel digitale. Perché no?*, 5 May 2022, available at https://www.filodiritto.com/labuso-di-dipendenza-economica-nel-digitale-perche-no; V. FALCE, *Correttezza nei rapporti e responsabilità delle imprese sui mercati digitali: la via italiana*, 24 May 2022, available at https://www.agendadigitale.eu/mercati-digitali/correttezza-nei-rapporti-e-responsabilita-delle-imprese-sui-mercati-digitali-la-via-italiana/.

[33] Tribunale di Milano, judgment 6 December 2017, R.G. 25998/2015.

[34] Cass. civ., SS.UU., ordinance November 25, 2011, n. 24906; Cass. civ., Sez. III, judgment July 23, 2014, n. 16787; Tribunale Bergamo, Sez. IV, judgment January 4, 2017.

[35] Case A525 – Newspaper and periodical distribution market in the Genoa and Tigullio area, investigation started on December 19, 2018 and closed on December 20, 2019. The AGCM sanctioned the companies concerned for «arbitrary interruption of supplies of newspapers and periodicals»; Case A543 – Contractual relations between Benetton and its retailers, investigation started on November 17, 2020 and still ongoing; Case A539 – Italian Postal Service/Delivery Service Supply Contracts, investigation started on March 17, 2020 and closed, with the imposition of a penalty of approximately €11 million, on July 20, 2021; Case A546 – McDonald's Franchises, investigation started on July 27, 2021 and still ongoing. For a comparative level analysis, V. FALCE, *Abuse of economic dependence and competition law remedies*, cit.; V. FALCE, *The Italian regulation against the abuse of economic dependence at the crossroads*, cit.

ecosystem (through presumption) with the need to guarantee the right of defense and respect for the adversarial process (through proof of the absence of the state of economic dependence of the party that turns to the platform with a predominant position, for example, due to accessibility to alternative sources on the market).[36]

Of course, it could be contended that the new provision harms the market and businesses by introducing a discipline and pre-section that is unparalleled in European competition law. And it could be added that, with the approval of the new European rules on digital markets, Article 29 is no longer necessary.

Nonetheless, some clarifications seem useful.

From a technical point of view, the presumption is not a *mostrum* but a legal technique that already exists and is also applied in European antitrust law, in particular – and with the greater force of the absolute presumption – in the case of violations of the late payment discipline (thus does not hold the objection of contrary to European law and 117 Const.). Moreover, in digital, there are similar national provisions also or specifically toward large platforms. In Germany, for example, a new form of economic dependence has been introduced in two-sided markets: a company that provides essential intermediation services is also subject to the prohibition of discrimination if there are no alternative possibilities and operators to replace the intermediation service originally provided.

More generally, presumption is a technique that facilitates the protection of a right but only if that right exists and has been infringed. In this sense, Article 29 is a formidable incentive to adopt virtuous behavior toward businesses, thus strengthening their accountability.

As for the other objection, according to which with the new European rules on digital markets there is no longer the need to introduce Article 29 of Competition Law, it should be pointed out that the Digital Markets Act and economic dependence are different disciplines that pursue different ends.

Not only does the DMA target only a few gatekeepers, but more importantly, in case of violations, end users have no protection because the DMA is a public law discipline and not a private law discipline. In short,

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[36] It should be pointed out, however, that any positive finding of dependence is not equivalent, per se, to a judgment of the abusiveness of the conduct investigated, since, in such a case, the real possibility, for the abusive party, «to find satisfactory alternatives on the market» and, for the firm in a position of dominance, «to determine, in commercial relations with another firm, an excessive imbalance of rights and obligations», as provided for in Article 9, paragraph 1, Law n. 192/1998, will have to be further investigated.

the institution of dependency complements the DMA rather than overlapping with it (somewhat like class action with respect to antitrust tort), allowing access to civil or administrative justice if a right exists and it has been violated. Nor, finally, is there any formal overlap or conflict, because the DMA makes it clear from the outset as a matter of course) that EU regulation does not affect, nor interfere with, national regulations, much less those protecting competition and abuse of dependence.

## 4. Private-law enforcement

### 4.1. The nature of the relationship

The regulatory advancement is matched by jurisprudential directions that have also been evolving, starting with the nature of the relevant relationship.

While for a certain direction a situation of abuse can be realized exclusively in the context of a subcontracting contract,[37] according to a different line of argumentation, every type of relationship and form of interaction between companies can be influenced by significant asymmetries,[38] even in the absence of a contract.[39] As an intermediate position, insisting on the literal tenor of Article 9, it has been argued that the abuse of economic dependence finds application vis-à-vis all vertical relationships that are compatible with subcontracting.[40] Along the same lines, the Tribunal[41] ruled that the terms "customer" and "supplier" confirm that Article 9 does not find application vis-à-vis any type of contractual relationship, but exclusively in vertical relationships.

The last word came from the Supreme Court,[42] which finally indicated

[37] Court of Rome Civil Sec. X, July 4, 2011, n. 14381): «the provisions of the abovementioned law are exceptional and sectoral in nature and therefore cannot be subject to analogical interpretation. This solution is by far preferable for two reasons, the first literal and exegetical, the other of a systematic nature». «Its provisions are in no way applicable outside the boundaries drawn by the semantic meaning traced by the literal wording», Court of Potenza March 23, 2011, n. 414; Court of Torre Annunziata March 30, 2007.

[38] Court of Turin, March 11, 2010.

[39] Court of Rome, January 22, 2014, n. 1545.

[40] Court of Rome, May 5, 2008, n. 2688.

[41] Court of Torre Annunziata, March 30, 2007.

[42] Cass. April 24, 2014, n. 5403. In addition, the Court provided that the prohibition of abuse of economic dependence in the Subcontracting Law represents a particular application of

the high road in an "*obiter dictum*", arguing that the prohibition against abuse of economic dependence represents a provision «of general application, which does not require a specific subcontracting relationship».

However, in the face of this comforting indication, to which subsequent addresses have conformed,[43] the issue has been rekindled: in 2014, the Court of Milan returned to a restrictive approach, concluding that the abuse of economic dependence relates exclusively to subcontracting relationships, as they cannot be the subject of an exclusive sales contract. In 2017, the Court of Rome rejected this approach, adopting a broad interpretation, expanding the scope of the rule to any type of market relationship.[44]

Recently,[45] it was reiterated how, although the institution is placed within the law on subcontracting, it takes on a general scope, being applicable to any type of contractual relationship.[46]

This is a conclusion, rooted in the position of the Supreme Court, and confirmed by a number of elements: first of all, according to the *literal datum* of the norm – and unlike the remaining text of the law – no mention is made of the terms "principal and sub-supplier" to designate the dominant party and the dependent party of the rapport; secondly, according to well-established jurisprudence of legitimacy,[47] the abuse of economic dependence is a case of general application, which can disregard, in concrete terms,

a general principle that one would like to characterize the entire system of market relations. It is no coincidence that paragraph H-*bis* of Article 9, in turn, refers to Article 3 of Law 287/1990 for cases in which the abuse of economic dependence takes on a significance that goes beyond the interests involved in the individual contractual relationship, putting in broader terms the requirements of competition protection. It follows that a much broader scope than that formed by the parties to the individual contract is taken into consideration, to extend rather to a much more complex commercial relationship into which it comes, where precisely by virtue of that relationship the abuse takes place thus Cass. civ., Sec. III, July 23, 2014, n. 16787). See more recently Cass. civ. n. 1184/2020.

[43] See, *inter alia*, Court of Florence, January 24, 2014, n. 218; Court of Milan, September 24, 2014, n. 11203; Cass. n. 24906/2011.

[44] Court of Rome, January 24, 2017, n 1239.

[45] Court of Ascoli Piceno, January 21, 2019, n. 27.

[46] According to another ruling of legitimacy Cass. civ., sec. III, July 23, 2014, n. 16787), the case under analysis can come into consideration in a much broader scope than that formed by the parties in the individual contract, extending «to the more complex commercial relationship in which it is inserted, if it is precisely between such a relationship that the abuse takes place».

[47] Court of Cassation, judgment of November 25, 2011, n. 24906, in first. cie., 2013, 3-4; Cass. civ., Sec. III, July 23, 2014, n. 16787. With reference to the latter ruling, it was held that «[t]he prohibition of abuse of economic dependence set forth in the law on subcontracting constitutes a peculiar application of a general principle that one would like to characterize the entire system of market relations».

the possible existence of a specific sub-supply relationship.[48] To the effect, the discipline appears capable of potentially encompassing within itself any type of typical or atypical contract.

In the face of alternating case law, the doctrine[49] records substantially aligned positions that, independently of case law,[50] have pointed out how, although the provision is located in a special law, it actually disregards the technical or technological dependence that characterizes subcontracting, being rather connoted by a broader extension of the prohibition to the entire general discipline of the contract.[51]

On the other hand,[52] the "test case" of the rule is its consistency with the legal system and, specifically, the possibility of tracing the case back to the principle of good faith, which embodies one of the cardinal postulates proper to the discipline of contracts and obligations; it, in fact, requires not to take excessive advantage of the position of weakness in which the other party finds itself. The general clause of good faith, therefore, as an implementation of the constitutional duty of solidarity, rises to an instrument of control, even in a modifying and supplementary sense of the same negotiating statute, guaranteeing the fair balance between opposing interests and at the same time allowing an assessment to be made regarding the

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[48] Court of Ascoli Piceno, January 21, 2019, n. 27.

[49] C.M. BIANCA, *Diritto civile*, 3, *Il contratto*, 2ª ed., Milan, 2000, 405; R. CASO, *Luci e ombre della legge sull'abuso di dipendenza economica e sulla subfornitura industriale*, 2007, cit., 3; see also E. CAPOBIANCO, *L'abuso di dipendenza economica*, cit., 619 ff.

[50] Court of Bari, ord. May 6, 2002; Court of Bari, ord., July 2, 2002.

[51] The reasons on which this conclusion would be based are several. In the first place, the placement of the institution within the Subcontracting Law does not restrict its scope, since it often happens that the legislator inserts a given rule within seemingly inconsistent legal texts; this does not detract from the fact that its topographical placement depends on a different rationale, namely, that of pursuing the interest of the weak enterprise although, in practice, it would have been more consistent to place it before the specific discipline on subcontracting). To this would be added that the same, in drafting the rule, merely mentioned the business relationship between the enterprises; it follows that to support a restrictive interpretation it is not sufficient to rely on mere positioning. General application is, moreover, to be derived from co. 3-bis of Article 9, Law n. 192/1998, which was introduced by Article 11, co. 5, Law n. 57/2011. This paragraph – which will be examined in more detail below – gives the AGCM the power to sanction conducts of abuse of economic dependence that damage the competitive balance, without prejudice to the application of Article 3, Law n. 287/1990 so-called Antitrust Law).

[52] E. CAPOBIANCO, *L'abuso di dipendenza economica*, cit., 619 ff.: appare improbabile che l'art. 39 cod. cons. which requires that business activities be based on the principles of good faith, fairness and loyalty-cannot be confined only to relations between impacts and consumers, since the use of the term "activity" presumes a much broader scope, referable also to the context of business-to-business relations.

reasonableness of the contractual relationship.[53] It is agreed, therefore, that Article 9 cannot be restricted to subcontracting relationships but rather places a basic limit on contractual autonomy.[54]

## 4.2. The molecular state of economic dependence

Jurisprudential developments have also concerned the state of economic dependence, which, according to the rule, occurs in the presence of two cumulative requirements: 1) the establishment of excessive imbalances in the rights and obligations relating to business relations with another enterprise; 2) proof of the absence of a «real possibility for the person suffering the abuse to find satisfactory alternatives elsewhere in the market».[55]

For some judges,[56] the verification of the first requirement (that is prejudice to the weaker contracting party) goes through the ascertainment of sunk costs and not also of recoverable costs, the total amount of investment incurred by the party during the constancy of the economic relationship being irrelevant.[57] According to others,[58] the relevant aspect is the size of the companies, without taking into consideration the actual imbalance that exists between rights and obligations. In the opinion of others, the excessive imbalance of rights and obligations on the part of the parties should be assessed solely in legal terms, with the consequence that a contract that grants both parties the right of termination – placing them on an equal footing – would exclude in *re ipsa* the existence of a state of economic dependence.[59]

Also from an overall assessment perspective, some judges believe that it is not necessary to screen for the actual existence of excessive imbalances, being sufficient to prove the existence of a potential imbalance between the parties.[60] In addition to this, a contract that gives both parties the right of termination does not in itself exclude the existence of a situation of eco-

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[53] Cass. September 18, 2009, n. 20106; Cass. May 31, 2010, n. 13208.

[54] Court of Parma, ord., October 15, 2008; Court of Forli, October 27, 2010.

[55] Cass. n. 24906/1. For a different interpretation on the point see: Court of Torre Annunziata March 30, 2007), in the opinion of which the state of economic dependence does not require a pre-existing economic relationship by way of example, the hypothesis of refusal to sell or purchase).

[56] Court of Bari, October 22, 2004.

[57] Court of Rome, February 4, 2010.

[58] Court of Taranto, September 17, 2010.

[59] Court of Turin, March 18, 2010.

[60] Court of Parma, October 15, 2008.

nomic dependence. Although on the surface the contract may place them on an equal footing, in reality it may in fact leave one of them in a dependent[61] condition.

Coming to the second condition, the absence of satisfactory alternatives can be inferred: a) from an objective point of view, since no alternatives are available;[62] b) from a subjective point of view, since the investments incurred cannot be reused elsewhere or redeployed, precisely because of the high conversion costs.[63]

Certainly, the connection to a relevant market is important. The Tribunal of Bari[64] clarified that the absence of satisfactory alternatives must be ascertained by taking into consideration both the market in which the company operates and the company's particular characteristics. However, this position was partially revised in 2010, when the Court of Forli[65] asserted that the analysis on the possible absence of satisfactory alternatives for the company should consider (but not also be limited to) the market in which it operates. Recently,[66] it has been observed how the substantial difference between abuse of dominance and economic dependence is that, while in the former case it is necessary to verify the relevant market, in order for the antitrust case to be integrated, in the latter, the abuse and the imbalance created in constancy of the negotiating relationship between companies and not also the position of dominance as such, assumes importance.

Such a scenario becomes inadmissible when some Courts open the way for other possible and different requirements. For example, it has been argued that the assessment of the existence of a situation of economic dependence should not be based solely on the two *ex lege* requirements. The latter, in fact, expressly provides that «economic dependence shall also be assessed taking into account the real possibility for the abused party to find satisfactory alternatives on the market». Consequently, it is evident

[61] Court of Torre Annunziata, March 30, 2007.

[62] Court of Forli, October 27, 2010.

[63] Court of Rome, March 17, 2009.

[64] May 6, 2002.

[65] October 27, 2010.

[66] Court of Ascoli Piceno, January 21, 2019, n. 27; Cass., Sent. of November 25, 2011, n. 24906: In this ruling, particular emphasis is given to the contractual framing of the liability of abuse of economic dependence. Specifically, since abuse takes place in light of the excessive imbalance of rights and obligations in the context of a contractual relationship, the existence of a contract is presumed.

how the legislator wanted to grant the court the possibility of structuring its analysis on the basis of other parameters, which were not explicitly listed because of their particular heterogeneity.[67] Recent jurisprudence on the point, in fact, has leaned toward this second approach;[68] it follows that the mere imposition of unbalanced contractual conditions does not imply, automatically, the configuration of a situation of dependence, and this because where the supplier is able to choose to operate with third parties, it will be able to escape the aforementioned unfair contractual conditions and, therefore, will not find itself in a true situation of dependence.

### 4.3. A non-exhaustive list of abusive conduct

Conduct qualifies as abusive when it violates the objective principle of fairness and good faith.[69] Starting from the premise that each party must behave and exercise its contractual autonomy in "rational terms",[70] the Subcontracting Law clarifies that an «abuse may also consist of refusal to sell or refusal to buy, the imposition of unjustifiably onerous or discriminatory contractual terms, and the arbitrary termination of existing business relations».

With reference to unjustifiably onerous or discriminatory contractual conditions, it has been held[71] that the unilateral fixing of contractual conditions (including price) is, for all intents and purposes, a form of abusive conduct contrary to the principle of good faith. In relation to «arbitrary

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[67] For example, in the case of a refusal to sell, the overall duration of the business relationship as well as the nature of the performance of the contract must also be taken into consideration Court of Bari, May 6, 2002. Where the duration of the relationship is relevant, some Courts have overturned this requirement, also considering short-term dependence. See, by way of example, the Court of Bari, May 6, 2002, which recognized the state of economic dependence of a clothing store vis-à-vis its main supplier, even though it was concretely a case of temporary dependence limited to the upcoming seasonal sale) and affected only part of the stock.

[68] Tribunal of Lecce, Sec. I, 12 September 2018, n. 2964; Tribunal of Rome, Sec. IX, July 2, 2019, n. 13840: more specifically, for there to be talk of economic dependence, the absence of real alternatives for the supplier company is necessary, which is forced not only to suffer unfair contractual conditions, but also to operate with the strong customer, in the absence of valid alternatives. See, also, Tribunale di Milano, 17 September 2019.

[69] Supreme Court, September 18, 2009, n. 20106; Cass. civ., Sec. I, January 21, 2020, n. 1184.

[70] Court of Rome, November 30, 2009 and Court of Torre di Annunziata, March 30, 2007.

[71] Court of Trieste, September 21, 2006; Court of Appeal of Turin, n. 393/2021; Court of Bologna, May 5, 2021.

termination of established business relations», it has been held that termination is considered "arbitrary" when such a choice is not supported by valid reason.[72]

For the purposes of the configuration of the aforementioned case, there is no arbitrary interruption of business relations in the event that the subcontractor is unable to prove, with sufficient probability, that there is exclusionary conduct on the part of the principal, taking into account both the constitutional freedom of economic initiative and the maintenance of pre-existing supplies, since it is not possible to «configure a general right to new allocations in favor of the subcontractor itself».[73]

Since the list of behaviors is not exhaustive, it has been held[74] that the clause giving the parties the right to terminate is fully compatible with the very structure of open-ended contracts, provided that the exercise of this right is preceded by a reasonable period of notice, which gives the counterparty the opportunity to find viable "satisfactory alternatives" on the market.[75] However, it has also been argued[76] that the dominant party's decision not to continue the business relationship further-even if legally permissible-may be unlawful where it is arbitrary and unexpected to the counterparty who reasonably relies on the continuation of the contractual relationship. On this point, it is useful to point out that part of the case law[77] has ruled that the hypothesis of an *ad nutum* termination without specific objection, observance of the reasonable period of time that allows the company to identify new business partners, as well as the withholding of a large sum, nevertheless configures abuse of economic dependence, in the form of arbitrary interruption of existing business relations.

In the definition of atypical behavior, the possible unilateral modification of downstream market conditions can play an important role when considering the introduction of new subjects into the distribution system.[78] As an example, consider conduct by the dominant firm that – by exercising its contractual pre-eminence – includes new players in a distribution system affecting areas already covered by pre-existing distributors, which may constitute an abuse of economic dependence. Why? Because

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[72] Court of Taranto, December 22, 2003.

[73] Court of Turin, specialized enterprise section, June 6, 2017, n. 2952.

[74] Court of Torre Annunziata, March 30, 2007.

[75] Court of Rome, Sec. IX, July 2, 2019, n. 13840.

[76] Court of Bari, October 22, 2004.

[77] Court of Milan, June 17, 2016.

[78] Court of Turin, March 12, 2010.

such behavior does not allow the weaker party to be able to recover the costs of investments made and consequently constitutes a violation of the principle of good faith. Competition with one's distributors may also be relevant:[79] competition between a manufacturer – of brand-name products – and its resellers in the downstream market could constitute an abuse of economic dependence, provided, however, that the manufacturer imposes a higher resale price than that offered when selling directly to customers. For what reason? Because, again, such a behavior would not allow the weaker party to recover the costs of investments incurred. The significant limitation of orders placed can also be considered abuse. According to part of the jurisprudence,[80] the significant reduction of orders placed by a company can in fact be equated with the hypothesis of termination of existing business relations.

## 5. The public-law enforcement

Private-law interventionism has been matched by a delayed public-law impulse. While, in fact, antitrust powers were introduced in 2011, these have been exercised since 2016, the year in which an Italian gas company was sanctioned for repeatedly violating payment regulations.[81-82] In relation to that matter, the state of economic dependence was not established, being confirmed in *re ipsa* by the conduct engaged in by the company con-

[79] Court of Isernia, April 12, 2006.

[80] Court of Catania, July 9, 2009; Court of Bassano, February 9, 2010; and Court of Catania, September 2, 2009.

[81] Proceeding n. 26251 of 2016. Hera-Awarding Gas Measurement Groups/Terms of Payment, in *Boll.*, 44, 2016.

[82] According to the literal tenor of the last sentence of Article 9, in the case where there is a foreshadowing of a repeated and widespread violation of the late payment discipline «the abuse takes shape regardless of the establishment of economic dependence». It follows that the AGCM is not required to prove the very existence of a situation of economic dependence, as there is no relative presumption of the existence of economic dependence, with respect to which individual parties can produce contrary evidence capable of proving its non-existence. In fact, the rule in question has introduced a "typified legislative case" that takes place in all those cases in which the creditors) suffer repeated and widespread violations of the discipline on payment terms as a weak contractual party *ex se*); the verification of the aforementioned situation takes place with the ascertainment of the subsistence of the conduct that has the abovementioned characteristics and is contrary to the rules set up to protect fairness in payments. This is due to the fact that aggravating the Authority's position by requiring it to conduct a timely verification of the impact of abuse on the market would be contrary to the very wording of the rule.

cerned.[83] Conversely, anticompetitive effects on the relevant market were established.

Public-law enforcement on the subject was explained in relation to the distribution of newspapers and periodicals in the local area of Genoa and the Gulf of Tigullio,[84] In that case, the set of investigative tools used by the Authority made it possible to ascertain the position of economic dependence in which the local company was in, whose potential exit from the market could have jeopardized the same competitive balances. It should be noted that the case under consideration has made it possible to definitively abandon the reconstructive line, albeit a minority one, according to which abuses of economic dependence constitute one of the possible declinations of the abuse of dominant position, as referred to in Articles 3, Law No. 287/1990 and 102 TFEU. To the effect, economic dependence was established as an independent case on the basis of indices different from and complementary to those typical of the antitrust instruments.[85]

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[83] F. PROSPERI, *Abuso di Dipendenza Economica*, in G. ALPA, G. CONTE (eds.), *La Responsabilità d'Impresa*, Milan, 2015, 331.

[84] A525 – Periodical Newspaper Distribution Market in The Genoa and Tigullio Area, Measure No. 28043. On December 20, 2019, the AGCM imposed a sanction of £321,597 on M-Dis Distribuzione Media S.p.A. M-Dis) and its subsidiary TO-Dis S.r.l. To-Dis), national distributors of newspapers and periodicals, for engaging in an abuse of economic dependence, consisting in the arbitrary interruption of supplies of newspapers and periodicals destined for the sole proprietor Rovido Nello Rovido), a local distributor in the Genoa area and surrounding areas. In order to better understand the case in dispute, it is necessary to briefly recall the main facts covered by the AGCM investigation. On June 30, 1989, To-Dis and Rovido had signed a contract for the distribution of newspapers. Similar contract had been signed on December 11, 2000 between M-Dis then RCS Diffusione S.p.A.) and Rovido. On November 29, 2016, Rovido had signed a preliminary contract for the sale of its business with Martini Dumas S.p.A. Martini), a local distributor operating in Tuscany. The day after the stipulation, M-Dis, which holds joint control over Liguria Press S.r.l. Liguria Press), a market player active in the local distribution of newspapers in the Genoa area in competition with Rovido, served notice of termination of the distribution contract with Rovido. In doing so, M-Dis de facto caused the sinking of the agreement with Martini. A few months later, Liguria Press itself made a proposal to purchase Rovido's business complex, offering a lower price than Martini's proposal. At the same time, To-Dis also terminated its distribution contract with Rovido. As a result, the latter found itself partly replaced by Liguria Press in the distribution of the Applicants' newspapers and periodicals destined for newsstands in the Genoa area and the Gulf of Tigullio. In order to determine the existence of an actual abuse of economic dependence, the AGCM analyzed i) the existence of RN's economic dependence on M-Dis and To-Dis; ii) the arbitrary and illogical nature of M-Dis and To-Dis' conducts; and iii) the relevance of the conducts for the protection of competition and the market. With particular regard to the arbitrariness of the conduct engaged in by the Applicants, the Decision reports that the branch of the conduct engaged in by the Applicants was traced back to their desire to avoid the acquisition of Rovido by Martini, as well as to benefit Liguria Press a direct competitor of Rovido) in local distribution in the Genoa area.

[85] In Judgment n. 11131 published on November 2, 2021, the Lazio Regional Administrative

More recently, the Authority initiated an investigation against Poste Italiane, in relation to the postal services sector. In the AGCM's opinion, in fact, the clauses adopted would have systematically stiffened the corporate structure of the counterparty (which was in a state of "single-client relationship"), precluding it as much from operating with competing companies as from placing itself in direct competition with it. Such unjustifiably burdensome contractual conditions would, moreover, have directly affected competition in the postal services market, particularly with regard to the service of distributing and collecting correspondence and unaddressed mail in urban areas. The proceedings were concluded, with the imposition of a penalty, the amount of which was commensurate with the gravity and duration of the infringement.[86] The decision has been quashed by the Administrative Tribunal on the ground of the *onus probandi*, thus reinforcing the standard for analyzing the prerequisites of dependence and the impact of the challenged

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Court upheld the appeal filed by M-Dis and To-Dis jointly, the Applicants) against the AGCM's decision dated December 20, 2019. The Appellants had alleged -among various arguments- a violation by the AGCM of the provisions of Article 14 of Law n. 689/1981, concerning the late notification of an offense by the competent authority. On this point, the Lazio Regional Administrative Court – upholding the grievance under consideration – specified that the 90-day period indicated by the aforementioned Article 14 begins to run from the time when the activity aimed at verifying the existence of an infringement was completed or «should reasonably have been completed»). In this regard, the Lazio Regional Administrative Court, after acknowledging the well-established nature of the jurisprudential orientation that wants the applicability of the principles relating to the immediacy of the objection to antitrust proceedings as well, firmly and decisively argued that it is not permissible for the AGCM to carry out a pre-investigation activity that is prolonged for a period of time «totally free from any constraint and unjustifiably prolonged». According to the factual reconstruction made by the Lazio Regional Administrative Court, the AGCM was in possession of all the information necessary to allow the start of the aforementioned 90 days as early as February 12, 2018, i.e., the date on which it received the additional information requested from M-Dis and To-Dis in relation to the report prevened by Rovido on December 21, 2017). In spite of this, the Proceedings did not actually start until the following December 19, 2019, thus approximately ten months after the full knowledge of the case being investigated. In the view of the Lazio Regional Administrative Court, to allow such a modus operandi would mean to nullify not only the principles positively affirmed in the aforementioned Law No. 689/1981 but also the general need for efficiency and certainty of administrative action, as well as the principles set forth in Article 6 of the European Charter of Human Rights ECHR) and Article 41 of the Fundamental Charter of EU Rights. The latter, in particular, envisage an obligation for the competent authority to ascertain the existence of a precise violation and to apply the relevant sanctions by proceeding to the initiation of the investigative phase within a "reasonably congruous" timeframe obviously taking into account the complexity of the case in question), under penalty of violating the principles of legality and good performance. In light of the above, therefore, the Lazio Regional Administrative Court concluded that the claim of late initiation of proceedings made by the appellants was well-founded and, consequently, accepted the appeal, annulling the decision in its entirety.

[86] A539 – Poste Italiane/Contratti Fornitura Servizio Recapiti, Measure No. 29782, August 9, 2021.

conduct on competitive dynamics. It in on the Council of State to state the final word on the matter.

In November 2020, the Authority also opened an investigation against the Benetton group, alleging violation of the provisions of Article 9, paragraph 3-bis, Law No. 192/1998. Given its prominent position in the market and the ability of the latter to affect both individual contractual relationships and the balance of markets, the affair took on significant weight from a competition and market protection perspective. Subject of scrutiny was the alleged discretionary use of certain clauses included within two franchise contracts signed with an independent retailer, which allegedly granted the corporate complex the possibility of incisively conditioning commercial strategies; as well as – on the level strictly related to the abuse of economic dependence – the imposition on the franchisee, in full compliance with the franchisor's requirements, of the observance of a certain sales structure and commercial organization that would have significantly compromised the corporate structure, if not prevented, its eventual reconversion.[87]

Again, in a decision dated July 27, 2021, the AGCM initiated an investigation against McDonald's.[88] In the reports received by the AGCM, certain franchise relationships were presented, starting from the first pre-negotiation contacts and the conclusion of the franchise and/or business branch lease contracts until the termination of the relationship with the franchisor. Specifically, the entrepreneurs complained about a set of allegedly abusive conducts of McDonald's – adopted towards its franchisees throughout the business relationship and even before the contracts were signed – consisting of the imposition of a complex and integrated system of fees, royalties, financial and investment charges, sales policies and multiple conduct obligations, extremely burdensome and not strictly necessary and related to the granting of the franchise or the renting of the business branch. These conducts can basically be grouped into 4 broad categories: i) conducts adopted prior to the conclusion of the contract; ii) clauses included in the business branch lease and/or franchise agreements; iii) conducts adopted during the negotiation relationship; and iv) further conducts adopted at the end of the negotiation relationship.

Most recently, on November 4, 2021, the AGCM opened an investigation against WindTre for some possible conduct to the detriment of re-

[87] A543 – Benetton/Miragreen S.r.l.; AGCM, A543, Measure No. 28447, November 17, 2020.

[88] A546 – McDonald's franchise, Measure No. 29793, July 27, 2021.

sellers, operated through "economically unsustainable clauses and conditions", as highlighted by a report from a company with several outlets.[89] First, it appears from the documentation collected that the contracts provide for a substantial obligation of exclusivity on the part of the retailer vis-à-vis Wind Tre, and this is due to both a non-compete clause and, among other things, stringent obligations on the type of furniture and material that the retailer can use on its premises. In addition, three contractual profiles of particular concern have emerged: i) the reverse charge mechanism under which the cost of VAT is, in fact, borne by the retailer rather than the end customer; ii) the mechanism of pro rata reversals; iii) a succession of unilateral changes aimed at worsening the retailer's economic remuneration; and iv) termination by Wind Tre.

Over time, the AGCM has refined its work, intercepting those behaviors that, regardless of the market position held by the strong party, express the abusive exploitation of a position of relative dominance.

Very recently, the AGCM has opened an investigation against Meta Platforms Inc., Meta Platforms Ireland Limited, Meta Platforms Technologies UK Limited and Facebook Italy S.r.l. (hereafter, Meta) to ascertain an alleged abuse of economic dependence in the negotiation with Siae of the stipulation of the license to use, on its platforms, music rights.

Under the new regime, Meta may have unduly interrupted the negotiations for the renewal of the expired contract by also removing music content protected by Siae from its social platforms and failed to provide the company with the necessary information to carry out the negotiations in full compliance with the principle of transparency and fairness. According to the Authority, Meta may have abused the contractual imbalance from which it benefits by asking Siae to accept an inadequate economic offer, but without providing the appropriate information to assess its actual fairness. Following the breakdown in negotiations, Meta removed Siae-protected music content from social platforms so that it could no longer be enjoyed by users. The Authority believes that the hypothesized abuse of economic dependence could have a significant impact on the protection of competition in the affected markets and result in serious harm to consumers.

Such conduct could not only significantly compress Siae's competitive ability in the affected markets, but also prevent the authors it represents-significant part of those active in Italy-from reaching the ever-widening category of users who enjoy social platforms. Meta's behavior could also

[89] A547 – Wind Three's conduct to the detriment of resellers, Measure No. 29874, November 4, 2021.

have repercussions on authors represented by other companies collecting societies) and who are co-owners of rights together with authors protected by Siae. In addition to this, hindering access to music content on Meta's platforms could also adversely affect the remuneration of related rights of music producers and all other legal positions protected under copyright law. Moreover, these abusive practices could considerably limit the possibility of choice for consumers, who would be deprived of the possibility of enjoying works protected by Siae, an important component of Italian and international music offerings.

At the same time as the investigation, the Antitrust Authority also initiated proceedings to take any precautionary measures under Article 14-bis of Law No. 287/1990. The interruption of the negotiation between Meta and Siae, in fact, could immediately affect the competitive dynamics between the different players that make up the supply chain of the markets of the intermediation of copyrights of musical works. Hence the need for precautionary intervention to ensure the reactivation of a negotiation process between Meta and Siae in accordance with the principles of good faith, transparency and fairness.

Interim measures against Meta have been adopted. In this context, Meta's behavior appears to be abusive in nature and such as to cause serious and irreparable damage to the competitive dynamics in the markets related to copyright management, affecting all the subjects that make up the chain authors, subjects who contribute to the creation of the work and protected by the copyright law, collecting societies that protect these rights, end users). As a result, the AGCM has ordered that Meta immediately resume negotiations, maintaining behavior inspired by the canons of good faith and fairness, and provide all necessary information in order for SIAE to restore balance in the business relationship with Meta. In addition, subject to SIAE's authorization, Meta must restore the availability of music content on Facebook and Instagram. Finally, the Authority has ordered that in case of disagreement between the parties regarding the quantity and quality of information to be provided by Meta, it will appoint a trustee to identify it. The trustee must be third party, independent, and possess adequate technical expertise.

The Tribunal of First Instance, supporting the AGCM analysis and preliminary conclusions, has confirmed the interim measures.

## 6. Conclusions

The foregoing *excursus* confirms that the framework on which the institution of economic dependence abuse rests is mature in its foundations and solid in its application criteria both from a private and public perspective.

Scope and contours, however, are in the making. The fronts reinforced at the national level are matched not only by the solutions promoted in other Member States aimed at intercepting imbalances between companies (Germany, France and Belgium)[90] also, that is, specifically, in certain market segments; but also by European pro-competitive regulations aimed at informing relations in digital markets and the circulation of industrial data under the banner of fairness (DMA, DSA and Data Act).

The reason for this motion should come as no surprise. Indeed, while the Union makes fairness a pivot for the regulatory framework of the digital strategy,[91] the prohibition on abuse of rights has long since established itself first as an external limitation on the exercise of Union rights and claims, and more recently as a general principle in both European and national.[92-93]

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[90] See Amendment of the German Act against Restraints of Competition, available at the link: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html, which introduces a new form of economic dependence in two-sided markets: a firm providing essential brokerage services is also subject to the prohibition of discrimination if there are no alternative possibilities and operators to replace the brokerage service originally provided. Belgium has recently adopted new provisions prohibiting the abuse of economic dependence: in particular, a law of April 4, 2019, which came into force on August 22, 2020, introduced Article IV.2/l ne1 Code of Economic Law Code of Economic Law – "CEL"). Also in France, abuse of economic dependence is expressly covered in Article L 420-2 of the French Commercial Code French Commercial Code – "FCC").

[91] V. FALCE, *Fairness e innovazione nel mercato unico digitale*, Turin, 2020.

[92] Court of Justice, February 21, 2006, Case C-255/2002, Halifax plc *et al.* v. Commissioners of Customs & Excise, [2006] ECR, 2006, I-1655, in which it is sanctioned for the first time clearly and unequivocally that one cannot make "fraudulent or abusive use of Community law" § 68), which prohibits the exercise of a right, even if formally respectful of the attributive framework, where it takes place in a manner that is censurable with respect to a criterion of evaluation, legal or extra-legal, verifying an unjustified disproportion between the benefit of the holder of the right and the sacrifice to which the other party is subjected. For a more in-depth discussion of the issue of abuse of rights in the Community context see K. SØRENSEN, *Abuse of Rights in Community has: A Principle of Substance or Merely Rhetoric?*, in *Common Market Law Review*, 2006, 423. G. ALPA, *Appunti sul divieto dell'abuso del diritto in ambito comunitario e sui suoi riflessi negli ordinamenti degli Stati membri*, in *Contratto e Impresa*, 2015, 247; C. CAVANI, G. GHIDINI, P. PISERÀ, *Il caso Pfizer*, in *Rivista di diritto civile*, 2015, 1565.

[93] For European case law, meanwhile, individuals may not fraudulently or abusively rely on Union rules See, in particular, Halifax and Others, C-255/02, EU:C:2006:121, paragraph 68,

So framed, and concluding, the expansionist drift of the regulatory framework on economic dependence abuse expresses a natural effect of a broader systemic arrangement under which it is not allowed to exploit one's rights to achieve ends, which are substantially detrimental to broader interests or so as to verify an unjustified disproportion between the benefit of the right holder and the sacrifice to which the other party is subjected.[94] And as such it has been accompanied and not hindered or slowed down.

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and SICES and Others, C-l55/ l3, EU:C:2014:145, paragraph 29.) In any case, an abusive practice exists where there is a twofold element, the objective one consisting in the failure to achieve the purpose pursued, albeit in the face of formal compliance with the conditions laid down in EU law) see judgments of December 14, 2000, Emsland-Stärke, C-110/99, EU:C:2000:695, para. 52, and March 13, 2014, SICES and Others, C-155/13, EU:C:2014:145, para. 32) and the other subjective see judgment of March 13, 2014, SICES and Others, C-l55/ l3, EU:C:2014:145, para. 31) relating to the intention to obtain an undue advantage see judgments of February 21, 2006, Halifax and Others, C-255/02, EU:C:2006:121, para. 75; of December 22, 2010, Weald Leasing, C-103/09, EU:C:2010:804, para. 30; and of March 13, 2014, SICES and Others, C-l55/13, EU:C:2014:145, para. 33) arising from Union law by artificially creating the conditions necessary for its obtaining see, to this effect, judgments of December 14, 2000, Emsland-Stärke, C-110/99, EU:C:2000:695, paragraphs 53 and 58; of February 21, 2006, Halifax and Others, C-255/02, EU:C:2006:121, paragraph 81; of February 21, 2008, Part. Service, C-425/06, EU:C: 2008:108, paragraph 62; and of March 13, 2014, SICES and Others, C-l55/l3, EU:C:2014:145, paragraph 33; see, to that effect, O. and B., C-456/12, EU:C:2014:135, paragraph 58 and case law cited therein). Finally, European law has clarified that the theory of abuse of rights applies regardless of and independently of the connection with competition law and principles EU Court of Justice, Sec. V, December 11, 2014, n. 113, in which Thus, the Court also clarified that where a national framework that reserves certain health transport activities as a priority is exercised in an abusive manner, the principles and rules of competition law need not be invoked in order for that exercise to constitute a case of abuse of right) and thus independently of the existence of the relevant conditions for applicability.

[94] Case law has over time declined the above conditions, bringing them back to the following constituent elements: 1) the ownership of a subjective right by a subject; 2) the possibility that the concrete exercise of that right can be carried out in a plurality of ways that are not rigidly predetermined; 3) the circumstance that such concrete exercise, although formally respectful of the framework attributing that right, is carried out in a manner that is censurable with respect to a criterion of evaluation, whether legal or extra-legal; 4) the circumstance that, as a result of that mode of exercise, there is an unjustified disproportion between the benefit of the right holder and the sacrifice to which the other party is subjected: TAR Milan, Lombardy, Sec. III, October 11, 2017, n. 1951, in *Foro amministrativo*, 2017, 10, 2078; Cons. St., Sec. V, February 7, 2012, n. 656.

Andrea Postiglione

# Relevant market definition in the digital markets

SUMMARY: 1. Historical introduction. – 2. Market Definition assessment criteria. – 3. The role of the consumer. – 4. Market Definition and block exempt regulations. – 5. The market definition notice (MDN). – 6. MDN and market shares. – 7. MDN in digital markets. – 8. MD and digital ecosystems.

## 1. Historical introduction

Relevant product market comprises all those products and services which are regarded as substitutable and interchangeable by the users due to their characteristics, price and intended use. Thus, the "substitutability" has been the primary tool implied over the years to identify the relevant market, which is the first essential step while investigating abuse of dominant position under Article 102 TFUE as well as mergers.

This was not always the case. At the beginning of the investigations on abuse of dominant position carried out by the European Community the concept of relevant market was deemed superfluous, since the starting point for Commission analysis and investigation was the abuse itself.

Let us consider for instance the Decision "Van de Bergh Food/Commission" T-65/98 or "Commission vs. Masterfood" C 344-98 (in a case of de facto exclusivity, where the sale of ice cream was conditional on the purchase of such a quantity that the refrigerator was only sufficient for Unilever's products). See also the case "British Airways vs. Commission" T 219-99 in which the Advocate General says that «*it is not necessary to prove an anti-competitive effect, it is sufficient to prove anti-competitive potentiality*».

In this regard, it has been held for a long time that, for an undertaking holding a dominant position on a market, the fact of tying – albeit at their request – certain purchasers by means of an obligation or promise to ob-

tain all or most of their requirements exclusively from it, constitutes an abuse of a dominant position within the meaning of Article 102 TFEU, whether the obligation in question is imposed "sic et simpliciter" or whether it is in return for the granting of discounts.

In analysing cases under former Article 86 TFUE concerning abuse of dominance, the Commission has, starting from the mid '70, – with very few exceptions – applied an economic approach in the form of a three-stage analytical procedure, aimed for assessing the relevant market in cases of infringement of Article 102 TFUE:

– The first stage would be the definition of a market in terms of product range and geographical area as well as based on buyers' ability and willingness to transfer demand in the short term (*Demand/Substitution*). Market shares have generally been based on actual sales of the relevant product and geographical area.

– The second stage would take in consideration the concept of supply-substitution, transfer of additional supply to the relevant market from enterprises already active within it.

– Finally in a third stage the Commission would assess to what degree dominance of the relevant market has been diminished by competition in a downstream or composite product market or by longer term demand/substitution.

This last point is of paramount importance because in the case "Eurofix Bauco vs. Hilti" C-138/88 the defendant stated that the final consumer was not affected by the allegedly infringing behaviour. Thus the European Court of Justice in the known "INTEL Judgment" C-413-14 at paragraph 138 holds that the presumption of illegality must be overcome when the Commission itself has made an assessment on the «*as sufficient competitor test*», the theory of the equally efficient competitor that requires the party that excludes the abuse of a dominant position on the market to show that in the position of the "non-dominant" party it would not have the same harmful consequences that the other party complains of.

Nowadays the ECJU is matter-of-factly increasingly inclined to adopt economic models in judicial decisions. Hallmarks cases are: T 834-19 in the proposed merger between TNT and UPS and T235-18 in the case Qualcomm vs. Commission of 15th June 2022.

The ultimate stronghold is the so-called complex economic assessment related to MD.

Even though the EUCJ showed reluctance to apply economic analysis within the 'complex economic assessment', is remarkable that in the case

of "Servier vs. Commission" T 691-14 l the EUCJ goes into the depths of market definition and finds that there was an inaccurate assessment of market definition by the Commission annulling the sanctions based on Article 102 TFEU. [1]

## 2. Market Definition assessment criteria

The allegedly traditional technical method for defining the market is the SSNIP test, which consists of a technical economic analysis on price variation. Nevertheless, the SSNIP test (Small but Significant and Non-transitory Increase in Prices) only works in the competitive market (where firms are price takers i.e. bound by the rules of competition), it does not work, however, in the monopolistic market (in the so-called cellophane fallacy case) because the monopolist as 'price maker' has already maximised profits so that the criterion of "increased profit" cannot work.

In fact, the SSNIP test is also called the hypothetical monopolist test.

The SSNIP test finds thus no practical enforcement by the Courts, neither in the public enforcement nor in the private enforcement domain.

Courts tend to use the so-called *Theory of Harm*; the theory of how much a behaviour may prejudice the market turning into possible price increases, possible establishment of dominant or monopolistic positions even local and not widespread ("competitive constrain", let us think of an hypothetical merger of petrol station brands where in a big city nothing apparently happens but at the level of small villages it may result into monipolizing the market).

In the "Somerfield-Morrisons" case, the merger of the two supermarkets was blocked out of these very motives.

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[1] See also case C 603-13 Galp Energia Espana. See also T 712-16 Deutsche Lufthansa *vs.* Commission or T 491-07 Groupement des cartes bancaires vs. Commission. See Hoffman La Roche vs. AGCM C179-16: «*The Court held that 'a national competition authority may include in the relevant market, in addition to medicinal products authorised for the treatment of the condition in question, another medicinal product whose MA [marketing authorisation] does not cover that treatment, but which is used for that purpose and thus bears a real relationship of substitutability with the former. In order to determine whether such a relationship of substitutability exists, that authority must – provided that the authorities or courts competent to do so have carried out an examination of the conformity of the product in question with the provisions in force governing its manufacture or marketing – take account of the result of that examination, assessing its possible effects on the structure of supply and demand*».

The *Theory of Harm* in the abuse of a dominant position case requires also to put the dominant firm in the same situation as its competitor and see if it would be able to bear the costs (as efficient competitor test). If it could not, it would mean that the undertaking is selling below cost and below the threshold of sustainability.

## 3. The role of the consumer

In the definition of a relevant market, we must furthermore take into account the real consumer in a specific market, a person who is used to buying specific products. Therefore, the effective sources for anti-competitive authorities' investigations are expert opinions and internal documents of the parties, studies on business strategies alongside with surveys of consumers behaviours.

The Italian Supreme Court (corte Suprema di cassazione) in its decision of May 19th 2016, n. 10336 states «*One of the prerequisites for establishing the existence of unfair competition, the absence of which prevents all competition, is the existence of the commonality of customers, which is given not by the subjective identity of the purchasers of the products of the two companies, but by the totality of consumers who feel the same market need, and, therefore, turn to the purchase of all those products that that need is capable of satisfying. The commonality of customers must also be verified in a potential perspective, it being necessary, in this regard, to examine whether the activity in question, considered in its natural dynamism, allows to configure, as a physiological and foreseeable market outcome, in terms of time and geography, and, therefore, in terms of merchandise, the offer of the same products, or of similar or substitute products compared to those currently offered by the subject complaining of unfair competition. As regards, in particular, the geographical scope, what comes into play is the ascertainment of the reference market, that is, in the so-called relevant market, which is the one in which the entrepreneurs in dispute operate or, according to the natural expansiveness of economic activities, may operate*».

This decision was issued following a long dispute: according to the appellant, the relevant market consisted of «*the smallest group of products and the smallest geographic area for which the creation of a dominant position is possible in view of the existing possibilities*».

The Supreme Court highlights that this principle should not be interpreted in a restrictive way and that, rather, for the definition of the relevant market reference must be made to the "Commission Communication on the

definition of the relevant market for the purposes of Community competition law", to the provisions of European and national case-law, to the EU institutions, and to the Competition Authority, which have all highlighted the relevance of the parameter of "substitutability" on both the demand and the supply side.

The criterion of substitutability on the demand side indicates «*the degree of fungibility of the reference product with other products considered substitutable on the basis of essential parameters determined by the function of use, the characteristics of the product and the price*». This fungibility, the Supreme Court specifies, must be perceived by the consumer not only for the product's characteristics, but also for "the level of their price".

The definition of the relevant market is essential for mergers and abuse.[2] It is not essential for *Cartels* and *Agreements* because there are previous scientific studies stating that agreements are always detrimental to competition (99.9% of cases).

## 4. Market Definition and block exempt regulations

The purpose of the *Block Exempt Regulation* for horizontal and vertical agreements is to create a safe harbour for specific vertical agreements.[3]

It creates a presumption of legality linked to the market share held by the parties.

Within the safe harbour, all agreements are considered lawful if three conditions are met (the example concerns vertical agreements):

1. The market share must be less than 30% for both the producing party (upstream market) and the subordinate party (downstream market) and the agreement must not exceed a duration of 5 years.

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[2] OECD thus observed that «*COVID-19 crisis is an unprecedented economic shock that will have, as some of its consequences, a disruptive impact on the economy leading to the financial distress of many firms and forcing many firms to exit the market or merge. The role played by competition authorities in preserving competitive market structures by using their merger control powers may thus become even more relevant. Without a thorough merger review, there is a serious risk that the economic crisis would result in higher market concentration and market power in several sectors, which might cause price increases, harm innovation and productivity, and aggravate inequality*».

[3] The 2010 Horizontal Block Exemption Regulations expired on 30 June 2023. Before their expiry, they were subject to a review, together with the 2011 Horizontal Guidelines. This review ended with the adoption of the revised R&D Block Exemption Regulation (Commission Regulation (EU) 2023/1066), the revised Specialisation Block Exemption Regulation (Commission Regulation (EU) 2023/1067) and the revised Horizontal Guidelines.

2. No “hardcore restriction” i.e. “restrictive agreements by object” (defined in Article 4 of the 2022 Regulation) e.g. exclusivity on territory (101 III does not apply); content, objectives and legal context must be assessed.
3. Agreements must be severable from the contract.

## 5. The market definition notice (MDN)

MDN has been used since 1997.
Basically, MDN it is a tool provided by the Commission to identify the boundaries of competition between companies: «*The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant market in its enforcement of Union competition law*» (Article 1). The Market Definition enables the Commission to identify the suppliers and customers active on each relevant market.
It can then calculate the total market size and the market share of each supplier, based on sales (and, for customers, purchases) of the relevant products in the relevant geographic area in which the customers are located.
At the same time Competitors on the market are informed about the benchmark used by the Commission to asses the market they are active in.
Commissioner Margarethe Verstager declared in this regard during a speech held in 2019: «*We want to be sure that the guidance it gives is accurate and up to date, and sets out a clear and consistent approach to both antitrust and merger cases across different industries, in a way that’s easily accessible*».
The key points of the MDN are therefore:

1. market definition is based on the facts of the case.
2. MD involves defining both the product and geographic market.
3. MD is only one step in the assessment; MD does not prejudge the outcome.

## 6. MDN and market shares

The Commission usually relies on market shares based on sales.
In procurement markets, on the contrary, the Commission usually relies on market shares based on purchases.
Market shares reflect the relative position of suppliers on the market and, as such, can be very useful in assessing market power.

However, market shares are not the sole indicator of an undertaking's strength in the market· Other factors, such as barriers to entry, access to specific assets and inputs, as well as product differentiation and degree of substitutability, may also be relevant, depending on the specific nature of the case. The Commission's guidelines on the substantive assessments in competition proceedings explain this further.

## 7. MDN in digital markets

In addition to sales or purchases, depending on the specific products or on the specific industry in question, other metrics can offer complementary or more useful information to determine market shares.

These may include: capacity or production volumes (in particular for markets characterised by the strategic importance of capacity); the number of suppliers (*in particular in markets with formal tenders or in situations where innovative products are at the development*) … *the number of visits* (Google Shopping Case T 39740 and then C-9/08) *the time spent or audience numbers, the number of downloads and updates* (Google Android T 40099 and C-402/08), *the number of interactions* (Merger Facebook/Kustomer) *or volume or value of transactions concluded over a platform* (in particular where access to products is provided mainly for free, as can be the case for instance in digital markets, or more generally in the case of multi-sided platforms).

There is a clear explanation for this.

The DMA and the DSA are considered ex ante regulations, regulations in which the protection of the market from infringements under Articles 101 and 102 of the Treaty is carried out by means of proactive rules, aimed at preventing future market distortions, thus irrespective of the existence of detrimental effects.

In both the DSA and the DMA, the relevant market cannot be taken into consideration as normally happens only in quantitative terms (market share, supply/substitution or demand/substitution), since the market distortion is yet to be produced, but requires an evaluation in qualitative terms.

Such elements are to be found also in the draft revised market definition Notice not yet in force.

I refer in particular to point 4.5 concerning "Market Definition in the presence of aftermarkets, bundles and digital ecosystems", which displays a large number of examples as to how much these systems diverge from traditional market systems.

Point 4.4. RMDN*: Market definition in the presence of multi-sided platforms.*

*95. In the presence of multi-sided platforms, the Commission may define a relevant product market for the products offered by a platform as a whole, in a way that encompasses all (or multiple) user groups, or it may define separate relevant product markets for the products offered on each side of the platform.*

*96. In practice, the presence of indirect network effects may render the assessment of demand substitution and, in particular, the application of the SSNIP test more challenging.*

*97. Multi-sided platforms often supply a product at a zero monetary price to a user group in order to attract users to products offered on the other sides of the platform and monetise their products on those sides. Zero monetary prices are an integral part of multi-sided platforms' business strategy, so the fact that a product is supplied at a zero monetary price does not imply that there is no relevant market for that product.*

*98. In such cases, non-price elements are particularly relevant for the assessment of substitution. The Commission focuses on elements such as product functionalities, intended use, evidence on hypothetical substitution and on competitive constraints based on industry views· barriers or costs of switching such as interoperability with other products and licensing features. The Commission may also consider alternatives to the SSNIP framework, namely by assessing the switching behaviour of customers in response to a small but significant non-transitory decrease of quality ('SSNDQ').*

## 8. MD and digital ecosystems

The Last frontier of Market definition is the Digital Ecosystem.

Digital ecosystems are a plurality of digitally connected markets, often through multifunctional platforms in which the technological knowledge and competitive advantages of one sector spill over and amplify into all the more diverse fields in which the ecosystem moves.

Digital Ecosystem are often multiconnected and build a whole digital galaxy.

Digital ecosystems can in certain circumstances be thought of as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance, by technological links or interoperability.

When considering digital ecosystems, the Commission may thus apply

similar principles to the ones applied to after markets to define the relevant product market(s). When digital products are offered as a bundle, «*the Commission may also assess the possibility of that bundle constituting a relevant market on its own*» (point. 103).

In the Google Case T-604/18 or in the Google and Alphabet case (Google Android) the General Court dealt with a defence based on Ecosystem (the broader is the market the smaller is the relative power in the market of the investigated Company) and stated (paragraph 116): «*in a digital 'ecosystem' [...] the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity. Taken together, the relevant markets may also have a global dimension in the light of the system that brings its components together and of any competitive constraints within that system or from other systems*».

An example of a digital ecosystem would be an ecosystem of products built around a mobile operating system, including hardware, an application store and software applications.

The EUCJ carries on: «*the General Court examines the plea alleging errors of assessment in the definition of the relevant markets and in the subsequent assessment of Google's dominant position on some of those markets. In that context, the General Court states that it is required, essentially, to ascertain, in the light of the parties' arguments and of the reasoning set out in the contested decision, whether Google's exercise of its power on the relevant markets enabled it to act to an appreciable extent independently of the various factors likely to constrain its behaviour. In the present case, the General Court notes at the outset that the Commission identified, first of all, four types of relevant market:*

(i) *the worldwide market (excluding China) for the licensing of smart mobile device operating systems*;
(ii) *the worldwide market (excluding China) for Android app stores*;
(iii) *the various national markets, within the EEA, for the provision of general search services*; and
(iv) *the worldwide market for non-OS-specific mobile web browsers*».

The Commission went on to find that Google held a dominant position on the first three of those markets. The General Court observed, however, that, in the Commission's presentation of the different relevant markets, it duly mentioned their complementarity, presenting them as being interconnected, particularly in the light of the overall strategy implemented by Google to promote its search engine by integrating it into an 'ecosystem'.

Having been called upon, specifically, to rule on the definition of the boundaries of the market for the licensing of smart mobile device operating systems and the associated assessment of the position held by Google in that market, the General Court established that the Commission found that the 'non-licensable' operating systems exclusively used by vertically integrated developers, like Apple's iOS or Blackberry, are not part of the same market, given that third-party manufacturers of mobile devices cannot obtain licences for them.

Nor did the Commission err, concludes the EUCJ, in also finding that Google's dominant position on that market was not called into question by the indirect competitive constraint exerted on that market by Apple's non-licensable operating system. The Commission also rightly concluded that the open-source nature of the licence to use the Android source code did not constitute a sufficient competitive constraint to counterbalance that dominant position.

**Antonio Manganelli** [*]

# Navigating Essentiality: A Compass for Digital Platforms Regulation

SUMMARY: 1. Introduction. – 2. The evolution of the Essential Facility Doctrine. – 3. Essential services, public utilities and service of general economic interest. – 4. Squaring the circle: old 'essentiality' concepts in a brand-new world. – 4.1. The Essential Facility Doctrine in the digital domain. – 4.2. Data as an essential facility? – 4.3. Blurred concepts of large digital platforms as 'public utilities'. – 4.4. Do digital platforms provide essential public services to end-users? – 5. Concluding remarks: Gatekeepers' Regulation on the Rise.

## 1. Introduction

Digital platforms are central to the discourse surrounding the regulation of digital markets. They epitomize multi-sided markets, embodying key characteristics such as substantial indirect network effects and economies of scale and scope, resulting in markets that are highly concentrated and resistant to competition. These platforms foster ecosystems that offer diverse products and services, serving as crucial channels for business users to connect with potential end customers. Additionally, gatekeepers wield significant control and intermediary power, functioning as *de facto* private regulators who dictate the terms and conditions for user participation in the networked services. They simultaneously serve as intermediaries and trading operators within the platform, assuming a dual role in facilitating transactions.

Concerns regarding the crucial economic positions of Meta (Facebook, Instagram, WhatsApp), Amazon, Apple, and Alphabet (Google) within global digital markets have prompted market studies initiated by various regulatory bodies, including the Australian Competition and Consumer

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Commission (ACCC),[1] the Netherlands Authority for Consumers & Markets (ACM),[2] the UK Competition and Markets Authority (CMA),[3] the Japan Federal Trade Commission (JFTC),[4] the US House of Representatives,[5] and so on. These studies focus on the rule-setting capabilities and dual roles of these major digital platforms.

Moreover, the terms and conditions governing access to digital platforms, such as rights concerning social media access and usage, freedom of speech, in-app purchasing regulations, and restrictions on the choice of payment apps on smartphones, are under scrutiny by courts and antitrust authorities worldwide. Furthermore, numerous legislative efforts have been enacted to ensure market contestability and establish equitable conditions by advocating regulatory approaches that aim to classify large digital platforms as common carriers or public utilities. This would impose a neutrality regime upon such orchestrators, aiming to create a level playing field in the digital marketplace akin to public infrastructure regulation.

Significantly, the EU has introduced on 12 October 2022 a novel *ex- ante* regulatory framework known as the Digital Markets Act (DMA),[6] while the UK is in the process of formulating a similar regime with the Competition and Markets Authority (CMA) crafting a code of conduct intended to govern online platforms holding a "gatekeeping" position or considered to have "strategic market status".[7] In alignment with these endeavours, Ger-

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[1] AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, *Digital Platform Services Inquiry*, (2023), https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202023%20Report%20-%20Interim%20Report%207%20-%20Final%2815835612.1%29.pdf.

[2] THE NETHERLANDS AUTHORITY FOR CONSUMERS & MARKETS, *Market study into mobile app stores*, (2019) https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf.

[3] UK COMPETITION AND MARKETS AUTHORITY, *Mobile Ecosystems: Market study. Final Report* (2022) https://assets.publishing.service.gov.uk/media/63f61bc0d3bf7f62e8c34a02/Mobile_Ecosystems_Final_Report_amended_2.pdf.

[4] THE JAPAN FEDERAL TRADE COMMISSION, *Discussion Papers on Ecosystems by Digital Platforms*, (2023) https://www.jftc.go.jp/en/cprc/reports/discussionpapers/ecosystem_dp/index.html.

[5] US HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW, *Investigation of Competition in Digital Markets*, (2020) Majority Staff Reports and Recommendations https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

[6] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[7] EUROPEAN COMMISSION, *Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)*, COM(2020) 842 final; UK COMPETITION AND MARKETS

many has fortified its national Competition Act (GWB) by enacting a new Section 19a, which lays out specific standards of conduct for entities deemed to be of «paramount significance for competition across markets».[8] Similarly, beginning in June 2021, the US House of Representatives initiated work on a comprehensive antitrust package designed to address the market dominance of major online platforms, categorizing them as 'critical trading partners'.[9] This effort resulted in the proposal of the US Senate introduced the "Open App Markets Act" aimed at diminishing "gatekeeper power" in the app economy.[10]

On the jurisprudence side, the *Google Shopping*[11] case, endorsed by the European General Court, set forth an approach emphasizing equal treatment, deemed a fundamental principle of EU law derived from case law applied to public undertakings.[12]

Despite variations, the legislative initiatives and the recent case law mentioned above share common aims and concerns. Primarily, they respond to challenges faced by antitrust enforcers, aiming to address enforcement shortcomings.[13] In the digital markets, antitrust measures are perceived as

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AUTHORITY, *Platforms and content providers, including news publishers Advice to DCMS on the application of a code of conduct*, (2022) https://www.gov.uk/government/news/cma-publishes-code-of-conduct-advice-for-platforms-and-publishers.

[8] Gesetz zur Änderung des Gesetzes gegen Wettbewerbs- beschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB – Digitalisierungsgesetz), 18 January 2021.

[9] H.R. 3816, *American Choice and Innovation Online Act* (https://www.congress.gov/bill/117th-congress/house-bill/3816/text?r=43&s=1); H.R. 3825, *Ending Platform Monopolies Act* (https://www.congress.gov/bill/117thcongress/house-bill/3825/text?r=34&s=1=; H.R. 3826, *Platform Competition and Opportunity Act* (https://www.congress.gov/bill/117th-congress/house-bill/3826?s=1&r=5); H.R. 3843, *Merger Filing Fee Modernization Act* (https://www.congress.gov/bill/117th-congress/house-bill/3843?s=1&r=11), and H.R. 3849, *Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act* (https://www.congress.gov/bill/117th-congress/house-bill/3849?s=1&r=1).

[10] S. 2710, *Open App Markets Act* https://www.blumenthal.senate.gov/imo/media/doc/8.11.21%20-%20Open%20App%20Markets%20Act%20-%20Bill%20Text.pdf.

[11] Case T-612/17, *Google and Alphabet v Commission*, ECLI:EU:T:2021:763, following Case AT.39740, *Google Search (Shopping)*, Commission decision of 27 June 2017. See R. NAZZINI, *Google and the (Ever-Stretching) Boundaries of Article 102 TFEU*, in 6(5) *Journal of European Competition Law and Practice*, (2015), 301; P. AKMAN, *The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law*, in 2 *Journal of Law, Technology & Policy*, (2017), 301.

[12] ID., para. 155.

[13] A. MANGANELLI, A. NICITA, *Regulating Digital Markets. The European approach.* London**,** 2022; O. BORGOGNO, G. COLANGELO, *Platform and Device Neutrality Regime: The New Com-*

inadequate due to their *ex-post* application and need for exhaustive case-by-case investigations. Hence, there is a demand for expedited enforcement processes and measures aimed at prohibiting specific practices.

In this context, certain obligations are proposed to expand upon the concept of essentiality in competition policy, aiming to establish a platform and device neutrality framework for digital platforms. Notably, the European DMA, German Section 19a, and select US bills (including the American Choice and Innovation Online Act, Augmenting Compatibility and Competition by Enabling Service Switching Act, and Ending Platform Monopolies Act) seek to prohibit designated platforms from various actions. These include discriminating between users through self-preferencing and unfair access conditions, restricting sideloading and uninstalling pre-installed apps, hindering data portability and interoperability, and imposing anti-steering provisions. Additionally, in May 2023, the 'Digital Platform Commission Act' was presented in the US Senate with the aim to restricting the ability of carrying out conducts perceived as detrimental to competitors.[14]

Lastly, while the UK regime adopts a principle-based approach rather than a rule-based one, relying on firm-specific codes of conduct, the CMA has proposed several pro-competitive interventions. These include third-party access to data, interoperability and common standards, interventions to counter consumer inertia and default bias, obligations to provide fair and reasonable access terms, and separation remedies.[15] These interventions, which cannot be achieved through codes of conduct alone, could significantly impact digital platforms.

Against this backdrop, this contribution seeks to examine the application of the concept of essentiality concerning digital platforms, both on the demand and the supply side (and on different sides of multisided markets), in light of the new legal frameworks introduced in the EU.

The structure of the piece is as follows. Section 2 delves into the evolution of the essential facility doctrine across US antitrust law and the EU competition law. Section 3 examines essential services for consumers and their access to public utilities. Section 4 conducts an in-depth analysis of

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*petition Rulebook for App Stores?*, in *The Antitrust Bulletin*, 67, Issue 3, 2022; M. CAPPAI, G. COLANGELO, *Taming digital gatekeepers: the 'more regulatory approach' to antitrust law*, in 41 *Computer Law & Security Review*, 105559 (2021).

[14] See S.1671 – *Digital Platform Commission Act – 2023* (https://www.congress.gov/bill/118th-congress/senate-bill/1671).

[15] UK Competition and Markets Authority (n. 3) para. 4.68.

the reasons which make the those traditional concepts of essentiality largely unfit to address the competitive and fairness problems raised by large digital platforms. Finally, Section 5 concludes by describing how the new digital markets regulation try to tackle these problems and to define new pro-competitive and fairness concepts and approaches.

## 2. The evolution of the Essential Facility Doctrine

The concept of the *Essential Facility Doctrine* (EFD) has evolved with the notion that a monopolistic firm bears a responsibility to grant access to its facilities to all parties, including competitors.[16] This doctrine serves as a limited exception to the general principle that firms, even those with monopolistic status, have the freedom to choose their business associates.

The development of this doctrine has followed distinct paths in the EU and the US. While rooted in US case law, recent proposals to rejuvenate the essential facilities doctrine indicate its ongoing evolution.[17] However, the current legal framework does not firmly establish it as a statutory tool, but rather as a case-law remedy. As noted in the *Trinko* case, the US Supreme Court has yet to officially acknowledge the doctrine.[18] Furthermore, mandating firms to share their advantageous resources may conflict with the core objectives of antitrust law, potentially undermining incentives for investment by both monopolists and rivals in economically beneficial facilities.

Moreover, preserving the incentive to innovate is crucial within the free-market system, where monopolistic power is not inherently illegal unless accompanied by anticompetitive behaviour. Therefore, the mere possession of monopoly power does not constitute unlawful conduct unless it is coupled with actions that hinder competition.

The sole "limited" exception to this general rule is exemplified by the circumstances outlined in the *Aspen Skiing* decision.[19] In this context, the unilateral termination of a voluntary course of dealings, even if previously engaged in by the facility owner, can be construed as a clandestine form of

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[16] Cf. G. Colangelo, A. Manganelli, A. Nicita, *Art. 102 TFEU*, in F. Arena, R. Chieppa (eds.), *Code of Competition*, Milano, 2023.

[17] US House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law (n. 9) 398.

[18] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

[19] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

exclusionary practice. Notably, if a firm alters its behaviour unreasonably by discontinuing a voluntary and presumably profitable course of dealings, it may be deemed unlawful if the firm sacrifices short-term profits to achieve an anticompetitive objective, namely, long-term profits derived from excluding competition.

Conversely, the essential facility doctrine has experienced significant success in the European context. Under the "exceptional circumstances" set forth in *Magill*, a refusal to engage in transactions may constitute an antitrust violation if (i) access to the product or service is essential for conducting business in a market, (ii) the refusal is unjustified, (iii) it leads to the exclusion of competition in a secondary market, and, if intellectual property rights are involved, (iv) it obstructs the emergence of a new product with potential consumer demand.[20] Subsequent rulings in *IMS*[21] and *Microsoft*[22] have substantially relaxed the third and fourth requirements, respectively, by deeming the secondary market requirement fulfilled even if the market is merely potential or hypothetical and considering the new product requirement satisfied when access to the facility is necessary for rivals to develop follow-on innovation, such as enhanced output with added value.

Nevertheless, the requirement for the indispensability of the requested resource remains intact and is challenging to establish. According to *Bronner*, access to an input is considered indispensable if there are no technical, legal, or economic barriers that could render duplication impossible or unreasonably difficult.[23] Additionally, proving the lack of a realistic alternative entails demonstrating that it is economically unfeasible to create the resource on a comparable scale to that of the controlling firm.

In this context, although pertinent to a US dispute, it is noteworthy to consider the arguments presented by the Northern District of California in dismissing Epic's claim regarding the Apple iOS platform's status as an essential facility. The court contended that, despite the proprietary nature of iOS, multiple avenues exist for distributing content to consumers, which undermines the claim of indispensability. The court emphasized that the doctrine does not mandate distribution according to competitors' prefer-

[20] CJEU, 6 April 1995, Joined Cases C-241/91 P and 242/91 P, *RTE and ITP v. Commission.*

[21] CJEU, 29 April 2004, Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. GH.*

[22] General Court, 17 September 2007, case T-201/04, *Microsoft Corp. v. Commission*.

[23] CJEU, 26 November 1998, Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.*

ences and cited Epic's ability to monetize Fortnite through various means as evidence against its claim. Furthermore, the court found that Epic had failed to demonstrate user lock-in or the inability to switch to Android devices in response to changes in game app pricing, availability, or quality, suggesting that low switching between operating systems primarily stems from user satisfaction rather than lock-in.[24]

Further, the decision by the Italian antitrust authority in the Enel and Google dispute marks a notable instance of applying the essential facility doctrine in the app store context.[25] The AGCM addressed the indispensability requirement differently from *Bronner*, asserting that despite the existence of less favourable options, Android Auto is irreplaceable due to its convenience and safety. The remedy, which mandates Google to redesign its platform according to Enel's business needs, extends beyond mere access provision for potential rivals. This novel approach was eventually upheld in July 2022 by the Regional Administrative Court of Lazio following Google's appeal against the AGCM's investigation.[26] Thus, the Italian court confirmed the findings contained in the AGCM proceedings and the fine of more than €100 million imposed on Google, and the order to 'open' the Android Auto system to potentially interested apps (such as, in the case at stake, Enel X).

In contrast, the recent *Slovak Telekom* judgment heralds a significant shift. Initially, the CJEU acknowledged concerns raised in *Bronner* and *Trinko* regarding the imposition of contracts on dominant undertakings. Such obligations undermine freedom of contract and property rights, as dominant firms retain the right to refuse contracts and utilize their infrastructure for their own purposes.[27] Additionally, enabling easy access to facilities discourages competitors from developing their own infrastructure and disincentivizes dominant firms from investing in efficient facilities.[28] Therefore, obligating a dominant firm to grant access to its infrastructure is unjustified from a competition policy perspective unless the firm genuinely controls the market.[29]

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[24] ID., para. 51.

[25] See AGCM case n. A529 – Google/Compatibilità APP Enel X Italia Con Sistema Android Auto, decision No. 29645 of 27 April 2021, published in the *AGCM Bulletin*, 20, 2021; CJEU, 25 March 2021, Case C-165/19 P, *Slovak Telekom a.s. v. Commission*.

[26] Regional Administrative Court of Lazio ('TAR Lazio') (ruling No. 10147 of 18 July 2022).

[27] ID., para. 46.

[28] ID., para. 47.

[29] ID., paras. 48-49.

In contrast, the CJEU clarified that the conditions set forth in *Bronner*, particularly regarding the indispensability of access, do not apply in cases where the dominant firm grants access to its infrastructure but imposes unfair conditions on that access.[30] Therefore, such practices cannot be equated to a simple refusal to provide access to rivals. Furthermore, the CJEU implied that enforcers are relieved of the burden of proving indispensability when access to the facility is granted as a result of regulatory obligation, rather than voluntarily.[31]

Similarly, the General Court's decision in *Lithuanian Railways* emphasized that *Bronner*'s exceptional circumstances were applied in the absence of any regulatory obligation mandating a dominant undertaking to share its facility with competitors.[32] In cases where a legal duty to supply exists, the necessary balancing of economic incentives, which justifies the application of *Bronner*'s exceptional circumstances, has already been addressed by the legislature when imposing such a duty.

The implications of the *Slovak Telekom* and *Lithuanian Railways* rulings are significant, especially with the entry into force of the DMA. The existence of a regulatory framework mandating access to platforms deemed gatekeepers would relieve antitrust authorities from the obligation of demonstrating the indispensability of such access.

The recent *Google Shopping* decision has introduced further ambiguity regarding the application of the essential facility doctrine in Europe.[33] By asserting that Google's general results page exhibits characteristics «akin to those of an essential facility», the General Court introduced an unprecedented quasi-essential facility doctrine.[34] Moreover, the Court supported the Commission's decision not to apply *Bronner*'s indispensability requirement, distinguishing between an express refusal to supply and the exclusionary practice under consideration, which does not primarily involve a simple refusal.

However, the obligation for a dominant undertaking engaging in abusive exploitation to transfer assets, enter agreements, or provide access to its service under non-discriminatory conditions does not necessarily entail

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[30] Id., para. 50.

[31] Id., para. 57.

[32] General Court, 18 November 2020, Case T-814/17, *Lietuvos geležinkeliai AB v. Commission*, para. 92.

[33] *Google Shopping*.

[34] *Google Shopping*, para. 232.

adherence to the criteria outlined in *Bronner.*[35] The Court suggested that in scenarios where the dominant firm not only refuses access but also implements active exclusionary practices hindering competition, the criteria for identifying abuse differ. While allowing access on reasonable and non-discriminatory terms may remedy the abuse, it does not reduce the abuse to a mere refusal of access.[36]

At the same time, it remains unclear why the discovery of additional abusive conduct, such as discrimination, should negate the requirements established for refusal-to-deal cases. By disregarding the indispensability requirement, the Court departed from the principle articulated in *Slovak Telekom*, which warns against compelling a dominant undertaking to enter contracts with rivals due to its adverse implications on freedom of contract and property rights.

Furthermore, the General Court justified this decision by considering Google's business model, specifically highlighting the "universal vocation" of its search engine and its "super-dominant" or "ultra-dominant" position as an internet gateway. Unlike tangible or intangible assets referenced in case law, Google's general search engine is fundamentally "open", distinguished by its capacity to incorporate results from external sources and display a variety of sources on its general results pages. Therefore, privileging its own specialized results over third-party results contradicts the economic model that initially propelled Google's search engine to success.

However, in associating the "abnormality" of favoring openness with the business model, the Court suggests that the duty of equal treatment may not universally apply to platforms employing different business models (e.g., Apple).

## 3. Essential services, public utilities and service of general economic interest

In the context of digital platform regulation, exploring the evolution of public utilities and essential services regulation is crucial for understanding the rationale behind such interventions. By examining the theoretical development of regulatory frameworks governing traditional public utilities and essential services, we can gain insights into the policy objectives and

[35] ID., para. 244.

[36] ID., para. 244.

considerations that have guided such interventions. This examination serves as a base to the analytical discussion that follows, enabling a critical assessment of whether similar regulatory endeavours in the digital economy are justified and well-founded. By laying this foundation, we can better understand the implications of applying regulatory measures to digital platforms and assess their effectiveness in achieving desired outcomes within the evolving digital landscape.

When discussing essential services from the user's perspective, one immediately considers those services of immense economic and social significance. These services have the potential to stimulate economic and social progress while fulfilling specific and fundamental needs of citizens and communities.

Some of these services align with the essential functions of a state, such as justice administration and defense, and are, from an economic standpoint, akin to public goods.[37] Others encompass services traditionally provided by the public sector but do not strictly fit the definition of public goods. These services have undergone varying degrees of liberalization policies across different sectors. Examples include public utilities like energy, telecommunications, postal services, and railway services. From the user's consumption standpoint, these utilities are equally essential from a socio-economic perspective as public goods.

Hence, a clear distinction exists between the essential nature of the service and its management and provision by public authorities. Initially, the concept of essential service was intertwined with the notion of public service in its subjective sense, involving public establishment, management, and provision – either directly or indirectly through third-party concessions under stringent government oversight. This subjective conception stemmed from the belief that market-based provision might not achieve socially desirable outcomes given the socio-economic significance and indispensability of such services to citizens.

The purely subjective understanding of public service has evolved into an objective conceptualization. Under this perspective, private entities can also deliver services considered "public" and "essential" due to certain

[37] A public good is defined by two key characteristics: non-rivalrous consumption and non-excludability. Rivalry in consumption occurs when one individual's use of a good diminishes its availability for others. Conversely, non-rivalry implies that one person's consumption of the good does not impede others from simultaneously using it. Excludability refers to the ability to prevent individuals from accessing the good. A good is considered excludable if individuals can be feasibly restricted from consuming it. Non-excludability denotes that individuals cannot be deprived, either technically or economically, from accessing and consuming the public good.

characteristics, encapsulated in the concepts of service of general economic interest or public utility.

This transformation aligns with the European legal system's objective approach, which emphasizes horizontal subsidiarity to encourage private sector involvement in activities of public utility and general interest. The focus lies primarily on the nature of the activity, defined by its purpose or its impact on the community's well-being, irrespective of whether it is undertaken by a public or private entity.

This European approach allows Member States the freedom to identify services of general economic interest in line with principles such as equal treatment, non-discrimination, transparency, and the free movement of persons. Member States are also empowered to determine the organization, financing, and specific obligations of these services in compliance with State aid regulations (as outlined in Recital 6 and Article 4 of Directive 2014/23/EU).[38]

Under European law, services of general economic interest are consistently subject to Treaty rules, particularly the principle of competition, akin to other economic activities. However, exceptions are granted if the application of these rules obstructs the performance of tasks assigned to these services, both in law and in practice (as stipulated in Article 106(2) of the TFEU). Therefore, even within an objective definition of public service, a subjective element persists concerning the identification and assignment of a mission of general interest, especially if exempt from Treaty rules.

In the context of advancing liberalization and fostering competition in public utilities markets, the shift to an objective concept of public service was not aimed at expanding the notion of public service or determining

[38] The feasibility of market opening processes depends not only on political will but also on the technical-economic characteristics of the sector. Introducing competition into markets is not always economically viable, as evidenced by liberalization directives that did not mandate total opening in all sectors. Consequently, certain areas or market segments may retain special rights or operate as legal monopolies. This decision-making process is shaped by the interplay between European directives, which may require market opening, and the political decisions of national public entities. These entities, typically state or local authorities, may intervene when the market fails to adequately provide essential services to the community. They can establish or take over public services through legislation or administrative acts. European law acknowledges the authority of Member States and public authorities to determine the most suitable management arrangements for works and services. This includes the option to execute works or provide services directly to the public or to outsource such provisions to third parties. This principle, outlined in Article 2 of Directive 23 of 2014, aims to ensure high standards of quality, safety, accessibility, equal treatment, and the promotion of universal access and user rights in public services.

which services are essential for citizens. Instead, its primary objective was to ensure the possibility of private (competitive) provision of these services.

The significance and public utility of these services are rooted in the legal and political acknowledgment of their essentiality for citizens. This recognition serves as a prerequisite for the extensive deployment of networks and the provision of services, often surpassing what the market would naturally produce. Typically, in public utilities such as electricity, gas, water, and telephony, the state mandates or incentivizes complete population coverage and affordable prices through universal service policies.

While universal service policies were traditionally associated with public management environments and legal monopolies, they remain prevalent across various industries post-liberalization. These policies impose universal service obligations (USOs) on one or more private companies. The USO system is often complemented by mechanisms to finance additional costs, which exceed those incurred through purely market-driven management, either by the state or by all companies operating in the sector.

## 4. Squaring the circle: old 'essentiality' concepts in a brand-new world

In analysing the role and activity of large digital platforms, it seems crucial to delineate their economic distinctions from classical network industries and public utilities, such as electricity, telecommunications, transportation and so on.

As outlined in section 2 and 3, traditional network industries and public utilities are deemed essential from the demand side, constituting vital components for citizens' overall development, yet there exists an additional essentiality on the supply side. This entails infrastructure prerequisites, rendering them economically significant as essential productive inputs for competitors.

This "double essentiality" underlies the specificity of these markets and the need for public intervention and, ultimately, for specific rules to address market failures and fairness issues.

Digital platforms, often characterized as the "public utilities of the 21st century", at a first sight may demonstrate analogous demand and supply side essentialities, as well as market failures and fairness issues.

In this direction, the European Union has been adopting a number of regulations,[39] that are gradually laying the foundations of a "European public digital law".

Nonetheless, considering large digital platforms as public utilities and applying them those traditional concepts, as the EFD or the USO, is very challenging and problematic because of their distinctive economic attributes and regulatory requirements.

## 4.1. The Essential Facility Doctrine in the digital domain

Several challenges arise when attempting to apply the EFD to very large digital platforms, particularly concerning the concept of replicability of the facility. While these platforms often hold dominant or super-dominant positions in their markets, applying the EFD becomes complex due to the difficulty in determining non-replicability criteria for non-physical assets. Developing a new platform in the digital realm typically incurs minimal costs, and competition from smaller players and fringe competitors is common, largely due to multi-homing.

Multi-homing, where users utilize multiple competing platforms simultaneously, is a key characteristic of digital platforms. This behaviour is facilitated by the minimal transaction costs associated with accessing and adopting digital services. As a result, establishing non-replicability criteria for digital assets becomes challenging, given the ease with which new platforms can emerge and users can engage with multiple platforms concurrently.

As delineated, the indispensability of access remains the fundamental requirement of the essential facility doctrine, preventing its overly broad application. Access to a resource is deemed indispensable, as per *Bronner*, only if there are technical, legal, or economic barriers that render duplication impossible or unreasonably difficult. Furthermore, demonstrating the absence of potential alternatives necessitates proving that developing a comparable resource to the one controlled by the dominant operator is not economically viable.

In the recent *Slovak Telekom* ruling, a significant development emerged. The Court posited that obliging a dominant undertaking to grant ac-

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[39] These include the Platform to Business (P2B) Regulation; General Data Protection Regulation (GDPR), the Digital Markets Act (DMA), the Digital Service Act (DSA), the Data Act (DA), the Artificial Intelligence (AI) Regulation and the European Media Freedom Act (EMFA); as well as the evolutions of the European Electronic Communications Code (EECC) and the Audiovisual Media Services Directive (AMSD).

cess to its infrastructure, developed for its own business needs, can be justified in competition policy only if the dominant undertaking genuinely holds supremacy in the relevant market.

However, there are additional obstacles in applying the essential facility doctrine. Notably, the criteria outlined in *Slovak Telekom* pertain to refusal to deal, rather than "constructive refusal to deal", which involves potential abuses related to price or access conditions. In the realm of digital platforms, instances of refusal to grant access from other companies are rare, even in cases of vertical integration where other companies are downstream competitors. This is because digital platforms thrive on expanding their ecosystem as extensively as possible. Consequently, digital platform abuses rarely revolve around a straightforward "refusal to deal".

In this context, the *Google shopping* case holds particular significance, where the European Commission identified the "self-preferencing" abuse and penalized Google for systematically directing traffic from competitors' comparative shopping services to its own, thereby establishing a privileged position for its products. The Commission found that Google exploited its dominance in the core market of search engines to facilitate its entry into the comparative shopping services market. While not explicitly introducing a new theory of competitive harm, the Commission categorized Google's actions as leveraging strategies, a well-known form of abuse.

The Commission asserted that leveraging dominance in one market to extend power into adjacent markets can constitute abuse, indicating that self-preferencing is a recognized form of dominance abuse. The General Court subsequently affirmed the Commission's decision (CJEU, 10 November 2021, Google LLC and Alphabet, T-612/17).

The Court identified four key elements that distinguish Google's behavior from fair competition on the merits and give rise to antitrust liability.

Firstly, the Court underscored the universal nature of Google's general search engine. Given its structure and function in ordering search results, it stands apart from other infrastructures reliant on exclusive control. Though not explicitly stated, the Court alluded to the essential facility doctrine. Consequently, the Court deemed Google's service subject to the obligation of fair and non-discriminatory treatment of traffic, akin to that outlined in the 'Open Internet' Regulation (EU) No. 2015/2120, originally designated for internet access service providers. Thus, the principle of net neutrality and openness served as a yardstick for identifying a manifestation of the general obligation to treat competitors fairly in the secondary market.

Secondly, due to Google's 'super-dominant' position in the general

search services market, where it serves as a gateway to the Internet, it bears an augmented responsibility not to undermine effective and equitable competition in the corresponding market for specialized product comparison searches through its actions.

Thirdly, the general search services market exhibits significant barriers to entry.

Fourthly, these aforementioned factors – comprising the functionalities of the search engine, its dominance, and the presence of barriers to entry – illustrate the atypical nature of Google's conduct. The Court observed that, for an entity like Google, constraining search results to its own offerings entails an inherent risk that may not be rational, except in circumstances like the present case, where dominance and barriers to entry preclude entry within a reasonable timeframe in response to the limitation of internet users' choice. In the Court's assessment, Google's conduct diverges from the economic model that propelled its search engine to success, indicating a departure from competition on the merits, particularly considering Google's altered behavior in the general search market.

Indeed, Google initially provided a general search service where search results were displayed uniformly according to the same criteria. Only after entering the specialized product comparison search market, and facing setbacks with its dedicated Internet page (Froogle), did Google alter its practices in the dominant general search market. This change involved enhancing the visibility of its product comparison results within general search result pages.

These four elements led the General Court to deem Google's search engine an essential facility. Despite the court recognizing similarities between Google's services and those of an essential service, the judgment affirmed the Commission's view that assessing compliance with essential facility requirements was unnecessary. The Court distinguished between explicit refusals to supply and leveraging practices, where refusal is merely an ancillary aspect.

In the recent *Slovak* ruling, the Court held that *Bronner*'s conditions do not apply if the dominant undertaking grants access to the infrastructure but imposes unfair conditions. Additionally, the Court suggested that antitrust authorities are not required to prove the indispensability of infrastructure if access is mandated by regulation.

This stance aligns with Advocate General Øe's opinion, where he differentiated between refusal to grant access and the economic terms of access. He emphasized that penalizing refusal to grant access, tantamount to

compelling an agreement, significantly infringes on undertakings' freedom, warranting a higher legal standard as seen in the *Bronner* judgment.

The Advocate General highlights the challenges arising from the concept of constructive refusal to deal, noting its potentially broad interpretation. He questions whether any abusive practice could be considered an implicit refusal to deal, as any disadvantage imposed by a dominant undertaking might deter potential customers. However, he clarifies that the Court has never applied *Bronner*'s conditions or a similar legal test to unfair pricing practices, despite these practices being quintessential examples of implied denials of access.

## 4.2. Data as an essential facility?

It now worth focussing on whether the large troves of data gathered by platform orchestrators could be under an antitrust obligation of access in favour of competitors. Indeed, increasing returns to scale, scope economies, and network externalities, both direct and indirect, contribute to heightened data sets concentration in digital platform markets. Tipping phenomena often occur, wherein once a platform achieves critical mass, its growth becomes self-reinforcing, potentially resulting in a quasi-monopoly situation. This poses significant barriers to entry for competitors, who must surpass the existing critical mass to establish themselves in the market effectively and may need that data to provide their own services.

Despite this, it is important to keep in mind that Big Tech firms face competitive pressures, particularly from potential rivals, especially in markets characterized by competition for market share. Unlike traditional public utilities, users have the option of simultaneously utilizing multiple competing platforms (multi-homing). However, the economic power of Big Tech has grown over time, exerting influence on global markets, competitive dynamics, and consumer rights.

A key aspect of the economy of large platforms lies in their data collection practices, often exchanged implicitly for free services, and sophisticated user profiling. This enables platforms to (i) engage in perfect price discrimination, (ii) enhance production efficiency exponentially by tailoring services and products to individual consumer preferences, and (iii) minimize users' transaction and search costs, thereby saving valuable time, a scarce resource.

The core challenge of the platform and data economy lies in the potential for information rents to be extracted exclusively by dominant digital

platforms, effectively placing consumers within an "information aftermarket". When consumers opt for a particular platform, they are also selecting a gatekeeper that directs them to this aftermarket. Exiting this gatekeeper becomes increasingly improbable due to high opportunity costs resulting from network externalities and the platform's size, compounded by the phenomenon of "information capture".

Access to data emerges as a crucial competitive factor driving network effects, economies of scale, and variety within the digital economy. These factors create formidable barriers for new entrants and potential competitors, hindering their ability to challenge incumbents or even establish a foothold in the market.

This backdrop has sparked debate within antitrust circles regarding whether competition law should sanction a refusal to share data when executed by a platform with significant market power. The contention revolves around whether data, as an economic asset, warrants data-sharing obligations under antitrust law and the essential facility doctrine (EFD) case law to foster fair market dynamics and a level playing field among companies.

Given that the EFD represents a departure from the general principle allowing undertakings, including monopolies, to freely contract and choose their business partners, its application is contingent upon "exceptional circumstances". However, the imposition of data-sharing obligations may disincentive investment, posing a trade-off between static and dynamic efficiency for both incumbents and competitors.

Consequently, while the EFD framework has been adapted to accommodate the unique characteristics of data markets, fulfilling its conditions remains challenging, as acknowledged by much of the antitrust doctrine. [40]

The European Commission's assertion that competition law is generally applicable to data-driven business models signifies its readiness to leverage existing jurisprudence to advocate for access to essential data held by dominant operators. [41] Building on CJEU precedents such as *Magill, IMS Salute, Microsoft*, and *Huawei*, the Commission maintains that it can impose obligations on dominant entities to share critical data resources when necessary. [42]

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[40] See G. COLANGELO, M. MAGGIOLINO, *Big data as misleading facilities*, in *European Competition Journal*, 13/2-3, (2017).

[41] Commission Staff Working Document – On the free flow of data and emerging issues of the European data economy Accompanying the document Communication Building a European data economy, Brussels, 10.1.2017 SWD(2017) 2 final.

[42] *RTE and ITP v. Commission*, Joint Cases C-241/91 P and 242/91 P, EU:C:1995:98; *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, EU:C:2004:257; Court of Justice, Grand Chamber, 17 September 2007, *Microsoft Corp. v. Commission*, Case T-

However, applying the essential facility doctrine (EFD) to data-driven markets poses challenges due to the unique nature of data as an asset. The traditional conditions of the EFD, particularly the notion of indispensability, face ambiguity and disagreement among scholars. While some argue that accessible data should never be deemed indispensable, others highlight the formidable barriers to replicating specific datasets, especially those acquired through data brokers. [43]

Moreover, the requirement to demonstrate the exclusion of effective competition in a secondary market presents practical hurdles. This condition typically applies when a dominant entity restricts access to essential inputs, thereby foreclosing the downstream market to potential new entrants. However, in many cases of data-sharing refusal, this condition may not be satisfied.

These practical and conceptual challenges underscore the complexities inherent in applying traditional antitrust frameworks to data-driven markets. Despite the Commission's willingness to assert competition law in this domain, resolving these issues will require careful consideration and potentially new approaches tailored to the unique dynamics of digital ecosystems and data markets.

The application of the essential facility doctrine (EFD) to data contexts presents significant challenges, particularly regarding the fourth requirement related to the prevention of the appearance of a new product. In data-driven markets, firms often do not know the specific products or services they will develop using the data until they gain access to them. This uncertainty complicates the determination of which data are indispensable for fostering competition.

Moreover, even if the EFD requirements were met, implementing compulsory data-sharing licenses faces practical obstacles. Firstly, defining the scope of the duty to share, including the identification of a well-defined set of data and the time horizon for sharing, poses difficulties. Since the requesting firm may not know the exact dataset needed beforehand, determining which data are subject to sharing becomes challenging. [44]

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201/04, EU:T:2007:289; *Huawei Technologies Co. Ltd v. ZTE Corp.*, Case C-170/13, EU:C: 2015:477.

[43] I. GRAEF, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility*, Alphen an den Rijn, 2016, 271; A.P. GRUNES, M.E. STUCKE, *'No Mistake about It: The Important Role of Antitrust in the Era of Big Data'*, in 14 *Antitrust Source*, 1, 8, 2015.

[44] G. COLANGELO, M. MAGGIOLINO, *Big data as misleading facilities*, cit., 274-277. See also V. KATHURIA, J. GLOBOCNIK, *Exclusionary Conduct in Data-Driven Markets: Limitations of Data Sharing Remedy*, in M. BOTTA (ed.), *EU Competition Law Remedies in Data Economy* (Springer, 2019).

Secondly, addressing the need for real-time data updates raises questions about the ongoing provision of fresh and relevant data. Data's value diminishes over time, necessitating continuous updates if they are deemed essential for competition. However, establishing a mechanism for perpetual data sharing raises logistical and operational challenges.

Thirdly, if the focus is on user data from digital platforms, ensuring compliance with data protection laws presents a significant barrier. Users share personal data with platforms under specific terms and conditions outlined by data protection regulations. Sharing this data with competitors without violating privacy laws poses a dilemma, as users may not have consented to such sharing at the time of data collection.

Lastly, the case-by-case nature of antitrust enforcement limits the effectiveness of applying the EFD to data markets. Each situation may present unique circumstances and complexities, making it challenging to establish standardized rules or guidelines for data-sharing obligations.

In summary, while the EFD holds potential for addressing competition concerns in data-driven markets, overcoming these practical and legal hurdles requires careful consideration and potentially innovative solutions tailored to the unique dynamics of digital ecosystems and data markets.

As to the UK, the Electronic Communications and Media Competition Authority, Ofcom, shares a positive attitude towards considering the application of the essential facilities doctrine (EFD) in digital markets.[45] Ofcom suggests that reassessing the criteria or interpretation of the EFD in the context of digital markets could be beneficial. However, Ofcom acknowledges the challenges associated with applying EFD criteria to information resources in digital markets, particularly concerning personal data.

Given that many data covered by potential antitrust remedies involve identifiable individuals, the interaction between such remedies and the General Data Protection Regulation (GDPR) must be carefully evaluated.[46] While competition law may favor broad data sharing to facilitate market entry for new competitors, the GDPR prioritizes principles such as purpose limitation and data minimization. Therefore, any antitrust remedy involving personal data must define the scope and extent of data sharing clearly, ensuring compliance with GDPR principles.

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[45] OFCOM, *Data, Digital Markets and Refusal to Supply*, in *Economic*, Discussion Paper Series, issue n. 6, 7, (2022), par. 3.1. In the same vein, is I. GRAEF, *Rethinking the Essential Facilities Doctrine for the EU Digital Economy*, in *TILEC*, Discussion Paper No. DP2019-028, (2019).

[46] Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1.

Moreover, pro-competitive remedies aimed at promoting business-to-business sharing of personal data must align with the GDPR framework. The intersection of competition and privacy in data sharing also offers interesting considerations regarding GDPR rights, notably the right to data portability under Article 20. This right aims not only to provide individuals with control over their personal data but also to foster competition by making data collected by incumbents in digital markets more contestable.[47]

In summary, while there is potential for pro-competitive remedies in data sharing, ensuring their consistency with GDPR requirements and their effectiveness in promoting competition requires careful consideration of both legal frameworks.[48] Additionally, leveraging GDPR rights such as data portability can contribute to fostering competition in digital markets while respecting individuals' privacy rights.[49]

The introduction of the right to data portability in the EU legal system aimed to enhance individuals' contractual power by granting them greater control over their personal data.[50] This right serves to address the power imbalance between platforms and users, enabling users to switch service providers more easily.[51] Importantly, the right to data portability aligns with

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[47] One potential radical solution to address compatibility issues with the General Data Protection Regulation (GDPR) involves completely anonymizing shared data. However, implementing this solution systematically presents challenges due to the ease of de-anonymization through data cross-referencing techniques and the abundance of information available on the internet. As a result, in most cases, only pseudo-anonymization can be achieved, wherein the individual's re-identification remains a possibility. Nevertheless, this does not exempt the application of the GDPR, as individuals subject to re-identification still benefit from the protections outlined in data protection provisions.

[48] See P. DE HERT, V. PAPAKONSTANTINOU, G. MALGIERI, L. BASLAY, I. SANCHEZ, *The right to data portability in the GDPR: Towards user-centric interoperability of digital services*, in 34 *Computer Law and Security Review*, 193, (2018). The Authors highlight how the precursor of the right to data portability is the telephone number portability mechanism introduced in Article 30 of Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services.

[49] GDPR, Recital (68). See O. LYNSKEY, *Aligning data protection rights with competition law remedies? The GDPR right to data portability*, in *European Law Review*, (2017) 793, 803. F. COSTA-CABRAL, O. LYNSKEY, *Family ties: The intersection between data protection and competition in EU law*, in *Common Market Law Review*, 54/1, (2017), 11-50.

[50] Article 29 Data Protection Working Party, Guidelines on the right to 'data portability', 2017. See also G. COLANGELO, M. MAGGIOLINO, *From fragile to smart consumers: Shifting paradigm for the digital era*, in *Computer Law & Security Review*, 35(2), 2019, 173-181.

[51] See A. MANGANELLI, A. NICITA, *The governance of Telecom Markets. Economics, Law and Institutions in Europe*, London, 2020. Demand-side policies, focused on empowering consumers as active market participants, mitigating switching costs, and averting lock-in effects, are

competition policies, representing a departure from traditional data protection systems focused on Article 8 of the EU Charter of Fundamental Rights.

Finally, as we will se in section 5, the Digital Markets Act (DMA) further reinforces the integration of data portability into competition policies.[52]

## 4.3. Blurred concepts of large digital platforms as 'public utilities'

In traditional network industries and public utilities, pro-competitive regulation is closely linked to market liberalisation. Indeed, in Europe, historically, all public *utilities* were public-owned legal monopolies, to which national laws had attributed special and exclusive rights. This was the result of the consideration (first political and then legislative) of the essentiality of those services for citizens, and consequently the importance to guarantee their inclusive universal provision to every individual, at affordable prices. Whereas this outcome was considered impossible for the market to deliver, due to limited economic profitability.

The EU platform digital law is not accompanied by any liberalisation processes (removal of legal barriers to market entry), but exclusively by the removal of economic barriers (contestability of markets) and by addressing situations of bargaining and informational advantage that generate unfair outcomes for consumers and business-users. Indeed, the concentrated structure of digital markets is consequential only to their peculiar economic characteristics.

Therefore, regulatory strategies primarily concentrate on eliminating economic impediments and addressing inequitable outcomes without mandating any universal service obligations (USOs). This is due to the inherent inclination of platforms to cater to the largest user base for economic reasons.

Therefore, a situation of entranced market power or even a *de facto* monopoly is neither a necessary nor a sufficient condition to identify a public service or a service of general economic interest. While, this narrative and conceptualisation make specific sense in the US policy-making debate, where the identification of a 'public' or 'general interest' has very

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crucial complements to traditional pro-competitive supply-side regulation and the enforcement of competition laws. Such initiatives play a vital role in ensuring efficient market operations, serving as pro-competitive interventions aimed not only at safeguarding vulnerable consumers but also at fostering competitive dynamics.

[52] EU Regulation No. 2022/1925 of the European Parliament and of the Council of 14 September 2022 on fair and contestable markets in the digital area and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Regulation) [2022] OJ L265/1 (DMA).

clear instrumental purposes, as only *public utilities* and *common carriers* can be subject to ex-ante economic regulation. For example, the Attorney General of the State of Ohio contended that given Google's pervasive presence to the extent that its brand name has become synonymous with internet searching, it should be designated as a common carrier and public utility for its provision of internet search services.[53]

Analogous regulatory endeavours in the US and UK operate under the premise of categorizing digital platforms as common carriers, thereby advocating for a regulatory framework akin to that of public utilities.

On the contrary, within the European Union, such classification (i.e., defining large digital platform as public utility or service of general economic interest) is deemed unnecessary and could even impede pro-competitive policies. Indeed, on one hand, private economic activities can be regulated for social purposes without formal public utility status and, on the other hand, identifying a general interest for those digital platforms' services could, in theory, be considered a possible basis for triggering Article 106(2) TFEU and thus derogating EU competition provisions. Obviously, such outcomes, although theoretical, would be paradoxical and openly contrary to current pro-competitive aims of EU digital public law.

In summary, although digital platforms share some essential demand-side characteristics with traditional public utilities, their regulatory treatment differs due to their unique economic features.

### 4.4. Do digital platforms provide essential public services to end-users?

To address the intrinsic importance of digital platforms for users and the peculiar structural implications thereof, it is pertinent to examine platforms employing moderation mechanisms, including algorithmic interventions, notably prevalent in social networks and video-sharing platforms. These practices fall under the regulatory ambit of the Digital Service Act (DSA).[54] The DSA delineates moderation responsibilities, entrusting platforms with the task of curbing illicit content while implicitly endorsing their extant moderation practices, consonant with user agreements.

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[53] See *State of Ohio v. Google LLC*, Case No. 21 CV H 06 0274 (Del. Com. Pl. 2021).

[54] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

Consequently, a corpus of case-law is emerging, focusing on moderation practices, particularly extreme measures like user exclusion, colloquially termed "deplatforming". Notably, the emphasis lies not solely on the freedom of expression paradigm, but also on framing platform exclusion as a deprivation of an essential service, prompting inquiry into platforms' obligations vis-à-vis universal service provision.

Of particular interest is the Italian case-law, exemplified by the landmark *Facebook v CasaPound* case, which epitomizes the spectrum of jurisprudence surrounding user exclusion from dominant online platforms.[55] This judicial pronouncement underscores platforms' obligation to render their service, thereby accentuating its essential nature and implying a quasi-public service mandate.

From a legal policy standpoint, the aforementioned mandate necessitates a precise delineation of the concept of essentiality. This entails determining whether the essential need for users pertains to accessing any social networking service or specifically utilizing the service offered by the predominant social networking platform, such as Facebook/Meta.

In the former scenario, the essential requirement would equate to access to the internet, given the absence of monopolistic control in the social networking services market, albeit with pronounced market concentration. It is noteworthy how this contrasts with 'traditional' public utility services or those of general economic interest, where multi-homing is impractical. From a societal and universal service perspective, the provider of the service becomes immaterial (e.g., natural gas supply); what is paramount is the provision of the service itself. Historically, in pre-liberalization legal monopolies, user access to the market coincided with access to the monopolistic enterprise. Universal service obligations in 'traditional' public utilities typically arise in situations where market forces alone cannot ensure the inclusive provision of a service at affordable prices and adequate quality due to limited economic viability.[56]

The second scenario, conversely, holds relevance: the indispensability

[55] Trib. Roma, sez. diritti della persona e immigrazione civile, *CasaPound Italia v. Meta Platforms Ireland Ltd* (già *Facebook Ireland Ltd*), sent. 5 dicembre 2022, R.G. 17909/2022.

[56] Furthermore, it is important to differentiate between two aspects: Firstly, the overarching and abstract duty to provide the service (within the predefined product or geographical boundaries stipulated by the universal service obligation). Secondly, the discretion to withhold the service in specific instances where a user fails to adhere to the standards and codes of conduct outlined by the service provider for the smooth functioning of the service for all users. For example, this could involve scenarios such as requiring a passenger to disembark from an aircraft before take-off or addressing instances of racist language directed at another passenger.

of utilizing Facebook, as a dominant entity, cannot be fulfilled by employing other social networking platforms. Consequently, one must recognize how this essentiality stems from direct network externalities, wherein the value – perceived by the individual user – of belonging to a network (and conversely, the detriment of exclusion) is proportionate to the number of other reachable users on the same platform. Hence, the 'general interest' value of the service provided appears not only (or predominantly) from the inherent nature of the service itself but also from the substantial user base of the dominant platform. As affirmed in legal precedent, «the preeminent and significant role assumed by Facebook in the sphere of social networks [...] makes exclusion from the community undoubtedly productive of an injury not susceptible to reparation in equivalent terms».

Consequently, two observations arise. Firstly, if the challenges of inclusion and essentiality of service stem from the size and market dominance of the prevailing platform, the primary resolution to this issue, albeit not always definitive (especially in the short term), appears to address that dominance rather than imposing Universal Service Obligations (USOs).

The second observation pertains to the inherent tension created by regarding the service offered by the dominant operator as essential, thereby safeguarding consumer interests solely within its network. This engenders a conspicuous conceptual conflict, or trade-off, with the objectives of fostering competition in the market, which ultimately seeks to diminish reliance on services provided by dominant operators. Indeed, there exists an inverse functional relationship between network externalities and competition, a characteristic common to network industries where communication and information flows are bilateral.

Given network externalities, the optimal scenario would involve a single network – a monopoly – wherein all users can communicate with one another, thereby maximizing the value derived from each user's participation. However, the protection of freedom of choice and the promotion of competition necessitate a preference for a plurality of alternative networks.

In such circumstances, the typical regulatory approach involves internalizing network externalities through interoperability or interconnection obligations among networks. This ensures that users of every provider can interact seamlessly with users of every other provider, thereby enhancing the overall utility of the network regardless of its size. Simultaneously, this approach removes barriers to competitive dynamics and fosters an increase in the number of networks available in the market.

Following the liberalization of the telecommunications markets, a symmetrical obligation to interconnect was imposed on all operators, address-

ing the need for seamless communication among all entities in the sector.[57] Presently, under the provisions of Article 7 of the DMA, a similar obligation has been enacted for gatekeepers of number-independent electronic communication services, such as messaging services provided by platforms like WhatsApp and Messenger. Despite encountering strong opposition from platforms, this measure aims to ensure interoperability and foster competition within the sector.

During the approval process of the DMA, discussions also broached the possibility of imposing interoperability obligations on social networks. However, this aspect was deferred for future deliberations. Notably, Article 12.2a of the DMA grants the European Commission the authority to extend the application of interoperability provisions to other basic platform services, including social networks, through delegated acts.

While many stakeholders express concerns regarding the economic and technical feasibility of such measures, proponents argue that they would address various challenges related to competition, inclusion, and pluralism in digital markets. By enabling interoperability, these measures have the potential to mitigate barriers to entry and promote a more diverse and competitive landscape, particularly when complemented by internal pluralism mechanisms on the demand side.[58]

## 5. Concluding remarks: Gatekeepers' Regulation on the Rise

As elucidated, the application of "essentiality" concepts to digital platforms presents notable challenges, stemming from multifaceted considerations encompassing both demand and supply dynamics. Regarding the EFD, digital platforms often exhibit limitations in the context of the "facility" criterion, which traditionally pertains to vertically structured markets. The doctrine typically applies to operators engaged solely in upstream ac-

[57] Article 15(2a) and 60(1) Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast). Following the abolition of legal monopolies within the telecommunications sector, measures were implemented to uphold service universality. This was necessitated by the financial unviability of providing services to users in specific geographic regions. To address this, a framework of universal service obligations and financial compensation was established, as outlined in Articles 89-90 of the Code.

[58] In this sense also J.M. BALKIN, *To Reform Social Media, Reform Informational Capitalism*, in L.C. BOLLINGER, G.R. STONE (eds.), *Social Media. Freedom of Speech and the Future of Our Democracy*, Oxford, 2022.

tivities, discriminating among downstream providers – a scenario less applicable to digital platforms.

The feasibility of applying the EFD to vertically integrated operators may influence motivations for discriminatory practices but does not fundamentally alter the definition of abusive behaviors. Digital platforms operate on a modular ecosystem framework, facilitating intermediation and orchestration among diverse parties throughout the ecosystem they foster. Consequently, instances of self-preferencing are primarily constrained to situations involving vertical integration, where platforms favor their own services over those of downstream competitors – a relatively rare occurrence within the digital platform landscape.

This correlation is intrinsically linked to the pivotal role digital platforms play as "essential" or rather "highly significant" (virtual) facilities for business users to access end-users on the opposite side of the market. This significance stems from the characteristic of two-sided platforms, where the importance is contingent upon the number of users on the other side, influenced by cross (or indirect) externalities.[59]

In such scenarios, platforms function as intermediaries facilitating interactions between two groups of agents or two sides of the market. The size of these platforms is directly related to the number of users on each side of the two-sided market, influenced by factors such as market power, information capture of users, and network externalities.

None of these intricately linked situations align well with the traditional separate concepts of essentiality on the demand and supply sides. Hence, the emergence of a new, tailored *ex-ante* pro-competitive regulation – i.e. the DMA – dedicated to very large digital platforms and their intermediating function. The DMA aims to enhance contestability and fairness on both sides of the two-sided markets, imposing obligations solely on digital platforms serving as crucial gateways for business users to access end-users, commonly referred to as gatekeepers.

The DMA is rooted in the recognition that a select few colossal online platforms, owing to their immense size and economic influence, have assumed the role of gatekeepers, serving as pivotal entry points for thousands of small businesses seeking access to hundreds of millions of consumers within the European single market. This position affords gatekeepers the ability to impose unfair terms, conditions, and practices concerning certain

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[59] Indirect positive network effects occur when multiple customer groups are interdependent, with the utility of at least one group increasing as the size of the other group(s) expands.

digital markets and services, significantly impacting business users reliant on gatekeepers' intermediation to connect with end-customers.

The regulatory scope of the DMA is tailored exclusively to the digital services most heavily utilized by both businesses and end-users, termed 'core platform services'(CPS), where concerns regarding low contestability and unfair practices by gatekeepers are most pronounced (Article 1.2 DMA). Consequently, the regulatory measures prescribed by the DMA are explicitly confined to CPSs, which may not necessarily correspond to relevant markets under antitrust principles. [60]

A gatekeeper, as defined by the regulation, encompasses a platform offering a CPS across at least three member states and meeting three overarching qualitative criteria (Article 3.1): (i) it exerts a significant influence on the internal market; (ii) it operates a CPS serving as a crucial conduit for business users to access end-users; (iii) it possesses, or is likely to acquire, a firmly entrenched and enduring economic position in its operations. Additionally, the DMA outlines quantitative thresholds (Article 3.2) by translating qualitative criteria into turnover and user benchmarks, establishing presumptive gatekeeper status. Specifically, for the gateway function, platforms must exceed 45 million monthly active users on one side and engage with over 10,000 yearly active business users on the other side.

The DMA diverges from traditional approaches by not explicitly addressing the concepts of essentiality and dominance. This departure stems from the inapplicability of conventional analytical tools, such as relevant market definitions and assessments of dominant positions, within the DMA framework. The DMA's overarching objective is to proactively regulate gatekeeper behaviour before anticompetitive practices manifest, necessitating a departure from the case-by-case analysis characteristic of competition law. This shift ensures greater legal certainty, timeliness, and effectiveness in achieving regulatory objectives.

Notably, the DMA introduces a novel conception of essentiality tailored to the unique dynamics of digital markets, particularly in its delineation of gatekeeping functions. While traditional notions of essentiality typ-

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[60] These are delineated by Article 2 as follows: (a) online intermediary services, (b) online search engines, (c) online social networks, (d) video sharing platform services, (e) number-independent interpersonal communication services, (f) operating systems, (g) web browsers, (h) virtual assistants, (i) cloud computing services, and (l) online advertising services, including any other advertising intermediary services provided by a company offering one of the platform services listed in the preceding paragraphs. As per Article 19, the roster of Significant Digital Platform Services (SDPS) may be expanded to encompass additional services by the Commission subsequent to a market investigation.

ically involve a one-sided perspective, the DMA's approach adopts a two-sided framework, adapted to the intricacies of digital ecosystems.

Data access, a central concern within digital markets, aligns closely with this new *ad hoc* notion of essentiality and is addressed comprehensively within the DMA.

The legislation mandates data portability (Article 6.9), reducing the perceived indispensability of gatekeeper platforms for users by enabling seamless data transfer to alternative platforms capable of efficiently curating information and products according to user preferences.

Article 6.9 of the DMA mandates gatekeepers to facilitate effective data portability, ensuring that users can access and transfer their personal data to third-party operators. This provision aims to mitigate the lock-in effect experienced by users within digital ecosystems and prevent gatekeepers from undermining competition and innovation.

Furthermore, the DMA imposes stringent regulations on data practices affecting business users. Provisions mandate transparency, prohibit unauthorized data usage across disparate core platform services, and curb strategies aimed at monopolizing user ecosystems for gatekeeper benefit. Gatekeepers are prohibited from leveraging business users' data unfairly to gain a competitive edge (Article 6.2), and restrictions on data aggregation prevent gatekeepers from consolidating personal data without user consent (Article 5.2). These measures collectively foster market contestability, encourage openness, and spur innovation within digital ecosystems.

Given the potential enforcement challenges of applying traditional essentiality concepts, new pro-competitive (or contestability) and fairness regulation is likely to play a central role in addressing distortions in digital markets. Systemic application of rules defining interoperability and data sharing contexts, along with harmonization at the European level, can enhance effectiveness and prevent enforcement fragmentation. On the other hand, caution must be exercised to strike the right balance between regulatory intervention and market innovation, which remains a challenge.

For this, although antitrust law may no longer bear sole responsibility for addressing distortions in digital markets, it remains crucial for complementing regulatory instruments, especially in dynamically evolving digital environments providing agility and adaptability to address newer and newer emerging challenges in the digital economy. The potential adaptability of antitrust law underscores the importance of utilizing existing tools to their fullest extent.

Alexandra Mikroulea

# Algorithms. Collusion and Beyond

SUMMARY: 1. Definition and Typology. – 2. Algorithmic Collusion. – 3. Legal Parallel behaviour *vs.* Illegal Tacit Collusion. – 4. Regulatory and competition policy considerations and measures. – 5. Computational Antitrust. – 6. Liability under the theory and case law of competition law.

## 1. Definition and Typology

To comprehensively address and underscore the issue of algorithmic collusion within the framework of competition law, it is essential, as a preliminary step, to elucidate the concept of algorithms.[1] It is noteworthy that the global academic community has not universally embraced a singular definition of the term "algorithms". Consequently, various interpretations of this technological tool abound, allowing for diverse explanations.[2]

A holistic interpretation of the algorithmic concept proves apt, as it accentuates the breadth of its applications and functionalities. In this context, the provided definition intentionally avoids tethering itself to the utilization of specific software, computer programs, or codes.[3] Instead, it centers on delineating the systematic algorithmic process. Expressing the

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[1] See, *inter alia*, A. PORTUESE, *Algorithmic Antitrust, A Primer*, in A. PORTUESE (ed.), *Algorithmic Antitrust*, Switzerland, Springer, 2022, 1, 4, C. VELJANOVSKI, *Algorithmic Antitrust, A Critical Overview*, in A. PORTUESE (ed.), *Algorithmic Antitrust*, cit., 39, 42. See further, OECD, *Algorithmic Competition*, *OECD Competition Policy Roundtable Background Note*, 2023, www.oecd.org/daf/competition/algorithmic-competition-2023.pdf.

[2] Y. MOSCHOVAKIS, *What Is an Algorithm?*, in B. ENGQUIST, W. SCHMID (eds.), *Mathematics Unlimited and Beyond*, Berlin-Heidelberg, 2001, 919-936.

[3] D.E. KNUTH, *The Art of Computer Programming. Fundamental Algorithms*, 3rd ed., Boston, MA, 1997, 1 ss.; Th.H. CORMEN, Ch.E. LEISERSON, R.L. RIVEST, C. STEIN, *Introduction to Algorithms*, 3rd ed., Cambridge, MA, 2009, 5; OECD, *Algorithms and Collusion, Competition Policy in the Digital Age*, 2017, 8, https://www.oecd.org/competition/algorithms-and-collusion.htm.

extensive array of possibilities verbally, algorithms can be defined as a «sequence of simple and/or well-defined operations to be executed in a precise order, aiming to accomplish a specific task or category of tasks, or to resolve a particular problem or class of problems».[4]

Nevertheless, some individuals opt to define the concept of algorithms with a specific emphasis on highlighting the diverse range of possibilities and various applications they can exhibit. They underscore that algorithms possess an expanded functionality that extends beyond the resolution of a singular computational problem. Instead, algorithms are viewed as applicable to a broader class of interconnected problems through a process of abstraction.[5]

Classification criteria for algorithmic applications include the function they are programmed to perform, the input parameters set during programming (i.e., the data on which the algorithm relies for results),[6] the learning method used to train the algorithm, the interpretability of the algorithmic behavior, and the identity of the programmer (natural person or company). Notably, algorithmic categorization cannot solely rely on programming principles and intended functions; thus, a comprehensive approach is warranted.

Concerns as regards competition law arise from specific types of algorithmic functions, particularly those related to determining crucial parameters such as price. For completeness, distinct subcategories need to be listed. Algorithms can be categorized based on their function into monitoring algorithms, price-setting algorithms, ranking algorithms, personalized algorithms, signalling algorithms, nudging algorithms, adaptive algorithms

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[4] A portion of computer science tends to liken algorithms to cooking recipes in an attempt to oversimplify and illustrate the algorithmic function, AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Algorithms and Competition*, November 2019, 3, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/06_11_2019_Algorithms_and_Competition.html. In particular, an algorithmic function is the process of executing a cooking recipe in which the input elements are its ingredients and the output element is the dish prepared on the basis of the recipe being executed.

[5] OECD, *Algorithms and Collusion*, 2017, 8 ss., http://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digitalage.htm.

[6] As regards categorisation see AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Algorithms and Competition*, cit. In particular, the relevant distinction made relates both to the type of data collected or fed into the algorithms and to the number and type of parameters that are introduced in their programming. From a technical point of view, the distinction could also be made between numerical inputs (exclusive use of digits) or inputs in the form of text, image inputs (input of photographic material). A similar distinction is made with regard to the availability and accessibility of the data with which the algorithms are fed, distinguishing between publicly available and non-publicly available data for example.

and trading algorithms. This list is not exhaustive, as the functions and instructions entrusted to algorithmic applications expand with their widespread adoption.[7]

It's important to recognize that the processes assigned to each algorithmic system during programming may involve combinational functions, complicating the work of competition authorities. For instance, matching functionalities algorithms, widely used by online applications and matchmaking platforms,[8] analyze user data to select the most suitable candidate.

Algorithms can also be divided based on the learning method into conventional machine learning algorithms and functionally advanced deep learning algorithms. In terms of interpretability and human intervention, algorithms fall into descriptive or white-box[9] algorithms and black box algorithms.[10] Descriptive algorithms allow human interpretation and correction, while black box algorithms, such as deep learning algorithms, operate with advanced functionalities that are not interpretable by humans.

Finally, the identity of the algorithm's programmer can be a criterion for distinction, distinguishing between algorithms developed in-house by the undertaking itself and those developed by external programmers.[11] This distinction is crucial for examining coordinated effects in the context of anticompetitive agreements and addressing questions of liability in the event of anticompetitive behavior.[12] Notably, specific categories of algorithms, such as price-fixing algorithms, are highlighted for their potential to develop anticompetitive behavior, implicating both Article 101 TFEU and Article 102 TFEU.

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[7] Other examples are the algorithms used to match supply and demand in passenger transport markets, the algorithms used by auction and advertising mechanisms and by price monitoring services to observe and monitor product offers.

[8] The OkCupid algorithm applied by the Uber online platform is similar in function.

[9] Other names such as static, analytic, heuristic, heuristic, white box algorithms have been advocated for this class of algorithms. The code name "descriptive algorithm" seems to be the most prevalent, see also the "descriptive algorithm". AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Algorithms and Competition*, cit.

[10] Typically, it is noted that: «The opacity of decision making by machine-learning algorithmic systems, which have one input of data and provide one output, without the synapses, correlations and computations that take place within them being able to be perceived and interpreted by humans».

[11] AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Algorithms and Competition*, cit.

[12] C.C.M.C. DE MATOS, *Algorithms: the end of traditional competitive markets*, *The Case of Partneo*, Master Thesis, No. 22203, Universidade NOVA, https://run.unl.pt/bitstream/10362/68140/1/Matos_2019.pdf.

## 2. Algorithmic Collusion

### A) Economic Theory

In economic theory, collusion entails strategic decisions made by a business, whether independently or through explicit agreements with competitors. These decisions lead to a marginal change in increasing its monopoly power (according to economists) or dominant position (according to legal experts).[13] In competitive markets, market participants act as price takers, aligning their product prices with the marginal cost of production.[14] Prices cannot surpass those under a competitive strategy when firms operate independently. Coordination strategies between firms, however, allow pricing policies to exceed competitive levels, creating collusive structures that detrimentally impact consumers, who end up paying higher prices for goods and/or services. This consumer harm serves as a primary justification for prohibiting coordination agreements among competitors.[15]

Regarding market effects, economic theory does not differentiate between explicit[16] or implicit[17] agreements, as the economic impact of relevant business coordination alternatives remains the same. In contrast to the legal perspective, which limits the prohibition of competition law to explicit collusion and concerted practice, economic literature includes any form of coordination, be it explicit or implicit.[18] According to economists, even tacit collusion qualifies as collusion, with the argument that collusion

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[13] Y. KATSOULAKOS, in D. TZOUGANATOS (ed.), *Free Competition Law*, Athens, 80 ss. (in Greek).

[14] R.A. POSNER, *Antitrust law: an economic perspective*, in *Michigan Law Review,* 75, 768, (1978), 241.

[15] N. VETTAS, Y. KATSOULAKOS, *Competition Policy & Regulatory Policy*, Athens, 2004, 433 (in Greek).

[16] "Explicit" refers to a collusive agreement that results from a clear and defined agreement, whether openly acknowledged or kept confidential. In such instances, undertakings reach consensus on the terms of the agreement through procedures that are not disclosed to the public. This may involve a formal and overt arrangement or a covert, secret agreement between the involved parties.

[17] Collusion which is not the result of a prior understanding or agreement between the merging parties, but is a reflection of the independent strategic choices they have made, is considered tacit. In the case of tacit collusion there is no element of prior communication between the parties involved, which distinguishes it from communication-based collusion, D. ENCAOUNA, L. KAPLOW, *Competition Policy and Price Fixing*, in *Journal of Economics*, 111(3), (2014), Review of Kaplow by R.A. POSNER, *Competition Policy and Price Fixing*, in *Antitrust Law Journal*, 79(2), (2014), 761.

[18] N. PETIT, *The Oligopoly Problem in EU Competition Law*, Research Handbook in I. LIANOS, D. GERADIN (eds.), *European Competition Law*, Edward Elgar, September 2013, 2.

can manifest in various forms, including explicit, tacit, or any possible combination of both.[19] Also Posner supported that conscious parallelism involves the making and acceptance of an offer through conduct, and therefore literally and materially fulfills the conditions for an agreement.[20] More recently, Posner repudiated his view.[21]

Specifically, an explicit collusion scheme typically involves explicitly concluded agreements resulting from the alignment of intentions among undertakings, leading to the formation of agreements, or decisions by associations of undertakings, or concerted practices.[22] Prohibited cartels aim to maximize profitability for undertakings by reducing overall output and charging prices above the marginal cost of production, surpassing levels prevailing under competitive conditions.[23] Prices significantly diverge from those that would exist in a market without the adoption of collusive strategies by undertakings.[24]

Despite the economic benefits that accrue to colluding undertakings, it is important to acknowledge that collusive arrangements inherently carry an element of instability. This instability arises from the incentives for participating undertakings to deviate from agreed cartel prices, aiming to maximize profits at the expense of other participants. To mitigate this negative condition, a robust and effective retaliation mechanism against collusive defectors is crucial.[25]

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[19] M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE, *The Economics of Tacit Collusion*, Final Report for DG Competition, European Commission, IDEI, Toulouse, March 2003, 5, https://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf, Review of Kaplow by R.A. POSNER, *Competition Policy and Price Fixing*, cit., 761.

[20] R.A. POSNER, *Antitrust Law: An economic Perspective*, in *University of Chicago Press*, 146, 1976.

[21] R.A. POSNER, *Competition Policy and Price Fixing*, cit., 761, 765.

[22] N. PETIT, *The Oligopoly Problem in EU Competition Law*, Research Handbook in I. LIANOS, D. GERADIN (eds.), *European Competition Law*, cit., 2; S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, in *CEPR*, 27, (2019), https://ssrn.com/abstract=3304991, U. SCHWALBE, *Algorithms, Machine Learning, and Tacit Collusion*, in *J. Competition L. & Econ.*, 1, 32, (2018).

[23] The monopoly price is determined by finding the point at which the cartel's marginal cost curve (the horizontal sum of the marginal cost curves of the individual firms if input prices do not increase as the cartel is formed) intersects the market's marginal revenue curve. The price along the demand curve at this level of output is the Monopoly Price. See in particular, E. MANSFIELD, *Microeconomics*, New York, 1979, 347-348.

[24] R.A. POSNER, F.H. EASTERBROOK, *Antitrust: Cases, Economic Notes and other Materials*, St. Paul, MN, 1981, 1064-1065.

[25] M.K. VASKA, *Conscious Parallelism and Price Fixing*, in 52(2) *University of Chicago Law Review*, (1985), 511.

For the sustainability of a cartel, particularly in a traditional economic environment, economic theory underscores the necessity of specific structural characteristics and conditions within these markets.[26] These factors act as catalysts for collusion by facilitating the work of firms, aiding in the identification of focal points around which the cartel should be structured. These factors can be categorized into three sub-categories: market structure, demand characteristics, and supply characteristics,[27] which essentially represent the terms of coordination between competitors.[28]

Identifying these focal points, indicating the equilibrium point of coordination, poses challenges in both explicit and tacit cases of coordination. The difficulties arise because each undertaking has incentives to deviate from the concerted policy if the expected profitability of deviating behavior is significantly higher than that resulting from coordination.[29]

To maintain cooperative balance in the long term, cartel participants must establish a coherent structure, agreeing on a common cooperative strategy, monitoring compliance, and effectively enforcement through a retaliation mechanism.[30] George Stigler outlines three conditions for cooperation: achieving a tacit understanding on transaction terms (eg. price, quantity or quality), detecting deviations from the agreed balance, and adopting credible retaliatory mechanisms.[31] Economic academics also emphasize the importance of high barriers to entry, as low barriers diminish incentives for coordination.[32]

Fulfilling these conditions relies on certain structural features within the market to ensure the viability and stability of collusion. The stabiliza-

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[26] For a comprehensive analysis of these factors see J. TIROLE, *The Theory of Industrial Organisation*, Cambridge, MA, 1988, Chapter 6.

[27] Examples of characteristics of the market structure are the number of competitors, barriers to entry, the frequency of interactions and the transparency of the market. Examples of demand-side characteristics are demand developments and fluctuations in demand. Examples of supply-side characteristics are the degree of product differentiation, cost symmetry between firms and the intensity of innovation activities.

[28] M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE, *The Economics of Tacit Collusion*, cit., 11-57.

[29] *Ibid.*

[30] OECD, *Algorithms and collusion – background note by the secretariat 2017*, DAF/COMP(2017/4), para. 33, https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf.

[31] D. COOPER, K.-U. KÜHN, *Communication, Renegotiation, and the Scope for Collusion*, in 6(2) *Am. Econ. J. Microeconomics*, 78, (2014), 247-278.

[32] C. MARSHALL, L.M. MARX, *The Economics of Collusion, Cartels and Bidding Rings*, The MIT Press, Massachusetts, 2012, E.J. GREEN *et al.*, *Tacit Collusion in Oligopoly*, in R.D. BLAIR, D. SOKOL (eds.), in 2 *Oxford Handbook of International Antitrust Economics*, (2015), 464.

tion of collusive arrangements is primarily catalyzed by the presence of a small number of firms operating within the market, making it easier for parties to reach agreements on the terms. In contrast, markets with a larger number of active firms strengthen incentives for divergent coordination policies.[33]

Collusion is notably facilitated in markets characterized by low barriers to entry, and it involves a strategic compromise between firms seeking higher long-term profits despite potential reductions in short-term profits due to effective retaliation mechanisms.[34] The possibility of a potential competitor entering the market acts as a disincentive for coordination, reducing the incentives for firms to engage in such collusive efforts. Reducing the likelihood of retaliation increases the incentive to deviate from coordination, thereby destabilizing the maintenance of the collusive structure.

Transparency is a crucial structural feature in encouraging firms to harmonize their behavior. Conditions of transparency facilitate monitoring of competitors'behavior with regard to compliance with anticompetitive agreements, enabling swift reactions to deviations through the activation of retaliation mechanisms. These factors are often found in oligopolistic markets, where the competitive process is characterized by a small number of players operating. These players perceive their business behavior as directly interdependent on the policies pursued by their competitors.[35]

The oligopolistic markets are characterized by a limited number of firms, high transparency, and frequent interactions, providing a fertile ground for the emergence of explicit and/or implicit collusion. Within this oligopoly framework, there exists an 'oligopolistic interdependence,' leading firms to adopt similar practices in promoting and distributing their products, ensuring alignment with the strategic choices made by their competitors.[36] This interdependent relationship among undertakings enables them to implement pricing policies that surpass levels observed under competitive conditions. Consequently, this coordinated approach effectively seals off competitive conditions in the market without the necessity for prior negotiation, or discussion between competing undertakings.[37]

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[33] J. FAULL, A. NIKPAY, *The EU Law of Competition*, 3rd ed., Oxford, 2014, 32.

[34] M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE, *The Economics of Tacit Collusion*, cit.

[35] J. FAULL, A. NIKPAY, *The EU Law of Competition*, cit., 25.

[36] R. WHISH, D. BAILEY, *Competition Law*, 10th edition, Oxford, 2021, 561.

[37] E. JAIME, M. CASTRO, *The limitations on the punishability of tacit collusion in EU competition law*, in 13 *Revista Derecho Competencia*, 20, 2, (2017).

## B) Algorithms and Collusion

Algorithmic tools designed to automate pricing processes for businesses offer a substantial competitive advantage and serve as powerful tools for managing the vast volumes of data in the digital economy and online markets. These tools promote economic efficiencies, fostering improved supply and demand relationships, innovation, and overall competitiveness. While the efficiencies gained are deemed crucial, competition theorists express strong concerns regarding the role of algorithms in creating conditions conducive to the development of collusive structures within markets.[38]

Firstly, the use of algorithmic pricing tools contributes to collusion through their reflexive effects, influencing or artificially altering the structural characteristics of the markets where they operate. According to economic theory, crucial factors enhancing and increasing the likelihood of coordination are inherently linked to algorithmic implementation. Algorithms tend to reinforce these characteristics, shaping a market environment conducive to collusion.[39]

Algorithms primarily enhance transparency within a market and increase interaction among competitors, although their impact on the removal of barriers to entry remains controversial. The effective application of algorithmic tools necessitates the prior collection of a substantial amount of data, extracted in real time through automated computing methods. The pursuit of this competitive advantage prompts increased investment in innovation, strengthening the overall 'algorithmic advantage.' The automated collection and processing of data create a highly transparent economic environment, allowing market participants to continuously observe competitors' actions and re-actions, consumer choices, market fluctuations, and changes in supply and demand. After evaluating these observations, market participants can adjust their strategies accordingly.

The viability of collusion is attributed to algorithms' ability to detect

[38] Similar to this claim are the findings of the working group of the Center of Intellectual Property and Competition Law (CIPCO) of the University of Zurich, which took place on 19 February 2018 in Zurich. The working group, which involved a large number of representatives, academics and practitioners of the law, concluded to limit those cases through which algorithms can actually act as a promoter for the establishment of implicit collusive structures. Among these cases, the impact of algorithms on market transparency and on the strengthening of interdependence between firms has been described, https://www.rwi.uzh.ch/dam/jcr:08b6d5cc-4cc2-4134-9eb5-de9aa34231fc/Flyer%20CICPO%20Round%20Table_19.02.2018.pdf .

[39] MONOPOLKOMMISSION, *Algorithms and collusion July 2018*, 6-7, https://www.monopolkommission.de/images/HG22/Main_Report_XXII_Algorithms_and_Collusion.pdf.

and suppress deviations. Highly transparent market conditions enable firms to efficiently monitor competitors' prices. In digital online markets, retailers use automated pricing software to adapt their prices in line with competitors, with almost a third employing such tools. These software tools greatly facilitate the identification of deviations from coordinated prices within a short timeframe, typically a few seconds.[40] Complex algorithms, in particular, can make nuanced distinctions between detected deviations, discerning those resulting from changes in supply and demand and those stemming from intentional deviations.[41]

The increased transparency resulting from price monitoring and the rapid adjustments made by price-setting algorithms initially appear synonymous with perfect competition, akin to Nash Equilibrium. However, several aspects of digital markets challenge this notion. Factors such as concentration levels in certain digital markets and the disparity between price transparency on the supplier's side versus the buyer's side cast doubt on the assumption. Retailers may excel at monitoring each other's prices compared to their customers. In such scenarios, increased transparency and flexibility may not necessarily lead to increased competition. Instead, due to a recurring prisoner's dilemma faced by sellers, these factors could result in price increases and reduced offerings.[42] In essence, deep learning algorithms remove the "market veil", making the "invisible hand" of the market fully visible.[43] Therefore, a transparent environment is susceptible to the development of collusive structures, exacerbated by the artificial increase in transparency conditions when algorithms are widely used, resulting in an even greater propensity for coordination.[44]

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[40] EUROPEAN COMMISSION, *Final Report on the E-commerce Sector Inquiry*, COM(2017) 229 final, 2017, point 13.

[41] OECD, *Algorithms and Collusion*, (2017), 22.

[42] J. BLOCKX, *Antitrust in Digital Markets in the EU: Policing Price Bots, Radboud Economic Law Conference 9 June 2017,* https://ssrn.com/abstract=2987705, See A. GOMES, P. GONZAGA, *Pricing Algorithms: The Risk of Collusion and Personalised Pricing*, in I. KOKKORIS, C. LEMUS (eds.), *Research Handbook on the Law and Economics of Competition Enforcement*, Cheltenham, 2022, 64.

[43] A. EZRACHI, M. STUCKE, *Virtual Competition: The Promise and Perils of the Algorithm Driven Economy*, Cambridge, MA, 2016.

[44] The empirical evidence from the market for petrol stations in Chile (2012) and Germany is a typical example of the susceptibility of highly transparent markets. In both cases, service stations were obliged to post all their price changes on a daily basis on their own website, so that consumers could obtain the best possible information and choose the most advantageous economic offer available. In both cases, the conditions of transparency were conducive to coordination between the undertakings, as they led to an increase in prices and profit margins for

Price-setting algorithms also contribute to increased frequency of interaction between firms. They enhance the frequency while significantly reducing the cost and time of transactions.[45] As a result, price divergences are less likely to go unnoticed for long, reducing the profitability of divergent behavior. Frequent and automated price adjustments enable immediate reactions to potential deviations, minimizing the profitability of firms deviating from collusion.[46]

The presence of significant barriers to entry in a market is crucial for maintaining collusion, acting as a safeguard for its viability and stability. Algorithms play a dual role in this context. On one hand, they can reduce entry barriers and facilitate the entry of potential competitors by informing them about specific competitive conditions and trends in the market. On the other hand, due to their advanced nature, algorithms can serve as a significant barrier to entry, immediately repelling or predicting new entry to some extent through their application and mainly their monitoring skills.[47]

The small number of undertakings is traditionally considered a crucial element for effective coordination in a market. However, algorithms eliminate this condition as a prerequisite for collusion. The technological sophistication of algorithmic tools, combined with their processing speed, facilitates the development of collusive structures even in markets with a larger number of competing firms. Consequently, oligopolistic markets are no longer a necessary condition for the establishment of an algorithmic cartel.[48]

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the undertakings concerned. These initiatives, although taken within a framework of pro-competitive policies, nevertheless appeared to have had a disincentive effect, damaging consumer welfare through the price increases that occurred in the context of coordination. See also F. LUCO, *Who Benefits from Information Disclosure; The Case of Retail Gasoline*, in 11 *Am. Econ. J.: Microeconomics*, 277, (2019) and Fuel Sector Inquiry Final Report, Bundeskartellamt (May 2011), http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Fuel%20Sector%20I%20nquiry%20-%20Final%20Report.pdf?__blob=publicationFile&v=14; and R. DEWENTER, The *Impact of the Market Transparency Unit for Fuels on Gasoline Prices in Germany (Düsseldorf Institute for Competition Economics)*, Discussion Paper, Issue 220, 2016, https://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/%20Discussion_Paper/220_Dewenter_Heimeshoff_Lueth.pdf%20%5bhttps://perma.cc/37Z2-RBLG.

[45] P.G. PICHT, B. FREUND, *Competition (Law) in the Era of Algorithms*, Max Planck Institute for Innovations & Competition Research Paper No. 18-10, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3180550.

[46] AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Competition Law and Data*, (10 May 2016), 14.

[47] MONOPOLKOMMISSION, *Algorithms and collusion*, cit., 7.

[48] OECD, *Algorithms and Collusion*, (2017), 21, https://www.oecd.org/competition/algorithms

Concerning demand conditions, it remains uncertain, both empirically and theoretically, to what extent algorithms can influence or alter these market characteristics. On the supply side, however, the adoption of algorithmic pricing is observed to influence, and to some extent shape, prevailing supply conditions.[49] In digital markets, algorithmic applications act as a crucial countervailing factor against high transparency conditions countering the risk of collusion.[50]

Despite the ambiguous effects on some facilitating factors of coordination, standard economic models suggest that in an almost perfectly transparent market with repeated interactions, collusion becomes the most viable and profitable option for competitors.[51] Algorithms contribute to the success of collusion scenarios by enhancing the stability of coordination through three key features.[52] Firstly, algorithmic decisions exhibit absolute rationality, making their methodology more decipherable than decisions made by humans. Second, algorithms, with their computational precision, reduce the risk of error in finding the optimal point of collusion. Third, algorithms are less susceptible to "agency slack", the human tendency to prioritize short-term gains over long-term profitability resulting from coordination.[53]

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-andcollusion.htm#:~:text=In%20June%202017%20the%20OECD,the%20challenges%20raised%20by%20algorithms.&text=Read%20the%20OECD%20Background%20paper. See A. EZRACHI, M.E. STUCKE, *Sustainable and Unchallenged Algorithmic Tacit Collusion*, in 17 *Northwestern Journal of Technology and Intellectual Property*, (2020), 217-259 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3282235.

[49] The contribution of algorithmic pricing can be identified in particular in the case of search engines, navigation applications and web platforms, where algorithms are a source of competitive advantage, companies may face greater competitive pressure to develop the best performing algorithm, thereby reducing the present value of collusive agreements as well as the incentive to collude. Similarly, algorithms may allow firms to differentiate their services or production costs, leading to cost asymmetries between market players. In this way, collusion may be more difficult to maintain because of the difficulties in finding a focal point for coordination. See in this regard OECD, *Algorithms and Collusion*, cit., 2017.

[50] *Ibid.*, 22-23.

[51] *Ibid.*, 65-97.

[52] P.G. PICHT, B. FREUND, *Competition (Law) in the Era of Algorithms*, cit., 7, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3180550.

[53] This is in essence what is known as 'relaxation of representation', a characteristic often found in cases of human-managed coordination. This particular problematic is addressed in the relevant research conducted by the CMA in 2018, which notes that: «Although collusion among a firm's senior managers has been agreed, salespeople and other non-managerial employees may have incentives to undermine the cartel. They may do so if they prefer the immediate rewards to the long-term benefits of maintaining a cartel. For these reasons, they may choose to undercut

Efficiency in calculating the collusion value that maximizes profit without explicit agreement is another reason algorithms make tacit collusion more likely. While the facilitation of collusive behavior by algorithms does not directly imply achievement within non-oligopolistic markets, there is a risk that intensive algorithm use may facilitate both explicit and tacit collusion. Salil Mehra, in his 2016 paper,[54] highlights instances where individuals might struggle with the cognitive evaluation of their competitors' reactions. In such cases, algorithms could potentially outperform humans in calculating the profit-maximizing value, thereby avoiding undesirable deviations and stabilizing collusion. It's important to note that while algorithmic implementation facilitates collusive behavior, this doesn't automatically imply that such coordination can be achieved within non-oligopolistic markets.[55]

Algorithms, by altering the factors shaping the competitive process, transform traditional market characteristics, characterized by low transparency, slower transactions, and non-automated human decision-making.

The impact of algorithmic tools on business decision-making is particularly pronounced in the development of tacit collusion cases between competitors. The use of automated tools, coupled with digital market characteristics, challenges the 'prisoner's dilemma,' suggesting that optimal profitability can be achieved through the strategic choice of implicit coordination via rapid, continuous, and transparent transactions. Pricing algorithms establish tacit collusion with other market participants without necessitating traditional market characteristics that facilitate coordination in the absence of prior agreement.[56]

To secure the conditions necessary for collusion, undertakings often implement practices that foster coordination. While not explicit collusion, these mechanisms promote coordination on prices or other competitive parameters through information exchange. Competitors predominantly engage in information exchange as a practice facilitating coordination, but various other ancillary methods are documented in theory. Firms adopt practices such as emulating the pricing policy of the market leader, engaging in

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the agreed price», CMA, *Pricing algorithms – Economic working paper on the use of algorithms to facilitate collusion and personalised pricing*, 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf.

[54] S.K. MEHRA, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, in *100 Minnesota Law Review*, (2016), 1323-1375.

[55] R. SELTEN, *A Simple Model of Imperfect Competition, Where 4 Are Few and 6 Are Many*, in 2(1) *International Journal of Game Theory*, (1973).

[56] S.K. MEHRA, *Antitrust and the Robo-Seller*, cit., 1339-1351.

joint research, jointly acquiring patents, and introducing meeting-competition clauses. These practices are adopted to ensure that firms possess the necessary characteristics for tacit collusion, making it possible for them to align their actions without explicit agreement.[57]

The impact of algorithms on various factors and parameters of the competitive process remains a controversial topic.[58] As an example, the concept of asymmetry, often considered a deterrent to effective collusion,[59] is explored in economic arguments. High cost asymmetry among firms can complicate finding a common pricing point, as lower-cost firms may be inclined to set lower prices, creating coordination challenges. Additionally, economic studies suggest that firms with lower costs might deviate from coordination strategies, anticipating higher profits and potentially facing lower retaliation compared to higher-cost competitors.[60]

Even when firms share the same algorithm provider, they are likely to tailor and parameterize the algorithm to align with their unique economic dimensions and business objectives. Programmers and providers of automated software assert that algorithmic adoption is linked to increased business profitability, yet the specific focus on short-term or long-term profit may vary between algorithms.[61]

Similarly, the algorithm implemented by a company integrates information or objectives that mirror the cost model of the specific undertaking. Feedvisor, a provider of pricing algorithms for third-party sellers on the Amazon marketplace, affirms that «pricing strategies for each individual sel-

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[57] R. REES, *Tacit Collusion*, in 9(2) *Oxford Review of Economic Policy*, (1993), 35-37 – Organization for Economic Co-operation and Development, Competition Committee, Roundtable on Facilitating Practices in Oligopolies, 2007.

[58] OECD, *Algorithms and Collusion: Competition Policy in the Digital Age par. 23*, www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm.

[59] J. MIKLOS-THAL, *Optimal Collusion Under Cost Asymmetry*, in 46 *Econ. Theory*, (2011), 99-125 where the author notes that «cost asymmetry is generally thought to inhibit collusion». But see D.P. BYRNE, N. DE ROOS, *Learning to Coordinate: A Study in Retail Gasoline*, in 109 *Am. Econ. Rev.*, 591, 618, (2019), where it is noted that «mergers that generate asymmetric firms may also facilitate collusion by enabling price leadership and experimentation».

[60] M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE, *The Economics of Tacit Collusion*, cit.

[61] CMA, *Pricing algorithms*, October 2018, https://assets.publishing.service.gov.uk/government/-uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf. The CMA report states that competition authorities could also consider whether the algorithm could give weight or value to future profits. If the objective function of the algorithm is very short term (e.g. maximising the profit on each sale without taking into account the impact of its current actions on future profits), then the algorithm is less likely to lead to coordination.

ler can be defined based on that seller's business objectives, and may, by way of example, be related to optimizing and increasing revenue, increasing profitability, or increasing the liquidity of the business».[62] This implies that even if competitors utilize algorithms with similar technical characteristics, complexity, and operational structure, these algorithms cannot effectively mitigate the inherent asymmetry distinguishing each competitor.

The type and nature of algorithms employed by companies also wield significant influence. According to Emilio Calvano *et al.*,[63] "learning algorithms" pose significant challenges to current competition law and policy. These algorithms can formulate strategies, even suboptimal ones, to learn from experience. This adaptability allows them to identify effective collusive strategies, ultimately reaching a collusive equilibrium without being explicitly designed for such coordination.[64]

### C) Classification of algorithmic-driven collusion practices

Concerning the potential anti-competitive impact of firms utilizing algorithms, a substantial theoretical debate revolves around the role these algorithms may play in orchestrating novel forms of coordination among competing entities. Notably, instances where competition authorities can establish that investigated entities use algorithms for anti-competitive practices or to align strategies with competitors fall explicitly within the legal framework prohibiting anti-competitive cartels. In different jurisdictions around the world, cases brought before competition authorities predominantly pertain to such cases, addressing them within the existing legal framework designed for prohibited cartels.[65]

However, challenges arise in cases lacking evidence of explicit agree-

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[62] N. TAYLOR, *Know Your Competition: How to Increase Sales on Amazon*, in *Feedvisor* (August 30, 2019), https://feedvisor.com/resources/e-commerce-strategies/know-your-competition-how-to-increase-sales-on- amazon-webinar-recap/.

[63] E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, in *CEPR*, Discussion Paper No. 13405, (2018), available at https://deliverypdf.ssrn.com/delivery.php?ID.

[64] E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, cit.

[65] United States of America v. D. Topkins, Plea Agreement, Case No. 15-00201 WHO (N.D. Cal. Apr. 30, 2015); CJEU, Case C-74/14 – Eturas, Judgment of the Court on January 21, 2016; CJEU, Case C-542/14 – VM Remonts, Judgment of the Court on July 21, 2016; Meyer v. Kalanick, Case No. 1:2015cv09796 – Document 37 (S.D.N.Y. 2016); Meyer v. Uber Technologies, Inc, Case No. 16-2750 (2d Cir. 2017).

ments or concerted practices that fit the definition of a prohibited cartel. In these situations, when available evidence is insufficient to prove the existence of agreements or communication between competitors, yet product or service prices significantly exceed levels expected under conditions of healthy competition, the concept of 'collusion by implication' surfaces. It is crucial to note that tacit collusion, even though familiar in competition law, does not categorically fall under prohibited agreements in competition law.

In scenarios where competitors independently set similar prices without explicit communication, and each firm independently and autonomously devises pricing policies to maximize profitability by observing competitors, no prohibited agreement exists. The mere use of algorithms capable of achieving tacit collusion through machine learning techniques, especially deep learning, does not render the algorithms, or the firms using them, liable for competition law infringement.

Hence, the broader apprehensions surrounding the emergence and perpetuation of anti-competitive practices through algorithmic tools center on the prevalence of the outlined scenarios. Specifically, the main subcategories of algorithmic collusion are the following: [66]

(a) Increased Availability of Pricing Data and Automated Pricing Systems: This can foster explicit collusion by identifying and addressing discrepancies, minimizing errors, and reducing the likelihood of random variations. Even basic pricing algorithms, equipped with real-time competitor pricing data, may enhance stability in explicit collusion structures among firms.

(b) Common Use of Algorithmic Systems: Firms utilizing the same algorithmic system, whether through shared software or services from third parties or by outsourcing pricing decisions to a common intermediary, may establish a "hub and spoke" structure, facilitating information exchange among them.

(c) Widespread Adoption of Advanced Technology Algorithms with self-learning capabilities: The theory contemplates the emergence of "autonomous algorithmic tacit collusion" when self-learning algorithms are extensively used by competing undertakings in the market. In this scenario, price-setting algorithms learn to collude independently, without requiring further information exchange or pre-existing coordination among competitors.

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[66] CMA, *Algorithms: How they can reduce competition and harm consumers*, 19 January 2021, https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers.

Ezrachi and Stucke categorize the application of new technologies falling within the prohibitive scope of competition rules into distinct forms: a) Messenger scenario, b) hub and spoke scenario, c) predictable agent scenario, and digital eye scenario.[67] For instance, the use of software to implement an anticompetitive agreement is classified as a "messenger".[68] Similarly, "hub and spoke" involves firms independently using the same software to set prices, creating a common exchange of commercially sensitive information and potentially leading to harmonized practices. The "predictable agent" scenario pertains to the unilateral use of an algorithm for monitoring competitors and predicting their behavior, falling under conscious parallel conduct, generally not prohibited by EU competition law. Lastly, the "digital eye" concerns using software to optimize a competitor's operations, contributing actively to the user's commercial policy and strategy. In this case, the conduct cannot in principle be considered as illegal, since the use is aimed at unilaterally improving commercial behavior by continuous self-training of the algorithm to understand in real time the market conditions.[69] Potential concerns arise when algorithms, despite their intelligent adaptation to competition, veer towards illegal coordination among competitors. It becomes essential to differentiate between scenarios where algorithms contribute to intelligent adaptations pursuant to market conditions changes and competitors' conduct and cases where they foster coordination among competitors.

Joseph Harrington's categorization provides additional insight into forms of algorithmic collusion. Harrington draws a distinction between using algorithms to monitor and enforce an already coordinated strategy and situations where pricing algorithms independently lead to coordinated outcomes, even without explicit communication between competing undertakings. This classification underscores the nuanced ways in which algorithms can influence market dynamics, both in enforcing existing strategies and in independently guiding firms towards coordinated results.[70]

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[67] A. EZRACHI, M.E. STUCKE, *Artificial Intelligence and Collusion, When Computers Inhibit Competition*, in *University of Illinois Law Review*, 1776, 1781, (2017), EZRACHI, M.E. STUCKE*, Virtual Competition, The Promise and Perils of the Algorithm-Driven Economy*, 2016.

[68] A. PORTUESE, *Algorithmic Antitrust, A Primer*, cit., 14-17.

[69] A. PORTUESE, *Algorithmic Antitrust, A Primer*, cit., 18.

[70] J.E. HARRINGTON, *Developing Competition Law for Collusion by Autonomous Price-Setting Agents*, in 14(3) *Journal of Competition Law and Economics*, (2019), 331-363, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037818. See also the paper entitled *Competition Law and Pricing Algorithms* presented by J.E. Harrington at the Bergen Competition Policy

## D) Explicit Collusion

In this context, akin to illegal anticompetitive agreements prevalent in traditional markets, algorithms serve as tools for executing the anticompetitive practices themselves. In essence, algorithms in this scenario function as conduits through which the agreements devised by natural or legal entities are put into effect.[71] It's crucial to recognize that, in such instances, algorithms are used solely as instruments for implementing traditional anticompetitive practices. Nevertheless, it is acknowledged that algorithms can play a role as cartel facilitators. For instance, they may foster forms of information exchange among competitors that are challenging for competition authorities to detect and penalize.

Pursuant to the New Horizontal Guidelines (2023)[72] collusion by code scenario applies in cases where competitors agree on using the same algorithmic pricing tool or rule, either to reinforce an existing cartel or initiate collusion (par.379). When used as part of an act of collusion, price monitoring algorithms can increase market transparency, detect price deviations in real time and make punishment mechanisms more effective. Collusion by code on essential parameters of competition is typically a cartel and therefore a restriction of competition by object, irrespective of the market conditions. Pursuant to the New Horizontal Guidelines, the treatment of pricing algorithms under Union competition law is based on two important principles. First, if pricing practices are illegal when implemented offline, there is a high probability that they will also be illegal when implemented online. Second, firms involved in illegal pricing practices cannot avoid liability on the ground that their prices were determined by algorithms. Just like an employee or an outside consultant working under a firm's "direction or control", an algorithm remains under the firm's control, and therefore the firm is liable even if its actions were informed by algorithms (par. 379).

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(BCCELE conference) in April 2019, http://beccle.no/files/2018/11/Harrington_BECCLE-2019_Slides.pdf.

[71] AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Algorithms and Competition*, cit. and FEDERAL TRADE COMMISSION, *Should We Fear the Things that Go Beep in the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing*, 23 May 2017, 10, https://www.ftc.gov/public-statements/2017/05/should-we-fear-things-go-beep-night-some-initial-thoughts-intersection.

[72] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements {SEC(2023) 212 final} – {SWD(2023) 167 final} – {SWD(2023) 168 final}.

AI emerges as a tool to address challenges threatening cartel stability. Algorithms, as a form of AI, can prevent misinterpretations or errors in implementing prohibited agreements by executing pricing or other decisions based on predefined parameters, particularly when a common data stream is accessible to all coordination parties. Advanced AI applications can also be deployed for monitoring implementation, identifying deviations from anti-competitive agreements, and implementing punishment strategies.

Monitoring algorithms play a crucial role in the evolution of algorithmic collusion forms, utilizing available data to monitor market conditions and ascertain whether any cartel participants have deviated from the agreement terms. Coupled with scraping technologies for automatic data collection, these algorithms can facilitate the detection of deviations, acting as a deterrent. Importantly, such algorithms may prevent the misinterpretation of undertakings' behavior, which could lead cartel members to erroneously believe that deviations have occurred, thereby undermining agreement stability, even if all members are in compliance.[73]

## 1. Horizontal Agreements

a) *Poster Cartel (CMA and USA)*

Monitoring algorithms came under scrutiny during investigations by the US and UK competition authorities concerning the high-profile Poster Cartel case in 2016.[74] Companies selling posters and related items on the Amazon website[75] entered into a price-fixing agreement using algorithms. Trod Limited and GB eye Limited[76] ("GB Posters") agreed that Trod Limited would refrain from reducing prices for posters and frames on the Amazon website in the UK. The implementation of this agreement utilized

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[73] CMA, *Pricing algorithms: economic working paper on the use of algorithms to facilitate collusion and personalized pricing*, 2018, 24, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf.

[74] DoJ, Plea Agreement of 30 April 2015; U.S. v. David Topkins; DoJ, Plea Agreement of 11 August 2016; U.S. v. Daniel William Aston and Trod Limited, CMA, Case 50223 – Online sales of posters and frames, Judgment of 12 August 2016.

[75] CMA, *Online Pricing of Posters and Frames*, published on 4 December 2015, https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products.

[76] Trod, based in Birmingham, and GB Eye limited, based in Sheffield, sold licensed sports and entertainment products and related products such as posters, frames, emblems, stickers and mugs featuring popular images from the world of sport and entertainment, including One Direction and Justin Bieber.

automated price adjustment software specifically designed by the parties to enforce the prohibited cartel.[77]

Concurrently, the UK's Competition and Markets Authority (CMA) collaborated with the US Department of Justice (DOJ) in investigating anticompetitive conduct involving algorithmic pricing systems facilitating price fixing in the online sale of wall decorations in the US.[78] In 2015, the DOJ convicted seller David Topkins for his involvement in a cartel fixing poster prices electronically for approximately six months. Topkins and his co-conspirators engaged in price-fixing by designing and programming algorithmic pricing tools. While algorithmic pricing itself is not inherently illegal, the unlawfulness in this case stemmed from a pre-existing agreement among competitors to use algorithms programmed for a specific function that served the cartel's objectives. The crucial aspect that brought the case before the DOJ was the existence of a relevant agreement between the competitors.[79] The role of algorithms in this context was limited to facilitating a pre-established horizontal agreement, acting as intermediaries in the formation of the anticompetitive conduct.[80]

b) *Economy Energy/E/Dyball (Ofgem)*

In 2019, the English energy regulator Ofgem addressed instances of algorithmic tools being used to establish anticompetitive agreements at the horizontal level. Ofgem, investigated the activities of two energy suppliers, Economy Energy and E.[81] These companies, formerly under common ownership, separated in 2014. Both focused on customers with pre-pay-

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[77] Trod agreed to accept a fine of £163,371 for participating in this anti-competitive cartel. The above fine was after deducting a relevant discount of 20%, which is attributable to the company's cooperation with the relevant authority, provided that it continues to cooperate and comply with the other terms of the CMA's leniency policy. Similarly, GB Eye was not ultimately fined as it reported the cartel to the CMA in accordance with the provisions of the Authority's leniency policy.

[78] Algorithms and Collusion-Note from the United Kingdom, DAF/COMP/WD (2017) 19, par. 49, https://one.oecd.org/document/DAF/COMP/WD(2017)19/en/pdf, https://one.oecd.org/document/DAF/COMP/WD(2017)19/en/pdf.

[79] Algorithms and Collusion, Background Note by the Secretariat, DAF/COMP (2017) 4, Box 9, https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf.

[80] MONOPOLKOMMISSION, *Algorithms and collusion*, cit.

[81] Ofgem, Decision to impose financial penalties on Economy Energy, E (Gas and Electricity) and Dyball Associates following an investigation into an infringement of Chapter I of the Competition Act 1998, 30 May 2019, https://www.ofgem.gov.uk/publications/decision-impose-financial-penalties-economy-energy-e-gas-and-electricity-and-dyball-associates-following-investigation-infringement-chapter-i-competition-act-1998.

ment meters, a demographic less engaged in the energy market and often not targeted by larger energy suppliers.

Dyball, a software and consultancy services provider to suppliers, played a crucial role in this case. In February 2016, Dyball facilitated the development of a customer relationship management and pricing system for both Economy and E. This system, employed to reject customers from registration in the CRM system, became instrumental in the anticompetitive practices investigated by Ofgem. Dyball's involvement extended to disclosing each supplier's customer lists to the other, leading to instructions for sales representatives not to contact each other's customers. Additional functionalities were introduced to facilitate customer switching between suppliers while preventing them from targeting each other's customers. The investigation, prompted by anonymous sources and Ofgem's analysis of switching data, commenced in August 2016.

The significance of this case lies in the involvement of Dyball, a software provider, in facilitating collusion between Economy and E through the development of software tools. Dyball explicitly admitted to providing the means for accessing customer lists, enabling the filtering of customers to prevent each company from targeting the other's clientele. This involved configuring settings in the CRM software to restrict the processing of sales.

Ofgem's findings revealed that Dyball was cognizant of how its products were being utilized by suppliers to obstruct the registration of each other's customers, with the clear intent of restraining competition. Dyball actively addressed IT issues to enhance the implementation of the anticompetitive practices. Importantly, Dyball not only responded to the suppliers'requests but also took the initiative to suggest more effective methods for information exchange and customer allocation. Proposals included offering improved software solutions to E to block sales to Economy's customers and advocating for daily updates of customer lists instead of monthly.

In light of these practices, Ofgem concluded that the actions of Economy and E, facilitated by Dyball's software, constituted a restriction of competition 'on the merits'.[82] Despite assertions by Economy and E that their agreement had pro-competitive effects by aiding E′s entry into the market as a lower-cost alternative, Ofgem rejected this argument. Ofgem emphasized that market and customer allocation are inherent restrictions of competition. Notably, Ofgem imposed fines on Dyball as part of its re-

[82] A. ANDREAS, *Die Haftung für Kartellverstösse durch Preisalgorithmen*, Tübingen, 2022, 45.

sponse to the software provider's role in facilitating the anticompetitive conduct.

c) *ADESBO (Brazil)*

The Brazilian Competition Authority has encountered cases involving automated billing software, leading to the imposition of fines. One notable case involved the use of software to monitor an agreement between driving schools and licensing agents, where the agents intended to employ algorithms and software for cartel agreements.[83] The investigation revealed that from 2002 to 2011, ADESBO (the association of driving schools in Santa Bárbara D'Oeste) and the software company Criar engaged in an anti-competitive agreement in the Santa Bárbara D'Oeste area of São Paulo. The purpose of this agreement was to allocate the market, coordinate prices, prevent the entry of new players and exert direct or indirect pressure on the cartel members to comply with the terms of the agreement.

The Competition Authority found that ADESBO commissioned Criar to develop a registration system for driving schools, intending to equally distribute customers for medical and psychological examinations to obtain driving licenses. However, ADESBO utilized the system to allocate the market, exchange sensitive information and customer data among participants, issue invoices based on agreed prices, create barriers to entry, impose sanctions for non-compliance with the registration system and agreed prices, and regulate the market through monitoring capabilities. In 2016, CADE issued a decision, declaring the existence of a cartel in violation of the Brazilian legal framework, resulting in fines totaling USD 254,779.[84]

d) *CNMC Case regarding CRM software usage*

The CNMC has placed a high priority on scrutinizing digital business models and sectors for potential anti-competitive behaviors, particularly focusing on how algorithms and information technologies might facilitate collusion.[85] A notable action in this area was the imposition of fines totaling €1.25 million in December 2021 on several companies engaged in

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[83] Guilherme Mendes Resende (CADE), *Algorithmic Collusion: Competition Implications and Anticompetitive Evidence in Brazil*, https://www.competitionpolicyinternational.com/wp-content/uploads/2021/10/LatAm-Column-October-2021-Full.pdf, and CADE, Administrative Proceedings g 08012.011791/2010-56.

[84] C. Veljanovski, *Pricing Algorithms as Collusive Devices*, 2020, available at https://ssrn.com/abstract=3644360.

[85] OECD, *Algorithmic competition-Note by Spain*, 19 May 2023, available at https://one.oecd.org/document/DAF/COMP/WD(2023)16/en/pdf.

online real estate intermediation.[86] These firms were penalized for entering into agreements that fixed brokerage prices and shared sensitive information, violating both Article 101 of the Treaty on the Functioning of the European Union as well as the national equivalent. The case highlighted the significant role that seemingly simple software can play in enabling such collusion.

The investigation was initiated by the CNMC's Directorate of Competition, which, upon noticing potential collusive behaviors through press releases and website information, conducted dawn raids on two real estate franchising companies and a software firm, the latter of which later sought leniency.[87]

At the heart of the case was the use of a Multiple Listing Service (MLS), a concept borrowed from the United States, which serves as a collaborative database for real estate brokers and agencies to share listings and sales information. The infringement stemmed not from the MLS itself but from the specific rules and regulations enacted by the MLS developers – two real estate franchisers. These stipulations, which all member agencies and brokers were required to follow, included enforcing a minimum commission rate of 4% and mandating the sharing of fee information among members.[88]

Compliance with these rules was ensured through various mechanisms, notably the integration of these requirements into the MLS and Customer Relationship Management (CRM) software. This software was designed to only allow listings to be shared if the associated fee met or exceeded the minimum threshold, with non-compliance resulting in the property not being uploaded and the issuance of a warning.[89]

The CNMC's decision to fine the involved parties was based on the conclusion that these practices restricted the ability of real estate agencies to compete freely and set their commissions independently.[90] The sanctions were directed at the two real estate franchisers responsible for establishing and enforcing the MLS rules, as well as several IT companies that

[86] CNMC, The CNMC fines several companies EUR 1.25 million for imposing minimum commissions in the real estate brokerage market, Press Release, 9 December 2021, available at https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20211209_NP_Sancionador_Proptech_eng.pdf.

[87] OECD, *Algorithmic competition-Note by Spain*, cit.

[88] *Ibid.*

[89] *Ibid.*

[90] *Ibid.*

managed the MLS system and adapted the CRM software to enforce compliance.[91]

This case serves as a clear instance of digital-age collusion scenario, facilitated by software tools, yet embodying a traditional form of collusion through minimum fees and information sharing, supported by enforceable rules and penalties for non-compliance. It underscores how software, even in its simplest form, can play a pivotal role in enabling and enforcing collusive agreements, even in decentralized markets with numerous participants. This scenario, referred to as "The Messenger Scenario" in the literature[92] on algorithmic collusion, suggests that the potential for such collusion extends beyond traditional sectors to encompass a wide range of activities in the digital economy.[93]

e) *Real Page case*

A class action lawsuit has been initiated by renters against numerous landlords. These plaintiffs claim that a significant number of property owners have outsourced their price-setting responsibilities to RealPage Inc., a Texas-based company specializing in revenue management software.[94] RealPage's platform, powered by artificial intelligence, processes extensive datasets provided by the landlords themselves.[95] This information encompasses a range of variables, including current pricing and leasing dynamics within the apartment market. Based on this data, RealPage's system is designed to determine the most advantageous rental prices for properties within a specified area.[96]

The core issue at stake in this lawsuit is whether the collective adoption

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[91] *Ibid.*

[92] A. EZRACHI, M.E. STUCKE, *Artificial Intelligence and Collusion*, cit. 67.

[93] OECD, *Algorithmic Competition-Note by Spain*, 19 May 2023, available at https://one.oecd.org/document/DAF/COMP/WD(2023)16/en/pdf.

[94] H. VOGEL, *Department of Justice Opens Investigation into Real Estate Tech Company Accused of Collusion with Landlords*, in PROPUBLICA, 23 November 2022, available at https://www.propublica.org/article/yieldstar-realpage-rent-doj-investigation-antitrust as well as M. GAL, D.L. RUBINFELD, *Algorithms, AI and Mergers*, in *Antitrust Law Journal*, June 5, 2023, NYU Law and Economics Research Paper No. 23-36, available at https://ssrn.com/abstract=4469586 and A. EZRACHI, M.E. STUCKE, *The Role of Secondary Algorithmic Tacit Collusion in Achieving Market Alignment*, University of Oxford | Centre for Competition Law and Policy | Working paper CCLP(L)54, 21 August 2023, University of Tennessee Legal Studies Research Paper, available at SSRN: https://ssrn.com/abstract=4546889.

[95] H. VOGEL, *Rent Going Up? One Company's Algorithm Could Be Why*, in PROPUBLICA, 15 October 2022, available at https://www.propublica.org/article/yieldstar-rent-increase-realpage-rent.

[96] *Ibid.*

of AI-driven tools by landlords for price setting purposes crosses the line into illegal collusion. [97] This case is poised to shed light on the applicability of traditional antitrust tools – formulated in an era before the digital age – to contemporary scenarios involving algorithmic models capable of processing and analyzing competitive information with unprecedented speed and efficiency.

f) *Nessie Amazon Algorithm case*

Amazon has come under scrutiny for reportedly employing an algorithm, to experiment with price increases and observe the reaction of its competitors, including major retailers like Target. [98] This revelation emerged from a report by The Wall Street Journal, following allegations by the Federal Trade Commission (FTC) that accuse the online retail company of alleging U.S. competition law. [99]

Project Nessie was designed to incrementally raise prices on Amazon's platform across various product categories to gauge whether competitors would match these higher prices. If competitors chose not to follow Amazon's lead and kept their prices low, the algorithm would then automatically adjust Amazon's prices back to their original levels. [100] This strategy reportedly contributed to Amazon enhancing its profit margins by artificially inflating prices, a practice it is said to have discontinued in 2019. [101]

This case against Amazon is part of a broader investigation by the FTC, which accuses the company of employing various tactics to unlawfully sustain its dominance in the e-commerce sector. [102]

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[97] OECD, *Algorithmic Competition*, June 2023, available at https://www.oecd.org/daf/competition/algorithmic-competition-2023.pdf.

[98] A. CASTRO, *Amazon reportedly used a secret algorithm to jack up prices. A new report details Amazon's Project Nessie pricing algorithm*, in *The Verge*, October 3, 2023, available at https://www.theverge.com/2023/10/3/23901840/amazon-project-nessie-algorithm-antitrust-ftc-complaint.

[99] M. KELLY, *Amazon Used Secret 'Project Nessie' Algorithm to Raise Prices*, in *The Wall Street Journal*, October 3, 2023, available at https://www.wsj.com/business/retail/amazon-used-secret-project-nessie-algorithm-to-raise-prices-6c593706?mod=rss_Technology.

[100] *Ibid.*

[101] *Ibid.*

[102] M. KELLY, E. RONTH, *FTC files a massive antitrust lawsuit against Amazon/The FTC's legal battle against Amazon has just begun*, in *The Verge*, 26 September 2023, available at https://www.theverge.com/2023/9/26/23809817/amazon-ftc-antitrust-lawsuit-monopoly.

## 2. Cases at Vertical Level

Monitoring algorithms not only serve an ancillary role in establishing pre-existing horizontal agreements but also play a pivotal role in promoting the development of anti-competitive agreements in vertical level, particularly in the context of resale price fixing agreements, which, according to EU competition law, represent a hard-core restriction on competition. The deployment of automated pricing software by involved parties is deemed essential for ensuring the effective enforcement of agreement terms, especially in the realm of vertical agreements.

These algorithms are instrumental in identifying any potential deviation from the predetermined resale price, thus guaranteeing the enforcement of terms in anti-competitive vertical agreements. Consequently, the heightened transparency in online environments empowers suppliers to promptly activate their retaliation mechanisms in case of non-compliance, significantly reducing the incentives for resellers to engage in practices that deviate from the agreed terms. [103]

Furthermore, it is noteworthy that when a reseller adheres to fixed prices and is monitored by another reseller using monitoring software, the latter can adapt its pricing policy even without a formal agreement by setting prices at levels higher than those prevailing in the absence of a competitive market. [104]

a) *Consumer Electronics Manufacturers Case*

In this case, the European Commission made a significant decision regarding the utilization of a sophisticated algorithmic system, imposing a collective fine of €111 million on four electronics manufacturers. [105] The European Commission imposed fines on manufacturers from Japan, Taiwan, and the Netherlands for violating Article 101(1) TFEU. The violation centered on the manufacturers' practice of restricting the autonomy of online retailers by enforcing fixed resale prices for various electronic pro-

[103] It becomes clear that even if the resale price level is set by the supplier in the context of simple recommendations, the algorithmic application tends to reduce the recommendation feature to a fixed resale price, stabilising through the mechanism described the contracting function.

[104] OECD, *Algorithms and Collusion – Note from the European Union* (21-23 June 2017), para. 12, https://one.oecd.org/document/DAF/COMP/WD(2017)12/en/pdf.

[105] European Commission-Press Release, *Antitrust: Commission Fines Four Consumer Electronics Manufacturers for Fixing Online Resale Prices*, 24 July 2018, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4601.

ducts, including laptops, headphones, speakers, kitchen appliances, vacuum cleaners, and hair dryers.

Online retailers offering products at prices considered low by manufacturers were subjected to potential sanctions, including supply bans. The scrutiny of retailers' pricing policies was executed through the implementation of advanced algorithmic monitoring systems. These algorithms empowered the companies to closely monitor the pricing strategies at the resale price level within their established distribution networks. The incorporation of monitoring algorithms in this context significantly contributed to stabilizing anti-competitive practices among competitors.

The European Commission's decision holds particular significance for the overall assessment of algorithmic functionality from a competition law perspective. Notably, the European Commission underscored the impact of pricing algorithms, emphasizing that numerous retailers, through the use of such algorithms, could automatically align their prices with those of their competitors.[106]

b) *Casio Case*

Similarly, resembling the aforementioned case, the Competition and Markets Authority (CMA) issued a decision against Casio in 2019.[107] The CMA imposed a fine on Casio Electronics for engaging in anti-competitive practices involving the imposition of resale price maintenance clauses. Specifically, the CMA found that from January 2013 to April 2018, Casio adopted an unlawful pricing policy, compelling its resellers to advertise and sell Casio products at or above a specified minimum resale price. Simultaneously, Casio prohibited its resellers from offering discounts for online sales.

The CMA highlighted that, as part of its strategy for these resale clauses, Casio UK implemented specialized software called "price2spy".[108] This software served to stabilize resale prices and diminish the number of complaints related to non-compliance with Casio's pricing policy. The software facilitated the monitoring of the implementation of these clauses by Casio's resellers.

[106] It can be concluded that resale price fixing, in addition to having a vertical effect on the relationship between supplier and distributor, also has horizontal effects between retailers.

[107] CMA, Decision 50565-2, Online resale price maintenance in the digital piano and digital keyboard sector, October 8, 2019, https://www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-2#non-confidential-infringement-decision.

[108] *Ibid*, para. 3.109.

Acknowledging its participation in the restrictive practice through the imposition of resale clauses, Casio entered into a settlement agreement with the CMA.

c) *Zaappaaz*

A comparable case within the e-commerce sector occurred in the United States involving Zaappaaz company.[109] The company admitted guilt for participating in an anti-competitive price-fixing agreement related to promotional products sold online. The authority revealed that this anti-competitive practice was executed through the utilization of common social networking platforms and messaging applications, including Facebook, Skype, and WhatsApp. Interestingly, despite the use of technological tools such as these, it was noted that they were not deemed sufficient to entirely replace face-to-face meetings among executives and company representatives involved in the collusion.[110]

In this case, it is evident that technological tools alone may not eliminate the need for in-person interactions among key stakeholders. However, it underscores the significance of Competition Authorities having access to the digital environment and storage media, including passwords for decryption purposes.[111] Encryption applications, driven by algorithms, continuously encrypt and re-encrypt exchanged data. In the U.S., Acting Assistant U.S. Attorney Finch emphasized that companies violating legal requirements cannot evade detection by colluding digitally through the use of encrypted messages.[112]

This perspective aligns with EU law, as reflected in the ECN+ Directive, which aims to enhance the competencies of competition authorities in Member States. The directive is designed to ensure the proper and effective functioning of the competitive process within the market by grant-

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[109] P. JULIAN, M. SIEGEL, *The US DOJ announces that an e-commerce company and its president have agreed to plead guilty in participating in a price-fixing conspiracy (Zaappaaz)*, 7 August 2017, e-Competitions August 2017, Art. N° 84675. See V. PEREIRA, in 39 *ECLR*, 5, (2018).

[110] DoJ, Press Release: E-Commerce Company and Top Executive Agree to Plead Guilty to Price-Fixing Conspiracy for Customized Promotional Products, 7 August 2017, available at https://www.justice.gov/opa/pr/e-commerce-company-and-top-executive-agree-plead-guilty-price-fixing-conspiracy-customized.

[111] ECN Recommendation on the power to collect digital evidence, https://ec.europa.eu/competition/ecn/ecn_recommendation_09122013_digital_evidence_en.pdf.

[112] A. FINCH, *Acting Assistant Attorney General Andrew Finch Delivers Keynote Address at Annual Conference on International Antitrust Law and Policy*, New York, September 14, 2017, https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-keynote-address-annual-conference.

ing authorities access to both the digital environment and storage media, including the necessary passwords for decryption. [113]

d) *Geoblocking (Geographic Blocking)*

The agreement to employ algorithms for unjustified geographical exclusion based on nationality, place of residence, or establishment is addressed by Regulation 2018/302. Notable instances include investigations into Valve Corporation's Steam platform and Meliá Hotels, as highlighted in EU press release. [114] In the Valve case, the company collaborated with computer game producers to employ geo-blocking, restricting purchasers from using games in a country different from where they made the purchase. This arrangement constitutes a clear instance of prohibited market allocation, demonstrating the misuse of algorithms for geographic exclusion.

In contrast, the Meliá Hotels case involved hotels collaborating with major travel providers to program algorithms. [115] These algorithms were designed to selectively suggest available rooms or favorable offers based on the nationality and location of the individual, thus implementing a form of prohibited purchase allocation. Unlike the Valve case, pricing algorithms were specifically utilized in the Meliá Hotels case to facilitate the forbidden practice of manipulating purchase allocations. Both cases illustrate how the technical capabilities of algorithms were leveraged to execute anticompetitive practices, whether through market or customer allocation strategies.

e) *CNMC Tabacco Case*

The CNMC has imposed fines totaling EUR 57.7 million on three leading cigarette manufacturers – Philip Morris Spain, Altadis, and JT Internacional Iberia – alongside the distributor Logista, for sharing sensitive sales information from 2008 to 2017. [116] Logista, which provided a software platform used by the manufacturers to exchange price information in realtime, received the penalty of EUR 21 million for its role as the facilitator of

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[113] A. SINCLAIR, *Proposal for a Directive to Empower National Competition Authorities to be More Effective Enforcers (ECN+)*, in 8(10) *Journal of European Competition Law & Practice*, (2017), 625-633.

[114] EUROPEAN COMMISSION, *Antitrust: Commission opens three investigations into suspected anticompetitive practices in e-commerce*, Press Release, 2 February 2017, available at https://europa.eu/rapid/press-release_IP-17-201_en.htm.

[115] A. ANDREAS, cit. 82. 49.

[116] CNMC, Resolución Expte. S/DC/0607/17 TABACOS-14 May 2019, available at https://www.cnmc.es/sites/default/files/2416763_64.pdf.

this arrangement. The company has announced plans to appeal the decision, arguing that its actions were legitimate and did not have any anticompetitive impact. [117]

This case highlights significant considerations for how competition authorities view the use of technology in potentially facilitating anticompetitive behaviors, especially in terms of liability and the permissible scope of information sharing among competitors. The implicated technology allowed the cigarette companies to access each other's sales data in real-time, offering insights into consumer behavior, the impact of price changes on demand across different provinces, and the introduction of new products. While the CNMC did not accuse the companies of intentionally pursuing an anticompetitive agenda with the platform, it determined that the ability to exchange sensitive information through the platform had an anticompetitive effect. [118]

The ruling underscores a stringent stance by competition authorities towards the use of technological platforms that might enable anticompetitive practices. Although the case does not directly address the emerging concerns around Big Data and algorithm-driven collusion, it reflects the broader trend of applying traditional competition law principles to digital and software-based platforms. [119]

### E) Hub and Spoke

Under this collusion structure, algorithms function as the central hub orchestrating alignments and convergences in pricing policies among competing firms. Unlike the first scenario where algorithmic pricing tools serve as a means of structuring a prohibited agreement, here, the shared use of the same pricing algorithm by competitors is the catalyst for coordination, resulting in a collusive outcome. [120]

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[117] *Ibid.*

[118] OECD, *The Concept of Potential Competition-Note by Spain*, 18 May 2023, available at https://one.oecd.org/document/DAF/COMP/WD(2021)18/en/pdf.

[119] Nick Pimlott and Jonathan Peters, Spain's competition authority smokes out cigarette cartel facilitated by online software, 17 April 2019, available at https://www.fieldfisher.com/en/services/competition-and-consumer/competition-connect-blog/spains-competition-authority-smokes-out-cigarette-cartel-facilitated-by-online-software.

[120] N. COLOMBO, *Virtual Competition: Human Liability Vis-a-Vis Artificial Intelligence's Anticompetitive Behaviours*, in 2(1) *European Competition and Regulatory Law Review*, 13, (2018), https://www.sipotra.it/wp-content/uploads/2018/07/Virtual-Competition.pdf, G. DELPORTE, *Pricing Algorithms in EU Competition Law*, Maklu Uitgevers N.V., , 2019, 24.

This anticompetitive practice doesn't align with the widespread use of algorithmic pricing,[121] as courts have previously acknowledged cartels structured through this typical scheme.[122] The term used, stemming from criminal law[123] and adapted into free competition law, refers to a hub undertaking acting as the organizer of the cartel, with other spokes, typically operating in upstream or downstream markets, participating. German theory also refers to this as 'Sternkartell' or 'trilaterale Abspache.'[124] The vertical organization of this cartel form minimizes the need for horizontal cooperation among competing firms (spokes) as a third party assumes responsibility for determining crucial coordination parameters.

While European case law hasn't fully defined this cartel form, the UK Competition Authority has identified five key elements to establish its existence. This includes undertakings (spokes) revealing future intentions to the hub, foreseeability in the transmission of this information to competitors, the actual transmission of information by the hub, competitor awareness of the circumstances, and the use of information to shape their pricing policies.[125]

For an undertaking to be held liable for participating in this anticompetitive hub-and-spoke cartel under Article 101 TFEU, each participating entity must be aware that the scheme facilitates anticompetitive coordination.[126] Transposing this model into a digital environment, computer algorithms could represent the hub's activity to facilitate collusion among competitors.

Consider Boomerang Commerce as an example, providing online retailers with price optimization software. If horizontally competing customers share pricing information with the platform and are aware of its anticompetitive behavior, they may be accused of hub-and-spoke collusion through the use of third-party pricing algorithms.

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[121] A. EZRACHI. M.E. STUCKE, *Virtual Competition*, cit., 42-46.

[122] United States v. Newton, 326 F.3d 243, 255, (1st Cir. 2003).

[123] See. Kotteakos v. United States, 328 U.S. 750, (1946).

[124] A. ANDREAS, *Liability for antitrust violations by pricing algorithms*, cit., 41. See *Münchener Kommentar*, 2nd ed., WettR-Paschke, 2015, Art. 101 TFEU, No. 185; Frankfurter Kommentar zum Kartellrecht, Roth/Ackermann, 99 delivery, 2021, Grundfragen des Art. 81, No. 88.

[125] Tesco Stores Ltd, Tesco Holdings Ltd and Tesco Plc v. OFT (2012), Competition Appeal Tribunal (CAT), 1188/1/1/11, [2012] CAT 31, § 57.

[126] European Commission – Press Release, Commission fines broker ICAP €14.9 million for participation in several cartels in Yen interest rate derivatives sector, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4104 and A. EZRACHI, M.E. STUCKE, *Virtual Competition*, cit., 47-48.

Collusion could also arise if companies use pricing algorithms to real-time monitor a market leader (tip-for-tat strategy), who, in turn, programs a pricing algorithm to set prices above the competitive level.

In cases where a third-party provider's algorithm is not explicitly designed to facilitate collusion but can still influence market prices, the question arises whether the use of such an algorithm could be considered an inherent restriction of competition. A notable example is Uber's surge pricing algorithm in 2015,[127] which faced legal scrutiny in the US. It was alleged that the algorithm increased ride prices, leading to horizontal coordination among drivers. Uber, leveraging smartphones and applications, orchestrated agreements among hundreds of thousands of drivers without direct communication between them. Although the final judgment favored Uber due to lack of evidence,[128] the New York District Court emphasized in its interlocutory order that competition law cannot ignore the technological evolution enabling large-scale prohibited price-fixing agreements.[129]

It's crucial to highlight that the costly nature of continually improving algorithmic tools often prompts companies to outsource algorithm programming tasks to third-party companies. In a related scenario, companies might outsource the creation or programming of pricing algorithms to the same third-party companies used by other competitors. This situation could resemble a hub-and-spoke scenario, as competitors relying on the same distributor for their pricing algorithms may end up utilizing similar algorithms to shape their pricing strategies.

However, the distinction between the traditional hub-and-spoke scenario and the latter scenario involving a third-party software company lies in the intent of the parties involved. In the latter scenario, where a third-party software company is utilized, the anti-competitive effect may be a reflexive consequence rather than a deliberate outcome of the parties' intentions.

a) *Eturas Case*

The European Commission and the European Courts addressed cartels in the form of hub-and-spoke in the notable Eturas case, which centered

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[127] Meyer v. Kalanick [2016], 174 F. Supp. 3d 817, 820 (S.D.N.Y.2016). and C. COGLIANESE, A. LAI, *Antitrust by Algorithm*, in *Stanford Computational Antitrust*, 2, 5, 2022.

[128] Meyer v. Uber Techs, Inc., 868 F.3d 66 (2d Cir.2017), petition to declare the Court's order dismissing the complaint against Uber prejudiced, denied Aug. 3, 2020; cf. and A. ANDREAS, *Die Haftung für Kartellverstösse durch Preisalgorithmen*, cit., 48.

[129] Meter, 174 F. Supp. 3d at 826.

around the implementation of a restrictive agreement through automated price-fixing software distributed by the Eturas platform.[130] The infringement focused on the imposition of a maximum discount limit (3%) set by the Lithuanian platform operator, Eturas, acting as the 'hub.' Email communications from the platform to travel agents conveyed the specified maximum discount limit for customers. This practice was deemed a prohibited concerted practice falling under Article 101 TFEU due to its anti-competitive effects.

During the assessment of liability assigned to tour operators, it was considered that those operators, fully aware of the email's content indicating their anti-competitive intention to participate in the infringement, failed to publicly distance themselves beforehand from the application of the maximum discount limit or file a complaint with competent authorities.[131]

In addition to the requirement of public distancing, the Court of Justice of the European Union (CJEU) assigned particular significance to the element of awareness among recipients regarding the anti-competitive content of the message. In essence, when undertakings use a pricing algorithm with full knowledge of its illegal and anti-competitive purpose, competition principles establish the existence of a prohibited concerted practice.[132]

b) *The a2i systems Case*

Automated pricing software used by businesses raises particular concerns as it cannot easily be attributed the role of facilitating an agreement, yet its actions significantly undermine the competitive process. An illustration of this is evident in the case of the liquid fuels market in Rotterdam, the Netherlands. In this scenario, certain service stations entrusted the task of analyzing, processing, and adjusting their pricing policies to a third-party provider of pricing software, the Danish company 'a2i Systems.' Approximately 700 service station operators opted for this software to avoid costs associated with aggressive competitive practices, aiming to enhance the profitability of their businesses. Research indicated that service station

[130] Case C-74/14, Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba, 21 January 2016.

[131] *Ibid.*, para. 51.

[132] N. COLOMBO, *Virtual Competition*, cit. Respondent S. SCHECHNER, *Why Do Gas Station Prices Constantly Change? Blame the Algorithm*, in *The Wall Street Journal*, May 8, 2017, https://www.wsj.com/articles/why-do-gas-station-prices-constantly-change-blame-thealgorithm-1494262674.

operators using the 'a2i' software achieved an overall turnover 5% higher than those not using such software.

Notably, the 'a2i' pricing algorithm was not employed to coordinate and establish a prior agreement among the petrol station operators using it. Instead, it aimed to eliminate costs resulting from an unwanted price war. Despite taking the typical form of a hub-and-spoke scheme, this arrangement is not considered contrary to provisions protecting free competition, as it is motivated by fully rational business considerations.

The legal challenge in managing this phenomenon lies in the fact that the absence of an agreement does not have legal consequences for the involved parties. However, it results in price alignment, leading to higher prices than what healthy competitive conditions would entail.[133] This particular instance of hub-and-spoke collusion poses new challenges to competition law, specifically concerning the use of a common algorithm by competitors.

The UK Competition Authority has acknowledged that hub-and-spoke cartel structures represent the most immediately applicable scenario of algorithmic collusion, presenting the most challenging issues for competition authorities to address. In cases where the algorithmic pricing application is outsourced to a third-party company, three criteria must be met to trigger regulatory intervention: a significant likelihood of a substantial price increase due to a large number of players in the same market using algorithmic pricing tools, an investigation into whether the hub company uses publicly available data on competitors, and a demonstration that the pricing algorithm's objective function aligns with maximizing the overall profitability of competitors.[134]

c) *Uber Surge Algorithm*

The question arises as to whether Uber's pricing algorithm could operate as a hub-and-spoke structure, acting as the hub that determines fares for numerous competing drivers, who function as the spokes. This potential configuration poses a concern for the effective functioning of competition in the transport market.[135]

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[133] A. EZRACHI, M.E. STUCKE, *Sustainable and Unchallenged Algorithmic Tacit Collusion* (Nov. 10, 2018). University of Tennessee Legal Studies Research Paper No. 366, Oxford Legal Studies Research Paper No. 16/2019, 30 *Northwestern Journal of Technology and Intellectual Property*, 217, 2020, https://ssrn.com/abstract=3282235.

[134] CMA, *Pricing algorithms Economic working paper on the use of algorithms to facilitate collusion and personalised pricing*, 26-27, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf.

[135] Some scholars have given the Uber platform the code name "algorithmic monopoly". See

An illustrative example is the Uber case in the USA, where the issue revolved around the pricing policy applied by the company in charging its drivers for their rides.[136] The platform used an automated method to calculate fares, with the basic fare determined by the platform itself and additional factors, such as distance, ride duration, and any extra remuneration for the driver, factored in. The final amount is then calculated by multiplying these parameters with the factor indicated by the Uber surge algorithm.[137] While an (interlocutory) judgment found a violation of the Sherman Act, indicating a vertical prohibited agreement between Uber and drivers and horizontal coordination among drivers,[138] the final judgment did not find evidence of the algorithm being used for anticompetitive purposes, resulting in a ruling in favor of Uber.[139]

In German legal theory, the Uber case has been widely considered a classic example of a hub-and-spoke structure.[140] From a European law perspective, a pivotal criterion for activating antitrust provisions in the Uber case is the functional independence of drivers, allowing them to be regarded as independent and autonomous undertakings.[141] The CJEU's

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in this respect A. EZRACHI, M.E. STUCKE, *Virtual Competition*, cit., 51; M. STOLLER, *How Uber Creates an Algorithmic Monopoly to Extract Rents*, 11 April 2014, https://www.nakedcapitalism.com/2014/04/matt-stoller-how-uber-creates-an-algorithmic-monopoly.html. See C. VEITH, *Künstliche Intelligenz,* Haftung und Kartellrecht, 2021, 199.

[136] J. NOWAG, The *UBER-Cartel? UBER between Labour and Competition Law*, Working Paper, 3 *Lund Student EU Law Review*, 2, (2016); cf. and C. COGLIANESE, A. LAI, *Antitrust by Algorithm, Stanford Computational Antitrust*, 2 *Stanford Computational Antitrust*, 2022, 1, U of Penn, Inst for Law & Econ Research Paper No. 21-33, https://ssrn.com/abstract=3985553,

[137] This automatic system monitors in real time changes in the number of passengers requesting transport and the number of drivers offering their services, thus increasing fares when consumer demand at a location exceeds the supply of available drivers. See in this regard J. HALL, C. KENDRICK, CH. NOSKO, *The Effects of Uber's Surge Pricing: A Case Study*, 2015, available at https://drive.google.com/file/d/0B1s08BdVqCgrOHdwaGlEVVMwa1E/view.

[138] Case 15 Civ. 9796, Meyer v. Kalanick, (2016).

[139] N. PASSARO, *How Meyer v. Kalanick could determine how Uber and the sharing economy fit into Antitrust Law*, in *Michigan Business & Entrepreneurial Law Review*, 259, 2018.

[140] MONOPOLKOMMISSION, *XXII Hauptgutachten Wettbewerb*, 2018, 173, 177, P. POHLMANN*, Algorithmen als Kartellverstoß (Algorithms as Cartel Infringements)*, in J. KOKOTT, P. POHLMANN, R. POLLEY (eds.), *Europäisches, Deutsches und Internationales Kartellrecht, Festschrift für Dirk Schroeder*, Köln, 2018, 633, 638. Contrast U. SALASCHEK, M. SERAFIMOVA, *Prissetzungsalgorithmen im Lichte von Art. 101*, in *WuW*, 8, 12, (2018).

[141] According to the settled case law adopted by the European Commission, where the 'spokes' are considered to be employees and not undertakings with functional independence from the hub undertaking, they cannot be accounted for as undertakings and the provisions of competition law do not apply. See in this respect Joined Cases C-159/91 and C-160/91, Poucet et Pistre.

judgment in the Asociación Profesional Élite Taxi case[142] shifted the perception of the Uber platform within the European Union. Uber was reclassified as a "service provided in the transport sector" rather than an "information society service", leading to the conclusion that competition law protections do not apply.[143] This decision was based on the understanding that Uber drivers lack the operational independence required for them to be considered autonomous undertakings. despite adopting pricing policies above competitive levels.[144]

A similar stance was taken by the UK Supreme Court in the "Uber BV and others v. Aslam and others" case in 2021, where drivers were deemed part of Uber's business due to the platform's control over them. Likewise, a judgment in New Zealand (October 2022) considered Uber drivers as employees rather than merely participants in an intermediary digital platform. This highlights the ongoing legal challenges and debates surrounding the classification and implications of Uber's operational structure.[145]

d) *Uber/Ola*

The concept of hub-and-spoke algorithmic collusion has not only been examined by the European Commission and US courts but has also come under scrutiny from the Competition Commission of India (CCI). After conducting an investigation, the CCI concluded that Uber and Ola, a local ride-hailing service akin to Uber, did not use their respective algorithms to facilitate price fixing among drivers.[146] The CCI found no prima facie infringement, as there was no evidence of a price-fixing agreement either between Uber and Ola or among the drivers them-

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[142] Case C-434/15, Asociación Profesional Élite Taxi v. Uber System Spain SL, 20 December 2017.

[143] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178 of 17 July 2000.

[144] Pursuant to Odudu and Bailey, 'the concept of an economic entity is best understood as the minimum combination of natural and legal persons capable of exercising a single competitive force in the market'. O. ODUDU, D. BAILEY, *The Single Economic Entity Doctrine in EU Competition Law*, in 51 *Common Market Law Review*, 1723, (2014).

[145] E TŪ INC & Anor v. Rasier Operations BV & ORS, 2022.

[146] Indian Competition Authority. Samir Agrawal v. ANI Technologies v. Uber India, Case No. 37/2018 of 6 November. 2018, hereinafter see. *M.M.* SHARMA, *The Indian Competition Authority dismisses cartel allegations against taxi app drivers on the basis that they were following the algorithm pricing and not actively colluding to fix prices* (Samir Agrawal v. ANI Technologies / Uber India), 06.11.2018, e-Competitions November 2018, Art. n. 8944.

selves.[147] This decision by the CCI was subsequently upheld by the Indian Company Law Appellate Tribunal in 2020.[148]

e) *Ageras*

In contrast to the CCI's approach, the Danish Competition and Consumer Authority (DCCA) took a different stance in its examination of Ageras, a platform connecting professional service providers, such as tax advisors, with clients. The DCCA determined that Ageras had violated the Danish Competition Act by providing individual providers with "estimated market prices" for specific opportunities and by disclosing "minimum prices" for certain contacts. Unlike the CCI, the DCCA did not consider the existence of an agreement as a prerequisite for establishing anti-competitive behavior in this case.[149]

f) *Partneo/Accenture case*

The widespread use of automatic pricing software, designed to adapt to market conditions, introduces a complex dynamic that becomes challenging to assess under competition law when employed by entities operating in the same relevant market. While the utilization of such software is not inherently prohibited, the simultaneous use by competitors can yield negative effects on the competitive process and consumer welfare, akin to traditionally prohibited collusion cases. The complexity arises because parallel use does not fall directly within the scope of Article 101 TFEU.

French competition authority also grappled with questions arising from algorithmic pricing, specifically in the context of car manufacturers using pricing software developed by Accenture.[150] Accenture, holding the intel-

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[147] Indian Competition Authority, Samir Agrawal v. ANI Technologies v. Uber India, Case No. 37/2018, 6.11.2018.

[148] Indian Company Law Appellate Tribunal, Uber/Ola, Case No. 11 OF 2019, 19 May 2020. Subsequently see R. SINGH, S. BALA, *The Indian Company Law Appellate Tribunal clarifies the emerging jurisprudence on hub-and-spoke cartel and standing requirements in a case concerning two ride-hailing platforms in the automobile services market for fixing cab fares through their apps (Uber/Ola)*, 29 May 2020, e-Competitions May 2020, Art. n. 95574.

[149] Danish Competition Authority. Ageras, 30 June 2020. The Danish Competition Authority finds that a digital platform for professional service providers infringed competition law by object when its algorithm suggested minimum quotes that accountants and bookkeepers should charge clients on the platform (Ageras), 30 June 2020, eCompetitions June 2020, Art. n. 95676.

[150] D. MANDRESCU, *When Algorithmic Pricing Meets Concerted Practices- the Case of Partneo*, in *Core Blog* (June 7, 2018), http://coreblog.lexxion.eu/when-algorithmic-pricing-meetsconcerted-practices-the-case-of-partneo/, T. BERGIN. L. FROST, *INSIGHT- Software and Stealth: How Carmakers Hike Spare Parts Prices*, in *Reuters* (June 4, 2018), https://www.reuters.com/article/

lectual property rights to the 'Partneo' pricing software, was involved in pricing spare parts for major car manufacturers, resulting in substantial profitability increases during 2008-2013. The algorithm of 'Partneo' determined maximum prices based on consumer willingness to pay, contributing to a significant rise in stock prices. [151]

The anticompetitive nature, however, was attributed not solely to the pricing software itself but to the car manufacturers' decision to collectively employ the same software. The parallel use of this software led to parallel increases in product prices by the companies using it. Accenture's involvement in coordinating prices for Renault and PSA Peugeot Citroen, along with organizing a secret meeting between the companies' managers, raised concerns.

The algorithmic tool operated by weighing, photographing, and analyzing relevant parts to create a database, setting prices based on the most expensive product in the same category. Some products were found to be priced significantly above their actual value. [152]

Regarding the involvement of the companies in adopting the same algorithmic tool, a crucial distinction is made. If the decision to install the Partneo software was solely a result of business dealings between the car manufacturers and Accenture, focusing on the software's quality and expected contribution to business efficiency, it may not constitute an unlawful practice under competition law. The mere popularity of the software may be indicative of its success.

However, if Accenture's business proposal included information exchange practices touching on pricing issues of competitors or provided indications of price coordination, it could be considered evidence of an anticompetitive practice. This would imply conscious coordination by the car manufacturers and potentially hold the software provider responsible as a facilitator of an anti-competitive product.

Despite these concerns, the case was closed without a finding of infringement for both the car manufacturers and Accenture. [153]

g) *Las Vegas Hotels case*

On January 25, 2023, a class action lawsuit was initiated in the United

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autos-software-pricing/rpt-insight-software-and-stealthhow-carmakers-hike-spare-parts-prices-idUSL5N1T60H9.

[151] C.C.M.C. DE MATOS, *Algorithms: the end of traditional competitive markets*, cit.

[152] C.C.M.C. DE MATOS, *Algorithms: The end of traditional competitive markets*, cit.

[153] A. EZRACHI, M.E. STUCKE, *Sustainable and Unchallenged Algorithmic Tacit Collusion*, 17, cit.

States District Court of Nevada, targeting several prominent hotel management companies on the Las Vegas Strip, including Caesars Entertainment, Inc., Treasure Island, LLC, Wynn Resorts Holdings, LLC, and MGM Resorts International.[154]

Central to this lawsuit is the accusation of a so-called "hub-and-spoke" collusion scheme, facilitated through the use of sophisticated pricing algorithms provided by a third-party, the Rainmaker Group.[155] The algorithms in question – GuestRev, RevCaster, and GroupRev – serve distinct purposes within the realm of hotel management and pricing strategies.[156]

GuestRev is designed to cater to the unique needs of casino hotels, offering individual room pricing recommendations, which, according to Rainmaker Group's claims, boast a 90% adoption rate among its users.[157] RevCaster functions as a market analysis tool, enabling hotels to track and adjust their prices in response to the competition. GroupRev, on the other hand, predicts the demand from large booking groups, such as those attending conferences or conventions, to optimize pricing accordingly.[158]

The heart of the complaint alleges that these tools were instrumental in enabling the defendants to synchronize their pricing strategies covertly. By pooling their data and relying on the Rainmaker Group's software for pricing recommendations, the hotels are accused of abandoning independent pricing decisions in favor of a unified approach.[159] This strategy, while not involving direct sharing of future pricing plans or strategies among the hotels, nonetheless resulted in a collective pricing mecha-

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[154] Richard Gibson and Heriberto Valiente v. MGM Resorts International *et al.*, U.S. District Court, District of Nevada, No. 2:23-cv-00140, available at https://www.classaction.org/media/gibson-et-al-v-mgm-resorts-international-et-al.pdf as well as OECD, Algorithmic Competition, 2023, available at https://www.oecd.org/daf/competition/algorithmic-competition-2023.pdf See also, M. GAL, D.L. RUBINFELD, *Algorithms, AI and Mergers*, cit.

[155] Richard Gibson and Heriberto Valiente v. MGM Resorts International *et al.*, cit.

[156] *Ibid.*

[157] *Ibid.*

[158] *Ibid.*

[159] Hagens Berman: Las Vegas Hotel Operators Sued for Alleged Scheme to Illegally Inflate Hotel Room Rates to Record Highs, January 25, 2023, Business Wire available at https://www.businesswire.com/news/home/20230125005898/en/Hagens-Berman-Las-Vegas-Hotel-Operators Sued-for-Alleged-Scheme-to-Illegally-Inflate-Hotel-Room-Rates-to-Record-Highs, CBS News 'Vegas hotel giants MGM, Caesars, Wynn and Treasure Island sued for "algorithmic-driven price-fixing", 27 January 2023, available at https://www.cbsnews.com/news/vegas-strip-resorts-price-fixing-lawsuit-mgm-caesars-wynn-treasure-island/ as well as A. EZRACHI, M.E. STUCKE, *The Role of Secondary Algorithmic Tacit Collusion in Achieving Market Alignment*, cit.

nism that allegedly drove prices above competitive levels, to the detriment of consumers.[160]

## F) Price Signalling

The US courts addressed the use of algorithms in establishing signalling practices in the Airline Tariff case.[161] Specifically, when examining the facts of the case, authorities argued that the airlines involved utilized the Airline Tariff Publishing Company (ATPCO) software.[162] This software served as a means for publishing the tariffs imposed by the airlines. The publication of fares was the chosen methodology for these companies to develop effective channels of communication, facilitating collaborative fare-setting above those that would prevail in a competitive market.

The anti-competitive practice adopted by the airlines was linked to the recording of notes for each fare.[163] These notes played a crucial role in determining ticket issuance dates and the final date for the journey. Essentially, the parties utilized their electronic fare reporting system to monitor competitors' reactions to signals emitted through the software. Through this practice, extensive negotiations took place within the cartel until all airlines committed to identical surcharges or the elimination of discounts on fares. The computer program also contributed to the cartel's sustainability by detecting deviations. In the event of deviation, the software triggered a corresponding retaliation mechanism, ensuring the implementation of the agreed terms.[164]

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[160] A. EZRACHI, M.E. STUCKE, *The Role of Secondary Algorithmic Tacit Collusion in Achieving Market Alignment*, cit.

[161] United States v. Airline Tariff Publishing Co., 836 F. Supp. 9 (D.D.C. 1993). See United States v. Airline Tariff Publishing Co.

[162] It is a clearing house which collects all the data it receives from airlines (including price, travel dates, origin and destination, airports, etc.) and shares it in real time with travel agents, online reservation systems, consumers and the airlines themselves.

[163] United States v. Airline Tariff Publishing Co., 836 F. Supp. 9 (D.D.C. 1993) at 7. Among the notations that the airlines recorded, the first dates of ticketing indicated the future date on which a fare was scheduled to be placed on the market, while the notation of the last dates corresponded to indicating the dates on which that fare was not available on the market. This practice was followed by the undertakings concerned in order to indicate the relevant proposals for increases in fares.

[164] See in this regard United States v. Airline Tariff Publishing Co., 836 F. Supp. 9 (D.D.C. 1993); S. BORENSTEIN, *Rapid Communication and Price Fixing: The Airline Tariff Publishing Company Case*, in *Working Paper*, (1997), http://faculty.haas.berkeley.edu/borenste/download/ATPCASE1.PDF.

The issue of unilateral disclosure of information has not only been theoretically addressed but also examined in court cases. Notably, in Container Shipping case,[165] the European Commission, while claiming that contacts between parties were sufficient evidence of a concerted practice, did not issue a prohibitiondecision. Instead, it opted for the resolution of accepting commitments. However, in some cases, unilateral disclosure of information, possibly with anticompetitive effects and even explicit invitations to collude, may be evident. In such cases, establishing the element of 'acceptance' or mutual assurance to the required degree of certainty proves challenging.[166]

In response to the restrictive framework set by the ECJ's Wood Pulp II case law, competition authorities have sought to apply Article 101 TFEU to price communications between competitors more broadly. However, these attempts have encountered limited success.[167]

The recent amendment to Greek competition law, Law 3959/2011, introduced Article 1A, targeting cases involving unilateral disclosures of information related to future pricing or invitations to collude.[168] The first paragraph of Article 1A explicitly prohibits sending invitations to collude with the intent of directly or indirectly influencing purchase or selling prices, limiting or controlling production, supply, technological development, investment, or allocating markets or sources of supply.

The complexity increases in cases of public disclosures, addressed by the second paragraph of the new Greek competition law provision.[169]

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[165] EU, decision of 7.7.2016, AT 39850 Container Shipping (Commitment Decision).

[166] See the Eturas judgment or, in the American context, the dissenting opinion in the McWane judgment.

[167] The only cases where this practice has been successful are: i) the Container Shipping case, where again the solution of accepting commitments was chosen, ii) the Dutch operators case or iii) the Irish vehicle insurance companies case.

[168] Law No. 3959/2011, Protection of free competition, as amended by Law No. 4886/2022. See also the Guidelines of the EA on the application of Article 1a of Law No. 3959/2011, as published on 26 October 2022. I. LIANOS, F. WAGNER VON PAPP, *Tackling Invitations to collude and unilateral disclosure*, in *Journal of European Competition Lew & Practice*, (2022), 1, 4 (editorial).

[169] According to the second paragraph of the newly introduced provision in the Greek legal order, it is provided that "*an undertaking is prohibited from disclosing information on price, discount, provision or credit in respect of goods or services which it supplies or procures if: a) the disclosure restricts effective competition in the Greek territory, and b) it does not constitute a normal commercial practice. In assessing whether a disclosure restricts effective competition, account shall be taken of: (a) the degree of specificity and the individualised nature of the information; (b) whether the information relates to future activities; (c) the extent to which the*

There is a risk that a simple prohibition against unilateral disclosure of information might deter the sharing of information beneficial to social welfare and efficient business conduct. To safeguard these benefits, the second paragraph of Article 1A incorporates the rule of reason, requiring the competition authority to assess whether the disclosure in question restricts effective competition. Factors considered include the specificity of information, relevance to future activities, accessibility, market relevance, and the likelihood of future use. It is crucial to evaluate whether the disclosure aligns with ordinary business practices. Notably, a disclosure exclusively to end-users does not restrict effective competition. Justification for unilateral notification is also possible, similar to the mechanism under Article 101(3) TFEU.[170] Despite the acknowledged anti-competitive nature of signalling practices, it's important to note that not all forms of such signalling on cooperation and prices fall under Article 101 TFEU. The application of this article is specific, and not all instances of signalling may meet its criteria.[171]

Challenges also emerge regarding the standard of proof that the competition authority would need to apply in proving an attempted cartel or unilateral disclosure of information. This underscores the importance of caution when determining the scope and application of new rules. The complexity lies in distinguishing between legitimate business practices and those that have the potential to harm competition.[172] Therefore, careful consideration and adherence to established standards of proof are essential in the evaluation of cases involving signalling practices in the context of competition law.

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*information is directly accessible to the public; (d) whether the disclosure is part of a set of similar disclosures by the undertaking; (e) whether there is a history of previous collusion in the relevant market or industry between the same undertakings; and (f) whether the relevant market to which the disclosure relates is concentrated and oligopolistic. The information disclosure is not considered to restrict effective competition if it is addressed exclusively to the end-users of the product or service*".

[170] The newly introduced Greek provision bears several similarities to the specific price signalling provisions introduced in Australia in 2011, which introduced a "per se" ban on "private" communications by adopting an approach based on consideration of the effects of such public communications and which, following the Harper Review in 2017, were repealed.

[171] OECD, *Contribution of the European Commission to the OECD Roundtable on "Unilateral Disclosure of Information with Anticompetitive Effects"*, 11 October 2012, https://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf.

[172] See Decisions EA – Andatex/EA-Diasatm, Diasdebit, Diastrasfer.

## 3. Legal Parallel behaviour *vs*. Illegal Tacit Collusion

### A) Overview of Economic Insights for Collusion Issue

The research delves into the potential interplay among algorithms' learning capabilities within a competitive economic environment involving multiple agents. Demonstrating this relationship is crucial to affirm the potential development of cooperative dynamics within markets where firms operate and interact. Economic literature has formulated theories and conducted studies on coordination challenges in oligopoly markets or markets with oligopolistic characteristics, with game theory, including the famous prisoner's dilemma, being a notable example.

Theoretical economic studies often analyze collusion within oligopoly markets through repeated games, as interactions among market players are typically repeated and intensified over time. However, the feasibility of this interaction's sustainability needs further examination. Complex games with numerous players pursuing different strategies make calculating and achieving equilibrium challenging, particularly in identifying appropriate equilibrium points and the time required for players' behavior convergence.

Even in the simplest recurring prisoner's dilemma involving two players and two strategies, the Folk theorem reveals infinite equilibria, ranging from full cooperation to perfect competition.[173] The challenge intensifies when the game involves multiple players within an economic environment. While there are works simulating self-learning pricing algorithms, none have been applied on a commercial scale or serve as real-world examples.[174]

Salcedo's prior economic study suggests that pricing algorithms consistently reach equilibrium prices resembling monopoly levels.[175] The study assumes competition in a Bertrand-type duopoly, where firms periodically revise their algorithms, decoding and understanding each other's al-

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[173] D. FUDENBERG, J. TIROLE, *Games Theory*, Cambridge, MA, 1991.

[174] An early study conducted by Waltman & Kaymak finds that independent machine learning algorithms generally converge to apparently cooperative results. In particular, see W. LUDO, U. KAYMAK, *Q-learning agents in a Cournot oligopoly model*, in 32 *Journal of Economic Dynamics and Control*, 3275-93, (2008). Subsequently, Zhou *et al.* (2018) study the possibility of developing cooperative structures through algorithmic operation and human agent involvement. In particular, see. N. ZHOU, L. ZHANG, SH. LI, Z. WANG, *Algorithmic Collusion in Cournot Duopoly Market: Evidence from Experimental Economics*, (2018) arXiv:1802.08061v1 [econ. EM] 21 February 2018.

[175] B. SALCEDO, *Pricing Algorithms and Tacit Collusion*, Working Paper, 2015.

gorithmic tools over time. This crucial element enables algorithms to react and impose sanctions in response to competitors opting for competition over collusion. If a competitor chooses to compete, the firm can adjust its algorithm to reflect new data observed.

This hypothesis illustrates the communication between algorithms and their ability to choose a coordination strategy. When algorithms are programmed to price aggressively against competitors but possess the flexibility to adapt and mirror competitors' pricing policies, the other firm interprets this strategic choice as an invitation to coordinate. Salcedo suggests that, «under certain circumstances, tacit collusion between firms using pricing algorithms is ... inevitable [176]».

Various studies have aimed to assess the feasibility of collusive strategies and the speed at which pricing algorithms converge to prices exceeding competitive levels. These investigations involve experiments conducted in controlled economic environments through computer simulations. The majority of these studies focus on evaluating the collusive capabilities of algorithms employing specific strategies, such as the "win-constant-lose-reverse" or "tit-for-tat" algorithms, as well as more advanced strategies. Recent attention in economic literature has also turned towards reinforcement learning techniques.

Reinforcement learning, a machine learning method, involves algorithms learning autonomously from their interactions with the operating environment. A notable example is Q-learning, a well-established algorithm that aims to maximize the present value of future rewards in unfamiliar environments with repeated choices. The Q-learning algorithm continuously engages in trade-off processes, evaluating experimentally to arrive at the most profitable price, considering perceived optimal prices and other potential options. [177]

In a study by Timo Klein, computer simulations were conducted in an environment similar to that analyzed by Maskin and Tirole. [178] The study demonstrated that "Q-learning" pricing algorithms can learn to communicate and determine pricing policies for the respective firms. The experiment took place in a standardized dual-pool environment with homogeneous products, unlimited production capacity, and sequential price competition. The results indicated that independent "learning Q" algorithms

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[176] B. SALCEDO, *Pricing Algorithms and Tacit Collusion*, cit., 76.

[177] For a more detailed discussion of Q-learning see. T. KLEIN, *Assessing Autonomous Algorithmic Collusion: Q-Learning Under Short-Run Price Commitments*, in *TI Discussion Paper*, 2018.

[178] T. KLEIN, *Assessing Autonomous Algorithmic Collusion*, cit.

achieved prices higher than static levels.[179] In its basic version, the study found profits to be around 50% higher than the static Bertrand-Nash level, suggesting the ability of advanced algorithmic tools to impose pricing policies above competitive conditions.

In a related experimental paper, Emilio Calvano *et al.* investigated whether pricing algorithms can learn to cooperate and sustain collusion more effectively than humans.[180] They studied the behavior of artificial intelligence (Q-learning) supported algorithms in an oligopoly model with recurrent price competition. The findings revealed that algorithms consistently learned to charge higher prices than under competitive conditions without prior communication. The simulations incorporated economic theory insights, including price defection, cost asymmetry, stochastic demand, the entry of new players, and product differentiation, making the experimental investigation more realistic.

Abada and Lambin developed a sophisticated dynamic simulation focusing on battery power supply within the energy sector, finding that algorithms quickly learn to exert market power and set prices, termed "collusion effects", by monitoring competitors' prices.[181] The authors define collusion based on Harrington's concept, involving strategies with a reward-punishment system.[182] However, their model produces 'collusive phenomena' rather than integrated collusive strategies, penalizing both pro-competitive and pro-cooperative deviations from prices.

Another study by Assad, Chark, Ershov, Ershov, and Xu represents the first empirical analysis of the relationship between algorithmic pricing and competition in a real market. It reveals that German fuel retailers increased profit margins by approximately 9% after adopting automated algorithmic pricing tools, especially in areas with aggressive local competition. Competitors' margins also increased a year after the adoption of these tools, suggesting algorithmic coordination and implicit collusive effects.[183]

While these experimental studies raise concerns about the potential

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[179] The learning algorithm applied in this case is a new adaptation of learning Q in sequential interaction.

[180] E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, cit.

[181] I. ABADA, X. LAMBIN, *Artificial Intelligence*, 15 February 2020.

[182] J.E. HARRINGTON, *Developing Competition Law for Collusion by Autonomous Artificial Agents*, in 14 *Journal of Competition Law and Economics*, 331-63, (2018).

[183] S. ASSAD, R. CLARK, D. ERSHOV, L. XU, *Algorithmic Pricing and Competition: CESifo*, Working Paper No. 8521, 2020.

threat posed by price-fixing algorithms in technologically advanced settings, they do not provide sufficient evidence of anti-competitive collusion. The experiments involve simulated market conditions, and the scientific assumptions suggest that machine-based algorithms theoretically can be used to collude without direct communication.

However, a cautious approach is necessary due to several factors. The algorithms tested in these studies are not commercially available or widely used in the market.[184] Additionally, the models are based on restrictive assumptions, such as dual-pool situations[185] with cost-identical firms and market transparency. It is argued though that these models lack the complexity of real markets, and regulatory reports highlight the limited practical information on the types of algorithms prone to facilitating collusion under realistic conditions.[186]

The joint report from the French and German authorities[187] emphasizes a critical perspective on the theoretical explanations of collusion facilitated by algorithms. It underscores that these theoretical explanations offer limited practical insights into the types of algorithms most likely to contribute to implicit collusion. Furthermore, the report points out that the existing theories do not provide a comprehensive answer to the question of whether algorithms significantly amplify the occurrence of collusion under realistic market conditions. This stance highlights the need for more practical and empirically grounded insights to understand the real-world implications of algorithmic behavior on collusion in markets.[188]

While algorithmic pricing experiments suggest some degree of collusion is possible, their applicability to the real world remains uncertain. These experiments make assumptions about the economic environment, often overlooking factors like potential market entry, varying pricing policies among firms, and changes in market demand. Studies by Calvano/Calzolari/Denicolo/Pastorello[189] suggest that flexibility in these assumptions

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[184] E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, cit., as well as T. KLEIN, *Autonomous Algorithmic Collusion: July*, Tinbergen Institute Discussion Paper – TI 2018-056/VII, 2019.

[185] In this case the Bertrand dual-pole model is applicable.

[186] G. TESAURO, J.O. KEPHART, *Pricing in Agent Economies using Multi-Agent Q- Learning*, in (5) *Autonomous Agents and Multi-Agent Systems*, 289, 300, (2002).

[187] AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Algorithms and Competition*, cit., https://www.autoritedelaconcurrence.fr/sites/default/“les/algorithms-and-competition.pdf.

[188] *Ibid.*, 19.

[189] E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, cit.

may reduce the risk of collusive patterns, but the impact of specific parameters on experiment results requires further investigation. Additionally, the complexity and volatility of real-world environments may exceed what is considered in these experiments.

In light of the aforementioned studies, there is a certain degree of inadequacy in demonstrating and quantifying the effects of algorithmic collusion on the market. While the results suggest prices are above competitive levels, they do not reach strictly collusive or monopolistic levels. This aforementioned study[190] highlights that the impact of tacit collusion through algorithmic tools results in prices fluctuating between collusive and competitive levels, sometimes even leaning closer to the competitive side. This raises questions about whether prices within this range can be deemed anti-competitive.

Regarding the learning capacity of algorithmic tools and their ability to enhance performance through learning, it is crucial to consider the time required for these algorithms to cooperate. Calvano *et al.* economic model necessitates approximately 850,000 periods for the algorithm to implicitly cooperate.[191] As Deng aptly points out, while in a controlled laboratory environment the algorithm's learning process may take less than a minute of CPU time, the practical application of this learning under real market conditions presents significant challenges. Deng illustrates that, assuming daily price changes, the algorithm would practically "learn" after about 2,300 years. Even in the scenario where pricing policy is reset on an hourly basis, the algorithm's learning duration is estimated to be around 97 years.[192]

The lengthy learning process of algorithms, as highlighted by Deng, is compounded by the researchers' significant limitations and parameterizations of the potential price set that the algorithm could select. While this time-consuming aspect might be addressed with more advanced algorithms, the central concern raised by Deng revolves around the potential entanglements with competition authorities. Firms are unlikely to permit lengthy trials and errors with actual prices, especially if the process takes decades to complete successfully. Acknowledging this limitation, researchers typically focus on studying algorithmic behavior post-training.

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[190] *Ibid.*

[191] E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, cit.

[192] A. DENG, *Algorithmic Tacit Collusion Is a Limited Threat to Competition*, in *Law 360*, (2019).

Algorithm training in the mentioned studies takes place in controlled laboratory environments. This is crucial because programmers are already acquainted with the algorithmic behavior before development, as creating a computer program necessitates thorough pre-testing, usually accompanied by expert documentation. This documentation may serve as valuable evidence in cases examined by authorities.

The Competition and Markets Authority (CMA) highlights [193] that competitive harm is more likely when firms employ the same pricing algorithm, such as utilizing the same third-party provider. Conversely, algorithms with different targeting specifications at the planning stage are considered less likely to engage in coordination policies. [194] The value and secretive nature of algorithms make it improbable for firms to disclose information regarding the success of their operation to competitors. This further reduces the likelihood of practices that could potentially harm competition.

## B) Algorithms and Red Flags

Algorithms employed in digital markets play a crucial role in facilitating collusion through three distinct avenues. Firstly, they contribute to meeting Stigler's conditions, as previously discussed. Secondly, and notably, these algorithms obviate the necessity for a priori satisfaction of Stigler's conditions. By rapidly and continuously calculating competitors' reactions in real-time, they diminish the imperative to establish an optimal equilibrium in the initial round. This not only reduces the temptation to deviate but also mitigates the risk of not timely detecting any deviations. Consequently, explicit a priori commitments or the threat of adverse actions in case of violation are minimized. Consequently, algorithms enhance the likelihood of coordination without relying heavily on pre-meetings and threats of sanctions.

Furthermore, algorithms not only bolster players' ability to reach agreements but also incentivize such collaboration. [195] A study by Google Brain underscores this facilitation by demonstrating that algorithms can autono-

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[193] CMA Pricing Algorithms – Economic working paper on the use of algorithms to facilitate collusion and personalized pricing, Competition & Market Authority, October 2018, 49.

[194] D. FOSTER, *Algorithms and Price Collusion – Learning to love artificial intelligence*, in *Competition Law Insights*, (2018).

[195] M. GAL, *Algorithms as illegal agreements*, in 34 *Berkeley Technology Law Journal*, 67, 86, (2019).

mously learn when and how to encrypt messages, aligning with specific privacy policies to prevent other algorithms from extracting information.[196]

However, it is important to note that algorithms may not facilitate collusion in all circumstances. In cases where barriers to entry and/or expansion are low or Stigler's conditions cannot be efficiently met, coordination may be impeded. This is particularly evident in markets characterized by significant demand fluctuations, where distinguishing between deviations is challenging, or when relevant data is not easily accessible to all competitors. Conversely, in markets with high entry barriers and where algorithms aid in adhering to coordination conditions, the likelihood of excessive prices may increase.[197]

In scenarios of tacit collusion, each company independently deploys pricing algorithms that continuously monitor and adjust prices based on market information. Although this results in de facto tacit collusion, especially in oligopoly markets prone to coordination, it does not constitute an explicit agreement violating competition law. The legal distinction hinges on whether the use of algorithms is part of a rational, unilateral, and independent strategy to intelligently adapt to new market information (conscious parallel behavior) or part of collusion, in which case it is deemed unlawful.[198]

While Salcedo argues that algorithms act as "recipes for action", creating a situation akin to explicit communication,[199] our perspective maintains the fundamental distinction between legitimate parallel and illegitimate coordinated behavior, as previously mentioned.

The term "Dystopian Virtual Reality"[200] frequently emerges in legal literature, particularly within the context of antitrust law. This scenario involves pricing algorithms that achieve a coordination effect without exhibiting anticompetitive intent or illegal conscious parallelism among human actors. In this context, the computer executes strategies deemed optimal for maximizing profit based on continuous feedback from market infor-

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[196] M. ABADI, D.G. ANDERSEN, *Learning to Protect Communications with Adversarial Neural Cryptography*, (2016), https://arxiv.org/abs/1610.06918v1.

[197] E.J. GREEN, R.H. PORTER, *Noncooperative Collusion under Imperfect Price Information*, in 52(1) *Econometrica*, 87, 94-95, (1984).

[198] Case C-40/73, Suiker Unie and Others v. Commission, para. 174.

[199] M. GAL, *Algorithms as illegal agreements*, cit., 73.

[200] A. EZRACHI, M.E. STUCKE, *Virtual Competition*, cit.; N. COLOMBO, *Virtual Competition*, 2, (2018), CoRe 1/2018, 11-23, Human Liability Vis-À-Vis Artificial Intelligence's Anticompetitive Behaviours, 14.

mation. The algorithm may inadvertently lead to price coordination as the most effective strategy, irrespective of any safeguards developers may have implemented. This presents a challenge for enforcers, as the absence of evidence of human intent complicates the enforcement of competition law.

The central issue revolves around delineating between illegal collusion by implication and lawful conscious parallelism, especially in transparent and concentrated markets like the online market. This challenge exposes a vulnerability in both EU and US competition law, illustrating the difficulty in regulating such parallel behavior both online and offline. Instances where pricing algorithms are employed, such as parallel adoption without coordination, incorporating price matching clauses, appear to be parallel conduct not condemned by competition law. Establishing liability, following the case law of the CJEU in the Remonts case, requires proof along with identifying "plus factors" that aid in establishing collusion.[201]

The argument is made that any algorithm facilitating coordination should be considered a "plus factor".[202] However, caution is advised to differentiate between the effects of a specific algorithm and those arising from the digital world's conditions, such as increased connectivity. The challenge lies in distinguishing algorithms that facilitate coordination among competitors from those facilitating coordination between other market participants. 203 The difficulty in categorizing certain algorithms as facilitators of collusion raises concerns about potential over-regulation, which could stifle welfare-enhancing behavior.[204] In our perspective, algorithms facilitating collusion should not be subjected to a blanket prohibition. Instead, they should be evaluated individually under the rule of reason, weighing the negative effects against those beneficial to the competitive process.

Conscious parallel behavior should be restricted only when it manifests as a concerted practice or tacit coordination, particularly in instances where clear complementary elements, the so-called "red flags",[205] are evi-

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[201] United States Supreme Court, Monsanto Co v. Spray-Rite Service Corp. No. 82-914, 465 U.S. 752, 753, where the U.S. Supreme Court held that «plaintiffs must show that it is plausible that the defendants are moving far beyond a mere conscious parallel, and offer evidence indicating collusion, so-called 'plus factors'». On the importance of barriers to entry as a kind of plus factor, see the following. and OECD, *Algorithms and Collusion – Background Note by the Secretariat*, DAF/COMP(2017) 4, 41.

[202] M. GAL, *Algorithms as illegal agreements*, cit., 105ff.

[203] *Ibid.*, 110-111.

[204] *Ibid.*, 112.

[205] A. MIKROULEA, *Transparency and Competition Law in Tountopoulos/Veil*, in *Transparency of Stock Corporations in Europe*, 2019.

dent. The response mechanisms to address such behavior often lack well-defined criteria outlining these red flags, necessitating a more precise delineation by authorities and businesses.[206]

Given the autonomy and decision-making complexity inherent in algorithmic operations, influenced by numerous unknown factors, it is crucial to identify conditions under which algorithms exhibit a tendency toward cooperation over aggressive competition. Starting with known scenarios where algorithms favor coordination, defining market conditions and specific algorithmic operations conducive to coordination becomes essential. An initial step in this direction involves identifying problematic market conditions likely to foster collusion. Empirical studies suggest that algorithmic collusion is more probable in markets characterized by significant concentration, high entry barriers, a limited number of active firms, high transparency, a robust retaliation mechanism, and low consumer purchasing power.[207] This highlights the similarity between tacit collusion facilitated by humans and algorithms, emphasizing the common factors necessary for the development of this phenomenon.[208]

Market concentration is a specific concern under competition law, regardless of whether algorithmic pricing is involved, as these markets are inherently considered problematic. It is imperative to ascertain whether the relevant market is predisposed to collusion by implication, elucidating the precise role of pricing algorithms in creating conditions more favorable to collusion development.[209]

While the initial analysis provides a valuable starting point, it is crucial not to automatically conclude that algorithmic pricing invariably leads to collusion in markets with specific characteristics, rendering it illegal by definition.[210] The potential risks associated with such an approach lie in categorizing algorithmic pricing as a per se prohibited form of collusion. Adopting such a policy might prompt firms to altogether avoid using algorithms in these markets, which, in the absence of sufficient empirical data,

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[206] M. GAL, *Algorithms as Illegal Agreements*, cit.

[207] A. EZRACHI, M.E. STUCKE, *Algorithmic Collusion: Problems and Counter-Measures*, in *OECD Roundtable on Algorithms and Collusion*, 24, (2017), 3-4, U. SCHWALBE, *Algorithms, Machine Learning, and Tacit Collusion*, cit., 23-40, notes 25 as well as A. ITTOO, N. PETIT, *Algorithmic Pricing Agents and Tacit Collusion: A Technological Perspective, l'intelligence artificielle et le droit*, 241, 241-256, (2017), 11-12.

[208] *Ibid*., 5.

[209] *Ibid*., 3.

[210] S. MEHRA, *Antitrust and the Robo-Seller*, cit., 1371.

could be ineffective and pose significant risks to the competitive process.[211] Additionally, this policy option deviates significantly from the existing burden of proof applied in traditional price-fixing anticompetitive agreements.[212]

A subsequent step, supported to some extent by the literature,[213] involves identifying algorithmic features that could potentially increase the likelihood of cooperative structures. Economic simulation models often assume that competitors use a common or similarly operating algorithm with a predefined pricing methodology in static and fully controlled market conditions.[214] However, in real-world conditions, firms have a vast array of algorithmic tools at their disposal,[215] each behaving differently

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[211] The Oxera working paper states that 'The extent to which this kind of agreement is likely to occur in practice between algorithms is not yet clear'. See in particular OXERA*, When Algorithms Set Prices: Winners and Losers*, 2 (June 19, 2017), https://www.oxera.com/publications/when-algorithms-set-prices-winners-and-losers/. Subsequently, in some of these models, collusion will be harder to achieve as efficiency decreases. See also E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, cit. According to Schwalbe «algorithmic collusive behavior is not as likely or even inevitable as claimed by some theorists», *Algorithms, Machine Learning, and Tacit Collusion*, cit., 1, 32.

[212] Under US law, in order to prove collusion in price fixing (i.e. cartel), courts and competition authorities must prove the existence of such a cartel "beyond a reasonable doubt". In order to be able to meet this standard of proof, the case law suggests that, in addition to parallel conduct, there must be an element of cumulative evidence that it is not the result of oligopolistic interdependence, but of coordination between competitors. See, inter alia, Monsanto Co. v. Spray-Rite Service Corp. 465 U.S. 752, 768 (1984); Matsushita Electrical Industrial Co. v. Zenith Radio Corp. 475 U.S. 574 (1986); In re Flat Glass Antitrust Litigation, 385 F 3d 350, 359-60 (3d Cir. 2004). Subsequently, see W.E. KOVACIC, R.C. MARSHALL, L.M. MARX, H.L. WHITE, *Plus Factors and Agreements in Antitrust Law*, in 110 *Mich. L. Rev.*, at 395 et seq. Conversely, in European competition law, while the standard of proof is not as clearly defined as on the other side of the Atlantic, a similar approach has also been adopted by EU courts as to whether parallel conduct would be sufficient to prove anticompetitive price-fixing cartels. EU case law shows that parallel conduct between competitors is not sufficient to prove collusion unless 'coordination is the only reasonable explanation for that conduct', which excludes oligopolistic interdependence. See, inter alia, Joined Cases C-48, 49, 51-7/69, ICI v. Commission (Dyestuff), Ahlström Osakeyhtiö and others v. Commission (Woodpulp II) [1993].

[213] J.E. HARRINGTON, *Developing Competition Law for Collusion by Autonomous Price-Setting Agents*, 64 et seq. (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037818; M. GAL, *Algorithms as Illegal Agreements*, cit., 113 et seq. (2019). https://btlj.org/data/articles2019/34_1/02_Gal_Web.pdf; U. SCHWALBE, *Algorithms, Machine Learning, and Tacit Collusion*, cit., 1, 24.

[214] U. SCHWALBE, *Algorithms, Machine Learning, and Tacit Collusion*, cit., 1, 24.

[215] Schwalbe gives examples of algorithmic models which are used in real life as bandit models, customer selection models, econometric regression models, machine learning models as well as greedy ad-hoc approximation algorithms. In particular, see U. SCHWALBE, *Algorithms, Machine Learning, and Tacit Collusion*, cit., 1, 24.

based on market conditions, pricing methods, as well as programming and learning methods.[216] Equating all algorithmic functions and introducing a presumption for them without considering the specific market environment may lead to excessive law enforcement and a restrictive limitation of business freedom.

It is essential to clarify which types of algorithms could potentially lead firms to engage in conduct falling within the 'red flags' of collusion. Competition authorities should consider whether tacit collusion is a conscious choice that firms could avoid under different circumstances when using algorithmic pricing.[217] While the lack of empirical evidence limits the ability to draw secure conclusions,[218] theory suggests some algorithmic scenarios that are considered suspect for the development of tacit collusion and warrant particular attention.

One of the most suspicious algorithmic collusion scenarios involves the application of the same or similar algorithmic function, resulting in parallelism between competitors' pricing policies and market price stabilization.[219] If the use of the same algorithm cannot be justified by the absence of better alternatives, indicating a coordinated effort among undertakings, this may signal an intention to align pricing policies, influenced by dynamic market conditions.[220] Careful consideration of these factors is crucial to strike a balance in law enforcement without unduly restricting business freedom.

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[216] VAN DE GEER *et al.*, *Dynamic Pricing and Learning with Competition: insights from the Dynamic Pricing Challenge*, in *Informs RM & Pricing Conference*, 1, (2018), https://arxiv.org/pdf/1804.03219.pdf.

[217] M. GAL, *Algorithms as Illegal Agreements*, cit., 111 et seq., https://btlj.org/data/articles 2019/34_1/02_Gal_Web.pdf.

[218] J.E. Harrington suggests that certain types of pricing algorithms (such as estimation-optimization-estimation/optimization algorithms) could be considered illegal, but distinguishes between the properties of algorithms that produce efficiency and those that promote collusion. J.E. HARRINGTON, *Developing Competition Law for Collusion by Autonomous Price-Setting Agents*, (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037818. However, it is noted that this distinction is considered difficult in actual market conditions given the lack of relevant examples observed in practice to provide sufficient guidance to law enforcers on the characteristic properties of algorithms.

[219] D.I. BALLARD, A.S. NAIK, *Algorithms, Artificial Intelligence and Joint Conduct*, in *CPI Antitrust Chron.*, 32, (2017) and E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing and Collusion*, cit.

[220] The use of the same or similar algorithms may not always lead to the same price levels, given the differences between the cost and demand structures of competitors. Therefore, the similarity of the algorithm alone is not sufficient to prove an underlying collusion. In particular, cf. M. GAL, *Algorithms as Illegal Agreements*, cit., 113 et seq. (2019), https://btlj.org/data/articles2019/34_1/02_Gal_Web.pdf.

Contemplating the liability associated with using the same or a similar algorithm function, it becomes reasonable to consider the programmer of the algorithm, and by extension, the company implementing the algorithm, as potentially liable. At the programming stage, the programmer is likely the individual responsible for defining and controlling the pricing methods embedded in the algorithm. While some theorists affirm this viewpoint,[221] the lack of supporting evidence and a complete understanding of algorithmic behavior and decision-making processes prevents this approach from being universally accepted.[222]

Certain algorithms, especially those employing deep learning techniques, consist of multiple layers of neurons processing data from various sources to make strategic decisions aimed at maximizing profitability.[223] The result is the creation of black-box algorithms, making it challenging, if not impossible, to comprehend their inner workings, even for the implementing companies and the programmers themselves. This complexity poses a challenge for competition authorities as well, as they may struggle to fully understand such algorithms.[224] If a policy advocating the management of algorithmic pricing prevails, businesses risk being indirectly excluded from using autonomous algorithms that they cannot understand or accept.[225]

Consequently, businesses must be prepared for potential legal risks, as competent authorities may argue that companies should anticipate the risk of collusion when utilizing complex algorithms. This introduces a presumption of acceptance and consent to the possibility of participating in collusive structures, specifically when autonomous algorithms are

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[221] M. GAL, *Algorithms as Illegal Agreements*, cit., 108 et seq. (2019), https://btlj.org/data/articles2019/34_1/02_Gal_Web.pdf.

[222] OXERA, *When Algorithms Set Prices: winners and losers*, cit. See U. SCHWALBE, *Algorithms, Machine Learning, and Tacit Collusion*, cit.

[223] CMA, *Pricing Algorithms – Economic working paper on the use of algorithms to facilitate collusion and personalized pricing*, 8 October 2018, 14, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/“le/746353/Algorithms_econ_ report.pdf.

[224] *Ibid.*

[225] F. BENEKE, M.-O. MACKENRODT, *Artificial Intelligence and Collusion*, in 50 *IIC 109*, 125-134, (2019), 129, where it is discussed that firms may in fact not resort to the use of black-box algorithms, since they will continue to take care, due to the existence of an associated incentive, to be fully aware of the parameters that led to the prediction outcome. However, there is insufficient information on whether this can be assumed to be the business reality and that in fact there is no such thing as a black-box algorithm, which even the programmer himself cannot fully understand. See in particular M. GAL, *Algorithms as Illegal Agreements*, cit., 108 ff. (2019), https://btlj.org/data/articles2019/34_1/02_Gal_Web.pdf.

used. This approach aligns with the conclusions drawn in studies conducted by French and German authorities and endorsed by the European Commission.[226]

Even for enterprises using differentiated patterns or other categories of algorithms, the potential issue of developing communication channels between them without human intervention arises. The determination of whether this communication possibility can be demonstrated holds significant importance for meeting the standard of proof required for anticompetitive agreements within the current legal framework. Computer science has demonstrated that some algorithms can decode the decisive parameters[227] set in each algorithm, potentially enabling information exchange between competing algorithms. However, the practical confirmation of this decoding function in actual market conditions is less established. This is attributed to the complexity of sophisticated algorithms, often consisting of millions of lines of code, including information about the firm's software and other data that algorithms may have access to.[228] Unless undertakings take additional steps to make their codes and underlying information transparent to competitors, decoding by observing market behavior may not be feasible for other algorithms.

Even proponents of a conservative approach acknowledge that this proposal is in its early stages. Companies would need to take additional actions for a case of algorithmic pricing to be deemed illegal, considering the current state of the art in algorithmic operation. These additional actions might include feeding algorithms with the same or similar data sets, even when better alternatives are available, and designing algorithms to monitor their potential reactions to market conditions and future pricing strategies.[229]

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[226] The Franco-German study concludes by introducing a mechanism based on the reasonable predictability that businesses should have, while the European Commission is exploring the establishment and implementation of a system based on compliance by design.

[227] B. SALCEDO, *Pricing Algorithms and Tacit Collusion*, cit., 4 et seq., https://brunosalcedo.com/docs/collusion.pdf and M. GAL, *Algorithms as Illegal Agreements*, cit., 109 et seq., https://btlj.org/data/articles2019/34_1/02_Gal_Web.pdf.

[228] OXERA, *When Algorithms Set Prices: winners and losers*, cit., 19. U. SCHWALBE, *Algorithms, Machine Learning, and Tacit Collusion*, cit., 1, 22 as well as K.-U. KÜHN. S. TADELIS, *Algorithmic Collusion*, (2017), https://www.cresse.info/upload“les/2017_sps5_pr2.pdf, which critiques the theoretical approach that argues that algorithms can communicate without the intervention of human or business subjects.

[229] M. GAL, *Algorithms as Illegal Agreements*, cit., 114 et seq. (2019), https://btlj.org/data/articles2019/34_1/02_Gal_Web.pdf.

However, such a management policy should be balanced by clearly characterizing cases where these elements are found as per se anti-competitive, allowing undertakings to offer convincing justifications for such scenarios. Lowering the standard of proof required and failing to prove intent or the confluence of other facilitating factors could unjustly presume the illegality of business choices without demonstrating their inherently anti-competitive nature. Such a presumption should only apply in cases where a particular conduct is so inherently harmful to competition that it should always be deemed unlawful.[230] The current level of research and development on the operation of these tools is considered insufficient to reach this conclusion at this stage.

The third step in the delineation process appears less controversial, as policymakers will need to extend research on how self-learning algorithms function in real-world settings. This involves assessing the conditions under which they are most likely to cooperate and investigating whether these algorithms can autonomously cooperate without additional facilitating actions by the firms using them. Existing literature suggests methodologies for this research, such as creating an algorithmic pricing database by authorities to analyze whether a particular price level is competitive or the result of algorithmic collusion.[231]

Once law enforcers and competent authorities have accumulated sufficient empirical data to form a credible view on algorithmic collusion scenarios, a fourth step involves analyzing whether the current legal framework can effectively address the potential competition risks posed by such scenarios. If the answer is clearly in the negative, only then should the fifth and final step of the process be considered: investigating the validity of adopting a new approach to the concept of tacit collusion or designing an entirely new legal framework to address concerns about the competitive process.

In 1983, in the Michelin I case, the European Court of Justice (ECJ) introduced the concept of "special responsibility" for undertakings holding a dominant position in the market.[232] These undertakings bear a special responsibility not to distort effective and undistorted competition in the

[230] Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L.Ed.2d 545 (1958).

[231] A. EZRACHI, M.E. STUCKE, *Algorithmic Collusion: Problems and Counter-Measures*, in OECD, *Roundtable on Algorithms and Collusion*, 24, 2017, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2925&docLanguage=En.

[232] Nederlandsche Banden Industrie Michelin NV v. Commission of the European Communities (C-322/81). 57.

internal market. Over the years, this concept has been applied to address various types of conduct, including the use of transparent and non-discriminatory procedures and regulations. Accordingly, this concept should encompass the design, programming, and operation of algorithms to avoid any suggestion of tacit collusion.

This concept has been recently termed the «algorithmic special responsibility doctrine».[233] This doctrine underscores the need for undertakings, particularly those in dominant positions, to exercise special care in designing and implementing algorithms to prevent any tacit collusion that could undermine effective competition.

## 4. Regulatory and competition policy considerations and measures

### A) The dilemma of "to regulate or not to regulate"

The widespread use of algorithms and the potential adverse effects they may have on the competitive process have sparked debates on the most effective measures for intervention and regulation by competition authorities. Divergent viewpoints exist, with some theorists advocating for direct intervention by authorities, while others argue for a more hands-off approach, asserting that regulatory distance is essential to maintain the cost-effectiveness of algorithms. Proponents of this stance support decoupling, contending that any regulatory intervention could negate the efficiency gains achieved by algorithms. According to their reasoning, the costs associated with "false positives" resulting from an interventionist policy outweigh the costs of "false negatives" that may arise from an abstentionist approach by authorities.

Conversely, advocates for strict regulatory measures emphasize the necessity of regulating the situation, highlighting the markets' inherent inability to self-regulate. They posit that intervention is essential to curb potential negative impacts and ensure fair competition. The debate underscores the delicate balance between allowing algorithms to operate efficiently and preventing potential harm to competition, necessitating careful consideration and well-informed policy decisions by competition authorities.

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[233] V. DAN ROMAN, *Digital markets and pricing algorithms – a dynamic approach towards horizontal competition*, in 38(1) *European Competition Law Review*, 45, (2018), V. PEREIRA, *Algorithm-driven collusion: Pouring old wine into new bottles or new wine into fresh wineskins*, in *ECLR*, 392018.

## B) Need for algorithmic antitrust legislation?

Competition authorities have successfully addressed the challenge posed by algorithms in situations where they were utilized as tools to facilitate explicit collusion or where third-party algorithm service providers acted as hubs in a hub-and-spoke cartel. However, the application of competition law faces difficulties in dealing with automated systems that react to each other or self-learning algorithms, leading to tacit collusion. Although no concrete cases have been observed in these latter scenarios, scholars are urging modifications to existing antitrust rules to effectively respond to the growing use of algorithms. Some even argue that we may be witnessing the transformation of traditional competition.[234]

Heinemann and Gebicka advocate for a reconsideration of the concepts of agreement and concerted practice by competition authorities.[235] The OECD proposes a clearer definition of agreement but acknowledges the challenge in treating algorithmic interactions, or "algorithm meetings", similarly to meetings of human minds.[236] Given the multifaceted functions and benefits of algorithms, an assessment based on efficiencies that counterbalance competition restrictions is suggested.[237] Defining the prohibition content itself poses challenges to ensure legal certainty for market participants. Thomas suggests integrating the concept of concerted practice with an economic impact analysis,[238] while Siciliani recommends applying established price-cost tests for price-matching algorithms to determine their legality.[239]

Ezrachi and Stucke propose testing algorithmic collusion in a controlled environment, like a regulatory sandbox, and conducting market research to inform authorities about algorithm potentials.[240] Harrington sug-

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[234] A. EZRACHI, M. STUCKE, *Virtual Competition*, cit.

[235] A. HEINEMANN, A. GEBICKA, Can *Computers Form Cartels? About the Need for European Institutions to Revise the Concertation Doctrine in the Information Age*, in 7 *Journal of European Competition Law & Practice*, 431, (2016); and L. OTT, *The Future is now: machine learning pricing algorithms and tacit collusion*, in *WuW*, (2022), 590.

[236] OECD, *Algorithms and Collusion: Competition Policy in the Digital Age*, (2017), 36-39, https://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm.

[237] M. GAL, *Algorithms as Illegal Agreements*, cit., 111-112, https://btlj.org/data/articles 2019/34_1/02_Gal_Web.pdf.

[238] S. THOMAS, *Harmful Signals: Cartel Prohibition and Oligopoly Theory in the Age of Machine Learning*, in 15 *Journal of Competition Law & Economics*, 159, (2019).

[239] P. SICILIANI, *Tackling Algorithmic-Facilitated Tacit Collusion in a Proportionate Way*, in 10 *Journal of European Competition Law & Practice*, 31, (2019).

[240] A. EZRACHI, M. STUCKE, *Virtual Competition*, cit.

gests reading the "mind" (code) of artificial agents to classify collusion as illegal, proposing a blacklist of algorithms based on specific designs. Zheng and Wu propose a market-based regulatory approach, establishing a forum to assess negative externalities caused by algorithmic pricing and imposing fees on firms using algorithms in a non-oligopolistic market where sustainable prices above competitive levels are evident.[241]

Lamontanaro proposes the implementation of a whistleblower remuneration scheme to enhance the detection of algorithmic cartels, providing authorities with the necessary knowledge to apply competition law rules without hindering innovation.[242] Some scholars emphasize the importance of algorithmic compliance, suggesting that firms should design pricing algorithms with built-in features ensuring compliance with competition law, rather than enabling collusion.[243]

Addressing the challenges posed by AI and digital markets, Gal and Petit suggest radical remedies, including mandatory disclosure of algorithmic learning to expose knowledge generated by learning algorithms trained on illegally collected or exploited data.[244] Another promising proposal to tackle the challenges of algorithmic collusion revolves around altering control of concentrations to restrict mergers that are likely to enhance algorithmic coordination.[245] This approach aligns with the concept

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[241] G. ZHENG, H. WU, *Collusive Algorithms as Mere Tools, Super-Tools or Legal Persons*, in 15 *Journal of Competition Law & Economics*, 123, (2019).

[242] A. LAMONTANARO, *Bounty Hunters for Algorithmic Cartels: An Old Solution for a New Problem*, in 30 *Fordham Intellectual Property, Media and Entertainment Law Journal*, 1259, (2020).

[243] L. BERNHARDT, R. DEWENTER, *Collusion by code or algorithmic collusion; When pricing algorithms take over*, in 16 *European Competition Journal*, 312, (2020), A. DENG, *From the Dark Side to the Bright Side: Exploring, Algorithmic Antitrust Compliance*, (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334164, P.G. PICHT, B. FREUND, *Competition (Law) in the Era of Algorithms*, cit., 403, P.G. PICHT, G.T. LODERER, *Framing Algorithms: Competition Law and (Other) Regulatory Tools*, 2019, 42, S. VEZZOSO, *Competition by design*, in B. LUNDQVIST, M. GAL (eds.), *Competition Law for the Digital Age*, 2019, 93. See. M. VESTAGER, *Algorithms and Competition*, 2017 remarks at the Bundeskartellamt 18th Conference on Competition, https://ec.europa.eu/competition-policy/index/news_en?f%5B0%5D=oe_news_types%3Ahttp%3A//publications.europa.eu/resource/authority/resource-type/SPEECH. See also J. MOORE, E. PFISTER, H. PIFFAUT, *Some Reflections on Algorithms, Tacit Collusion, and the Regulatory Framework*, in 1 *Antitrust Chronicle*, 14 and 19(2020).

[244] M. GAL, N. PETIT, *Radical Restorative Remedies for Digital Markets*, in 37 *Berkeley Technology Law Journal*, (2021), which argues that such a remedy has four main benefits, namely it creates better conditions for restoring competition in the market, can be applied almost immediately, can limit the impact of illegally acquired comparative advantages without harming consumers by prohibiting the use of algorithms that increase consumer welfare, and does not require constant supervision.

[245] The importance of algorithms and data as important parameters in the review of concen-

presented by Glen Weyl and Eric Posner in their book "Radical Markets",[246] advocating for innovative enforcement of existing laws to drastically reduce consumer harm in digital markets.[247] In theory, various remedies have been proposed to address the challenge of tacit algorithmic collusion, and one compelling approach is the disruptive algorithm theory put forth by Michal Gal.[248] This theory suggests using algorithms on the supply side to alter market conditions, making it more challenging for algorithms to coordinate effectively. Economic theory highlights that introducing "noise" or changes in market conditions can disrupt optimal coordination equilibriums.[249]

The disruptive algorithm, designed to introduce noise, can limit the coordination capabilities[250] of other algorithms by mimicking the entry of an independent supplier that does not adhere to the coordination's equilibrium price.[251] Under this proposal, a supplier employing the disruptive algorithm charges lower, potentially competitive prices. Other firms' algorithms may then find it advantageous to lower their prices, benefiting consumers. Research, such as Assad's study[252] on petrol stations and fuel prices

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trations has already been recognised. See *inter alia* M. GAL, *Limiting Algorithmic Cartels*, ASCOLA 2022, 1, 24, in *Berkeley Journal of Law and Technology* (2023); A. CHIRITA, *Data-Driven Mergers Under EU Competition Law, The Future of Commercial Law: Ways Forward for Harmonisation*, 147, (2019); M. WASASTJERNA*, Big Data and Privacy in Merger Review-Competition Policy for the 21st Century Digital Economy* (January 13, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3073014.

[246] E. GLEN WEYL, E. POSNER, *Radical Markets, Uprooting Capitalism and Democracy for Just a Society*, 2019.

[247] *Ibid*.

[248] M. GAL, *Limiting Algorithmic Cartels*, cit.

[249] E.J. GREEN, R.H. PORTER, *Noncooperative Collusion under Imperfect Price Information*, in 52(1) *Econometrica*, 87, 94-95, (1984).

[250] E. DONINI, *Collusion and Antitrust: The Dark Side of Pricing Algorithms*, 51, (2019), 115-116, https://www.associazioneantitrustitaliana.it/wpcontent/uploads/2020/10/Tesi-Elena-Donini.pdf.

[251] A version of this proposed remedy was first advocated by M. Gal in the context of human oligopolistic coordination, but it can be applied here as well, with the necessary modifications. See. M. GAL, *Reducing Rivals' Prices: Government-Supported Mavericks as New Solutions for Oligopoly Pricing*, in 7 *Stanford Journal of Law, Business, and Finance*, (2001), NYU, Law and Economics Working Paper, No. 99-016 and Columbia Law School, Law-Econ Working Paper No. 163, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=211728. See, inter alia, E. DONINI, *Collusion and Antitrust: The Dark Side of Pricing Algorithms*, 51, (2019), 115-116, L. BERNHARDT, R. DEWENTER, *Collusion by code or algorithmic collusion*, cit. as well as M. GAL, N. PETIT, *Radical restorative remedies for digital markets (06.09.2020)*, in 37(1) *Berkley Technology Law Journal*, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3687604.

[252] S. ASSAD *et al.*, *Autonomous Algorithmic Collusion, Economic Research and Policy Implications*, in 37 *Oxford Rev. of Econ. Pol. Y.*, 459, (2021).

in Germany, indicates that to achieve supra-competitive prices, firms must adopt pricing algorithms focused on maximizing profitability. This suggests that a disruptive algorithm can impede coordination resulting from setting prices at supra-competitive levels under specific market conditions.

The European Commission explored a quasi-regulatory approach through a public consultation on a potential New Competition Tool, considering intervention where a structural lack of competition hampers market functioning, especially in oligopolistic markets with a risk of implicit collusion facilitated by algorithm-based transparency. Despite abandoning the New Competition Tool, the Commission retains investigatory powers, including access to databases and algorithms.[253] In the initial impact assessment, the Commission emphasized the growing prevalence of algorithm-based technological solutions.[254] These solutions, designed to monitor competitors' behavior and enhance market transparency, were identified as potential sources of risk, even in less concentrated markets. Despite this, the Commission possesses investigatory powers, including the authority to request information, conduct interviews, and carry out on-site inspections. Notably, these powers explicitly grant access to databases and algorithms. It is evident that the European Commission's initiative represents a paradigm shift, poised to bring about a substantial transformation in the competition law toolbox.

The UK CMA and Digital Competition Expert Group are exploring the impact of algorithms beyond traditional risk factors, acknowledging uncertainty regarding the implementation of predictive agents and autonomous coordination engines.[255] The French and German Competition Authorities note that the legal framework is currently sufficient to address potential competition concerns, and the extent of realistic scenarios involving algorithmic communication is still uncertain. These perspectives highlight

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[253] EUROPEAN COMMISSION, '*New Competition Tool', Inception impact assessment*, (2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool_el. See also F. BENEKE, M.-O. MACKENRODT, *Remedies for algorithmic tacit collusion*, in *Journal of Antitrust Enforcement*, https://academic.oup.com/antitrust/article/9/1/152/5880803 which explores how the possibility of fines as well as the adoption of behavioural measures can effectively prevent tacit collusion constituted by algorithms themselves, which have an advanced technological self-improving and self-learning function.

[254] EUROPEAN COMMISSION, *"New Competition Tool", Inception impact assessment*, cit.

[255] See also UK COMPETITION AND MARKETS AUTHORITY, *A new pro-competition regime for digital markets*, (2020), https://www.gov.uk/government/news/cma-advises-government-on-new-regulatory-regime-for-tech-giants, where it is considered necessary for the new digital markets unit to acquire a high level of expertise and specialisation, including the ability to understand the role of algorithms and artificial intelligence.

ongoing efforts to adapt competition law to the challenges presented by advanced algorithms and digital markets.

Several Competition Authorities have adapted to the challenges of algorithmic collusion by appointing Chief Technology Officers, establishing dedicated IT units, and incorporating data science experts.[256] For instance, the French Competition Authority has introduced a specialized Digital Economy Unit to enhance resources focused on analyzing the behavior of digital sector operators.[257] Similarly, the Dutch Consumer and Markets Authority initiated an experimental study to monitor the practical functioning of algorithms used by businesses.[258] The UK CMA launched the Analysing Algorithms Programme, soliciting views and evidence from academics and industry experts on potential harm to competition and consumers resulting from deliberate or unintended algorithmic use.[259]

Despite the lack of empirical evidence, some scholars downplay the significance of algorithmic collusion, deeming its prevalence within markets unlikely. Petit argues that predictions in the AI literature are based on strict assumptions without sufficient investigation into the destabilizing effects of algorithms on competitive harm.[260] Additionally, Miklós-Thal and Tucker suggest that improved demand forecasting from algorithms can lead to lower prices and increased consumer surplus, undermining collusion viability.[261] Similarly, Gautier *et al.* observe that the evaluation of algorithmic behavior concerning collusion, as discussed in the literature, often occurs in

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[256] A useful overview is provided by the HELLENIC COMPETITION COMMISSION, *Computational Law and Economics of Competition, Issues and Perspectives*, (2020), 16-55, https://www.epant.gr/enimerosi/ypologistiko-dikaio-oikonomika-tou-antagonismoy.html.

[257] AUTORITÉ DE LA CONCURRENCE, *The Autorité de la concurrence announces its priorities for 2020*, (2020), https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-announces-its-priorities-2020.

[258] ACM (Authority of Consumers and Markets), *ACM launches a study into the functioning of algorithms in practice*, (2020), https://www.acm.nl/en/publications/acm-launches-study-functioning-algorithms. See. ACM, *'Oversight of algorithms'*, (2020) https://www.acm.nl/en/publications/study-oversight-algorithmic-applications.

[259] CMA, *Algorithms: How they can reduce competition and harm consumers*, (January 2021), https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers.

[260] A. ITTOO, N. PETIT, *Algorithmic Pricing Agents and Tacit Collusion*, cit.; H. JACQUEMIN, A. DE STREEL (eds.), Bruxelles, 2017, 241, considering that algorithms are not determinative and perhaps cannot even be considered to have a causal relationship with the development of tacit collusion, N. PETIT, *Antitrust and Artificial Intelligence: A Research Agenda*, in 8 *Journal of European Competition Law & Practice*, 361, (2017).

[261] J. MIKLÓS-THAL, C. TUCKER, *Collusion by Algorithm*, in 65 *Management Science*, 1455, (2019).

controlled laboratory and experimental settings.[262] Similarly, Schwable identifies challenges associated with algorithmic collusion, suggesting that it is less straightforward and inevitable than commonly acknowledged.[263]

Even if algorithmic collusion were to become common, Ohlhausen contends that it raises familiar issues within existing rules rather than introducing hidden collusion.[264] Van Cleynenbreugel proposes considering algorithm-based platforms as 'associations of undertakings' under Article 101 TFEU,[265] bringing decisions to rely on self-learning algorithms within the scope of competition law, even without evidence of an explicit agreement or contact between undertakings.

It's essential to note a study by Assad *et al.* examining the German petrol retail market, an early adopter of algorithmic pricing software, which suggests that the adoption of AI has a significant impact on competition by increasing prices and margins.[266] The study indicates that profit margins start to rise approximately one year after the market-wide adoption of algorithmic pricing software, implying that algorithms in this market may have learned tacit-conflict strategies.

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[262] A. GAUTIER, A. ITTOO, P. VAN CLEYNENBREUGEL, *AI algorithms, price discrimination and collusion: a technological, economic and legal perspective*, in *European Journal of Law and Economics*, https://link.springer.com/article/10.1007/s10657-020-09662-6. In particular, the authors point out the limitations associated with the assumption that competing firms' products are homogeneous, that demand is linear or deterministic, that firms have limited ability to determine the range of prices they charge, and that competing firms compete only on price and not on other parameters.

[263] TH. SCHREPEL, *Collusion by Blockchain and Smart Contracts*, in 33 *Harvard Journal of Law & Technology*, 117, (2019), U. SCHWALBE, *Algorithms, Machine Learning, and Collusion*, 14 *Journal of Competition Law & Economics*, 568, (2019).

[264] M.K. OHLHAUSEN, *Should We Fear the Things That Go Beep in the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing*, 2017, 11, https://www.ftc.gov/public-statements/2017/05/should-we-fear-things-go-beep-night-some-initial-thoughts-intersection. See further L. BERNHARDT, R. DEWENTER, *Collusion by code or algorithmic collusion*, cit., where it is found that collusion by code is largely covered by the existing legal framework.

[265] P. VAN CLEYNENBREUGEL, *Article 101 TFEU's Association of Undertakings Notion and Its Surprising Potential to Help Distinguish Acceptable from Unacceptable Algorithmic Collusion*, in 65 *Antitrust Bulletin*, 423, (2020).

[266] S. ASSAD, R. CLARK, D. ERSHOV, L. XU, *Algorithmic Pricing and Competition: Empirical Evidence from the German Retail Gasoline Market*, (2020) in *CESifo*, Working Paper No. 8521, https://www.cesifo.org/en/publikationen/2020/working-paper/algorithmic-pricing-and-competition-empirical-evidence-german. See also SPANISH NATIONAL COMMISSION FOR MARKETS AND COMPETITION AND CATALAN COMPETITION AUTHORITY, *Artificial Intelligence and Competition*, 2020, 6, where it is argued that the possibility of algorithmic collusion is 'a theoretically and empirically proven reality', http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20200930_cnmcs-and-accos-joint-contribution-to-the-public-consultation-on-ai.pdf.

In the absence of empirical evidence and actual cases of algorithmic collusion, adopting a wait-and-see approach by some competition authorities is sensible and reasonable. While the idea of algorithmic antitrust legislation may be intriguing, it is premature to advocate for reforming antitrust rules or introducing regulatory measures. The effectiveness and impact of foreseeable models of coordination between agents and autonomous machines remain uncertain. As of now, the existing legal arsenal is deemed sufficient to address the current challenges.

## C) Algorithmic Consumers

In his renowned book "Exit, Voice, and Loyalty", Albert Hirschman delves into two consumer reactions to a decline in product and service quality: immediate exit from the contractual relationship or expressing dissatisfaction in an attempt to restore the relationship.[267] Michal Gal suggests the creation of a countervailing force through the adoption of algorithmic consumer.[268] These are algorithms operated by consumer groups or third parties, making purchasing decisions on behalf of consumers.[269] By influencing market demand and trading conditions, algorithmic consumers have the potential to disrupt algorithmic coordination, serving as a demand-side mechanism to counter supply-side coordination.[270] This solution, developed by Gal and Elkin-Koren primarily to tackle monopoly market power, may also be effective in addressing multilateral market power without requiring direct regulatory intervention in pricing algorithm decisions or algorithmic consumer choices.[271]

Algorithmic consumers contribute to limiting algorithmic coordination in several ways.[272] They challenge the assumption that transactions occur at digital environments characterized by high transparency, where individual consumers lack bargaining power due to small and frequent transactions. Algorithmic consumers can overcome this by consolidating purchasing power through the formation of buying groups facilitated by technolo-

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[267] A.O. HIRSCHMAN, *Exit, Voice and Loyalty: Organizations: Responses to Decline in Firms, Organizations and States*, 1970.

[268] M. GAL, *Limiting Algorithmic Cartels*, cit.

[269] M. GAL, N. ELKIN-KOREN, *Algorithmic Consumers* (August 8, 2016), in 30 *Harvard Journal of Law and Technology*, (2017), https://ssrn.com/abstract=2876201.

[270] *Ibid*.

[271] *Ibid*.

[272] M. GAL, *Limiting Algorithmic Cartels*, cit.

gy.[273] Diverse consumer preferences within these groups do not hinder the algorithmic consumers' ability to wield purchasing power.[274] With increased purchasing power, algorithmic consumers can disrupt coordination among sellers by introducing the element of supplying large quantities at lower prices. This disruption may weaken the stability of coordinated behavior among suppliers. Additionally, if algorithmic consumers represent a substantial consumer base, they could negotiate external agreements outside the digital market. These agreements, undisclosed on the internet, may avoid retaliation from other suppliers, enhancing the incentives for the diverging supplier to agree to such a deal.

Despite their potential analytical complexity, algorithmic consumers can employ various strategies to compel suppliers to lower prices,[275] utilizing the benefits of artificial intelligence to favor consumers. For instance, they can collectively decide not to purchase beyond a certain price, making their cumulative demand more elastic. Algorithmic consumers may also implement delayed demand signaling, which can subsequently lead to price reductions,[276] addressing the collective action problem among consumers.[277]

While this approach appears romantic, it has inherent limitations.[278] Coordinated behavior among algorithmic consumers may face competition

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[273] *Ibid.*

[274] Buyer power refers to the ability of buyers to influence the terms of transactions with their suppliers. Shared purchasing algorithms can acquire significant purchasing power for consumers in the event that a significant proportion of buyers choose to make their purchases through them. In particular see. OECD, *Policy Roundtables, Monopsony and Buyer Power*, DAF/COMP(2008)38, https://www.oecd.org/daf/competition/44445750.pdf. Buyer groups are created to take advantage of economies of scale and scope, P.C. CARSTENSEN, *Buyer Cartels Versus Buying Groups*, in 1 *WM. & Mary Bus. L. Rev.*, 1, 13-14, (2010).

[275] M. GAL, *Limiting Algorithmic Cartels*, cit.

[276] It is accepted that a more accurate estimate of demand generally prevents cartelisation. Cfr. J. MIKLÓS-THAL, C. TUCKER, *Collusion by Algorithm: Does Better Demand Prediction Facilitate Coordination Between Sellers?*, in 65 *Management Sci.*, 1552, (2019) as well as J. O'CONNOR, N.E. WILSON, *Reduced Demand Uncertainty and the Sustainability of Collusion: How AI Could Affect Competition*, in 54 *Information Econ. Pol'y,* (2021). However, J. Harrington finds a different result when the pricing algorithm is not designed by the firm but by a third party, J.E. HARRINGTON jr., *The Effect of Outsourcing Pricing Algorithms on Market Competition*, (2021), https://ssrn.com/abstract=3798847.

[277] This assumes, of course, that those using the algorithm have the flexibility to wait until the supplier changes its terms. However, a supplier anticipating the strength of an algorithmic consumer in the market could change its terms in advance.

[278] M. GAL*, Algorithmic Challenges to Autonomous Choice* (20 May 2017), in *Michigan Telecommunications and Technology Law Review*, 2017, https://ssrn.com/abstract=2971456.

law restrictions, potentially due to concerns about their market power.[279] Moreover, current market conditions significantly influence the control points critical to the functioning of algorithmic consumers, namely access to potential users and relevant data.[280]

Access to potential users often relies on online intermediary service providers, which can influence the reach and conditions under which algorithmic consumers connect with users. Major digital platforms are actively developing digital shopping assistants,[281] recognizing the importance of controlling access to users.[282] The aggregation of consumer data by algorithmic consumers conceals individual preferences, reducing the incentive for platforms, whose value depends on this data, to grant access to such applications.[283] Regulatory measures aimed at limiting artificial barriers that hinder access to both data and consumers are crucial.

However, challenges persist, including the impact of security measures like "bot mitigation" technology[284] that hinders automated data extraction and can impede algorithmic consumer activities.[285] Additionally, Michal Gal highlights potential harms and risks associated with algorithmic consumers, including limiting consumer choice and autonomy, increasing the likelihood of inefficient decisions, and raising concerns about psychological and social consequences. Balancing the advantages of algorithmic consumer strategies with these potential drawbacks requires careful consideration and regulatory oversight.[286]

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[279] M. GAL, N. ELKIN-KOREN, *Algorithmic Consumers*, cit.

[280] *Ibid.*

[281] M. PRIGG, *Apple Unleashes Its AI: "Super Siri" Will Battle Amazon, Facebook and Google in Smart Assistant Wars*, in *Daily Mail* (June 13, 2016), http://www.dailymail.co.uk/sciencetech/article-3639325/Appleunveil-SuperSiri-Amazon-Google-smart-assistant-wars.html.

[282] A. EZRACHI, M. E.STUCKE*, Is Your Digital Assistant Devious?* (August 23, 2016), in *Oxford Legal Studies Research* Paper No. 52/2016, University of Tennessee Legal Studies Research Paper No. 304, https://ssrn.com/abstract=2828117.

[283] A. EZRACHI, M. STUCKE, *Virtual Competition*, cit., 191-192.

[284] K. FINLEY, *"Scraper" Bots and the Secret Internet Arms Race*, in *Wired* (July 23, 2018), https://www.wired.com/story/scraper-bots-and-the-secret-internet-arms-race/. Followed by N. PETIT, *Submission to The FTC Hearings on Competition and Consumer Protection in the 21st Century*, (2018).

[285] M. GAL, *Limiting Algorithmic Cartels*, cit.

[286] M. GAL, *Algorithmic Challenges to Autonomous Choice*, in 25 *Mich. Tech. L. Rev.*, at 59, (2018).

## 5. Computational Antitrust

The integration of artificial intelligence and computational methods into competition law enforcement can indeed enhance the ability of authorities to address new challenges in the market. Computational law, which leverages AI, data, and computational techniques for legal analysis, holds the potential to assist authorities in identifying and tackling anti-competitive practices,[287] especially in a landscape where firms use algorithms to complicate regulatory oversight.

A proposed approach involves adopting new monitoring practices aligned with a "monitoring approach." In this framework, companies' practices are systematically monitored, and observed behavioral patterns in the market are analyzed to identify potential anticompetitive practices.[288] Creating a centralized database containing identified problematic practices could be a practical solution for authorities. This database could serve to enhance information and training, assess the presence of "plus factors" in a market, and facilitate the identification of red flags. The analysis of data, supported by the exchange of information between authorities, can provide a comprehensive understanding of market conditions and firms' behavior. Applying methods like Deep Reinforcement Learning (DRL) can optimize analysis algorithms, contributing to more effective enforcement.[289]

The integration of technological tools into competition authorities' processes for cartel detection and evidence collection is becoming increasingly prevalent. Authorities, such as the Hellenic Competition Commission, the CMA, the FAS, the KFTC, the CADE, and the European Commission, have been actively developing and employing such tools. These tools leverage various technological approaches, including whistleblowing mechanisms,[290] data collection and analysis systems, and web-scraping techniques, to enhance their ability to detect and investigate competition infringements, particularly cartels in tenders.

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[287] T. SCHREPEL, *Computational Antitrust: An Introduction and Research Agenda*, 1 *Stanford Computational Antitrust*, 2, (2021), https://ssrn.com/abstract=3766960. See M. MATTIUYYO, H.F. MACHADO*, Algorithmic Governance in Computational Antitrust-A Brief Outline of Alternatives for Policymakers*, *Stanford Computational Antitrust*, 23, 24 (2022).

[288] A. DENG, *Algorithmic Collusion and Algorithmic Compliance: Risks and Opportunities*, 27, *The Global Antitrust Institute Report on the Digital Economy* (19 Nov. 2020), https://ssrn.com/abstract=3733743.

[289] OECD, *op. cit.*, 2017.

[290] *Ibid.*, 13, on how the BRIAS (Bid Rigging Indicator Analysis System) works. Cf. *Press release, Commission introduces new anonymous whistleblower tool*, http://europa.eu/rapid/pressrelease IP-17-591 en.htm.

Web-scraping[291]and the use of tools like Tovek, designed for analyzing large datasets, further contributes to efficient data analysis. In notable cases, such as the Google Shopping case handled by the European Commission, web-scraping was employed to examine a massive amount of user searches.[292]

Computational methods also play a crucial role in merger assessments. They help manage large datasets, information asymmetries between undertakings and authorities, and enable continuous communication between the parties involved.[293] Moreover, these tools facilitate dynamic analyses of concentrations, contributing to a better understanding of complex concepts like 'power' in the digital economy.

The utilization of data from previous investigations and competition law enforcement proceedings by competition authorities allows for a retrospective analysis. Additionally, the data-driven approach enables authorities to conduct simulations and predictions regarding the potential effects of regulatory and legislative changes.

However, forecasting outcomes, especially in a complex and dynamic market environment, requires a simulation environment. This involves creating models that simulate the interactions of various factors and entities within the market. Despite the potential benefits, reservations are expressed, likely indicating that uncertainties and challenges exist in accurately predicting the outcomes of regulatory changes in the dynamic and multifaceted realm of competition policy.

## 6. Liability under the theory and case law of competition law

Traditional algorithms primarily serve as tools to execute pricing strategies previously determined by human resources within companies. The overall pricing policy is designed by the company itself, with algorithms tasked to implement it, typically adhering closely to the established design. In this context, the use of an algorithm could be viewed as an additional element demonstrating the anti-competitive intent of the undertaking using it. For algorithms falling into this category, no substantial theoretical arguments have been presented affirming the element of responsibility for the behavior de-

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[291] HCC, BRICS, *Computational Competition Law and Economics An Inception Report*, dir. by I. LIANOS, 2021, 10-16, https://www.epant.gr/en/enimerosi/computational-competition-law-and-economics.html.

[292] *Press Release,* cit. (2017), 276.

[293] T. SCHREPEL, *op. cit*. M.7932, Dow/DuPont, Dec. Commission 20 October 2017, para. 97.

veloped through algorithmic function, as pricing software operates as a de facto instrument of the undertaking, akin to each of its employees.[294]

The VM Remonts decision is relevant to this debate,[295] where the question of applying liability rules for employees was examined in the case of contractual algorithmic operations subject to control by the company's human resources. The CJEU addressed a question from the Latvian Supreme Court regarding the extent to which liability could be attributed to acts performed by a third-party service provider. The CJEU noted that an ostensibly independent service provider might actually act under the direction or control of the undertaking using its services, developing a relationship similar to that of an employer-employee dynamic.[296] If a service provider operates under the direction of the undertaking, they are considered fully integrated into the economic unit of the undertaking,[297] and any anti-competitive behavior by the service provider becomes the responsibility of the undertaking on whose behalf the service is provided.[298] Certainly, the direction or control over a service provider can be inferred from specific organizational, economic, and legal links between the service provider and the user of the services. This inference draws parallels to the relationship between a parent company and its subsidiaries.[299]

The CJEU defined conditions under which an undertaking may be held liable for engaging in an unlawful practice due to actions by a third-party service provider. Liability arises if (a) the service provider acted under the direction or control of the undertaking, (b) the undertaking was aware of the anti-competitive intent of others and intended to assist them, or (c) the undertaking could reasonably foresee the anti-competitive consequences and was prepared to take the associated risk.[300] The applica-

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[294] C. VEITH, *Artificial Intelligence*, in *Liability and Antitrust Law*, (2021), 240 ff.

[295] Case C-542/14, VM Remonts and Others v. Bankruptcy Padome, 21 July 2016, para. 23.

[296] N. COLOMBO, *Virtual Competition: Human Liability Vis-a-Vis Artificial Intelligence's Anticompetitive Behaviours*, 2(1) *European Competition and Regulatory Law Review*, (2018), 16-17, https://www.sipotra.it/wp-content/uploads/2018/07/Virtual-Competition.pdf.

[297] Case C-542/14, VM Remonts and Others v. Bankruptcy Padome, 21 July 2016, para. 23.

[298] *Ibid.*, par. 24

[299] Judgment C-97/08 P Akzo Nobel and Others v Commission, paragraph 58 and Joined Cases C-628/10 P and C-14/11 P Alliance One international and Standard Commercial Tobacco v Commission and Commission v Alliance One International and Others, para. 43; C-247/11 P and C-253/11 P Areva and Others v Commission, para. 30. Also Joined Cases C-293-294/13 P Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce, paras 75-78.

[300] *Ibid.*, para. 33. See also. Case C-49/92 P, Commission v Anic Partecipazioni SpA, 8 July 1999, para 87.

tion of Article 101(3) TFEU, can be reinvoked by the undertakings.

The principles of case law regarding a company's liability for acts constituting prohibited practices can also be extended to conventional algorithmic operations, where human control remains integral to technological development. A noteworthy condition among those set out earlier is the third, stating that an undertaking can be held liable if it has the capacity to foresee the potential anti-competitive effects of an applied policy and fails to make relevant efforts to prevent such effects. Consequently, the question of liability for actions attributable to the algorithmic function can be applied to parallel signalling algorithms,[301] akin to how undertakings can be held liable for anti-competitive actions stemming from the electronic price monitoring mechanisms they utilize.[302]

In the Remonts case, the Advocate General Wathelet proposed a form of strict liability,[303] questioning the extent to which an undertaking, as the recipient of a third party's services, can be held liable for the third party's acts. Two possibilities were distinguished: first, if the third party acted on behalf of the undertaking and committed the unlawful act in the course of carrying out tasks entrusted by the undertaking, the undertaking's liability is clear. Second, if the third party took initiatives beyond assigned tasks, and the directors of the undertaking were unaware of the unlawful act and did not consent to it, a strong presumption of liability for the acts of the third party is still proposed by the Advocate General.

This presumption, according to the Advocate General, helps strike a balance between effectively suppressing conduct contrary to competition rules and respecting fundamental rights concerning penalties. The presumption would apply even if the acts of the third party did not fall within the tasks assigned to them, and it is not proven that the undertaking using their services knew of or acquiesced in those acts. This approach emphasizes proactive behavior by undertakings to prevent any conduct contrary to competition rules.

According to the Advocate General, undertakings must take necessary precautions for using a provider's algorithmic tools at three stages. Firstly, when hiring a third-party service provider, the undertaking should careful-

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[301] *Ibid.*

[302] C/286/13P Dole Food v Commission, para. 581. See also ECJ Judgment T-99/04 AC-Treuhand v Commission, 256; T-27/10; AC-Treuhand v Commission, 59; C-194/14 AC-Treuhand v Commission, 717.

[303] Case C-542/14 VM Remonts and Others. See E. MASTROMANMANIOLIS, in D. TZOUGANATO (ed.), *Free Competition Law*, Wolters Kluwer Law, 2020, 427.

ly select and define the provider's scope of competence and tasks. It should impose obligations, including compliance with the law and competition law, specify sanctions for breach of contract, define necessary authorizations for actions outside assigned tasks, and decide on subcontracting conditions. Secondly, during project execution, the undertaking ensures the subcontractor's capability to perform the work. Lastly, throughout project execution, the undertaking ensures the third-party service provider's capacity to carry out the work. In the case of an infringement, the undertaking should publicly distance itself, ensure non-recurrence, and report it to the authorities.[304]

In a subsequent judgment by the Italian court (Tribunale Ordinario di Bologna) in 2020, a company using an algorithm was held liable for the discriminatory nature of its booking system.[305] The system applied driver evaluation based on two parameters: reliability and driver involvement. The court held that the driver profiling system, which treated drivers not participating for various reasons in the same way, discriminated against certain drivers, potentially marginalizing them and significantly reducing their future employment opportunities.[306] This highlights the responsibility of companies using algorithmic tools to ensure fair and non-discriminatory outcomes.

In the case of the Deliveroo algorithm,[307] the Court of Justice of the European Union (CJEU) applied anti-discrimination laws and held the company liable, despite the company's claim of "lack of knowledge" regarding the algorithm's operation as a defense against liability. The CJEU specifically noted that the failure to predict the algorithmic results amounted to discriminatory treatment. This landmark decision provides a clear and effective approach to addressing cases where parties attempt to evade applicable laws by relying on technology as a shield.[308] Importantly, the decision underscores that parties could have reasonably foreseen and prevented discrimination, emphasizing accountability even in technologically complex situations.

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[304] Case C-542/14 VM Remonts and Others, Views of Advocate General Wathelet, paras 65-68.

[305] Filcams CGIL Bologna v Deliveroo Italia SRL [2020] Tribunale Ordinario di Bologna NRG 2949/2019.

[306] *Ibid.*, 19.

[307] *Ibid.*, 19.

[308] *G. Geiger,* Court Rules Deliveroo Used "Discriminatory" Algorithm (5 January 2021) www.vice.com/en/article/7k9e4e/court-rules-deliveroo-used-discriminatory-algorithm.

Valeria Falce

# Private enforcement and the DMA: looking for a happy ending story

SUMMARY: 1. Introduction. – 2. The basics of private enforcement in competition law. – 3. Public and Private enforcement in light of the Digital Markets Act. – 4. Specifications of the role of national courts. – 5. Risk of decentralization leading to fragmentation and under-utilization. – 6. The effect on legal certainty. – 7. Conclusions and general remarks.

## 1. Introduction

The role of private enforcement of EU competition law is well established and well known. It took 40 years from the recognition of the competition rules' direct effect to the adoption of the EU Damages Directive. And it took over 20 years from the Commission's 1999 White Paper on modernization, which commenced the process of decentralization of EU competition enforcement, for private antitrust enforcement to take off.

Private enforcement refers to the decentralised application of the competition rules by individuals through private litigation before Member State courts, typically seeking damages. It provides an alternative to public enforcement, which involves the top-down application of competition law by the EU or Member State competition authorities against infringing parties. While the wider corpus of competition law comprises a broad spectrum of rules – governing, *inter alia*, merger control and State aid – the question of private enforcement relates only to what are described by the Commission as the "antitrust" provisions, contained in Articles 101 and 102 TFEU. Unlike the merger control rules, which incorporate a distinct Commission enforcement structure as a substantive element of the pre-notification framework, Articles 101 and 102 TFEU impose freestanding prohibitions on certain forms of anticompetitive behaviour that are enforceable,

publicly, by the Commission or national competition authorities ("NCAs"), and privately, by individuals that have suffered losses. The orthodoxy within EU law, moreover, is to view public and private enforcement as "complementary" and mutually reinforcing.

The last piece of this ongoing process is the Digital Markets Act ("DMA"),[1] which shifted the focus for the digital markets (i) from *ex-post* to *ex-ante* intervention; (ii) from an effects-based analysis to a list of *per se* prohibitions; and (iii) from flexible prohibitions based on general clauses (Articles 101 and 102 TFEU) to a *numerus clausus* of specific but inflexible prohibitions. While the initial Proposal included no reference at all to the potential of private enforcement, the final text recognized that the DMA will be enforced by the courts in civil law disputes between private parties.

This paper will cover and analyze the role of private enforcement and suggest that there are good reasons (and some major drawbacks) for the DMA to encompass such enforcement in its final text and institutional design and complement public enforcement and the relationship of the DMA enforcer – the Commission – with the NCAs.

## 2. The basics of private enforcement in competition law

The reality of private enforcement in Europe is rather more complex and retracing the history can be useful.

Based on Article 87 EEC (now Article 103 TFEU), the "First Regulation Implementing Articles 85 and 86 of the Treaty",[2] while recognizing the power of Member States' authorities to apply the prohibition rules of Article 85(1) and Article 86 EEC Treaty[3] (prohibition of agreements and

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[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act); Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council (C/2023/2530).

[2] Regulation No. 17/62 of the Council of 6 February 1962, OJEC 1962(13)204.

[3] The EEC (European Economic Community as established by the Treaty of Rome of 25 March 1957) became the European Community (EC) in 1992/93 as part of a "European Union" (EU), which the Treaty of Maastricht created. In 2009, the Conference of Lisbon resulted in consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU); see OJEU 2016 C 202, 1, 47. While the wording of the competition rules was never affected by these changes, they were renumbered from Articles 85, 86 EEC to Articles 81, 82 EC Treaty and Articles 101, 102 TFEU.

concerted practices in restraint of competition and abuse of their power by market dominating enterprises) as a matter of their direct effect, entrusted the Commission with broad powers to prohibit by means of administrative decisions those anticompetitive practices that violate Article 85 or 86 EEC. However, it withheld from national competition authorities the power to apply Article 85(3) EEC (now Article 101(3) TFEU),[4] the broad exemption rule that forms the counterpart of the general prohibition of restrictive agreements, by reserving such power exclusively to the Commission.

Since no major agreement[5] could benefit from the exemption unless it first had been notified with the Commission and, thereupon, formally authorized by it, administrative control was systematically broad.

In practical terms, this meant that the basic sanction for anticompetitive agreements, their ex lege or automatic nullity (Article 85(2) EEC, now Article 101(2) TFEU), would remain in legal suspense until the Commission had taken a decision. Thus, nullity would operate effectively only in regard of non-notified agreements or of agreements for which an exemption had been finally denied, and, possibly, in respect of agreements for which an exemption could not seriously be expected.

Thus, private enforcement was limited from the outset. It was so also because tort liability entitling one to compensation for damages suffered as a result of an anticompetitive practice, be it uni-, bi- or multi-lateral, was not provided for in the Treaty or in Regulation No. 17/62. Liability was a matter of Member States' domestic tort law. Consequently, it differed nationally and, in addition, at least as a practical matter, any liability could be enforced only once the incompatibility of a restrictive practice with Article 85(3) EEC (now Article 101(3) TFEU) had been confirmed administratively or was otherwise evident enough to risk investment in litigation.

After 40 years of operation, the rules of the game changed fundamentally when, in 2003, the then European Community replaced Regulation No. 17/62 with Regulation (EC) No. 1/2003 on the implementation of the rules

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[4] Articles 3, 6, 9, Regulation No. 17/62. Article 2, Regulation No. 17/62 conferred on the Commission also the (exclusive) competence to grant a "negative clearance" for agreements or behavior that do not come under the prohibition of Article 85(1) or 86 of the EEC Treaty in the first place.

[5] Articles 4 and 5, Regulation No. 17/62, which established the notification requirement, distinguished between mandatory notification of major agreements and voluntary notification of minor agreements (such as agreements between parties of one Member State only or bilateral agreements establishing simple distribution systems or simple license agreements; in addition, some "innocent" forms of horizontal cooperation, such as collective standardization, joint R and D, and specialization agreements, did not need to be notified).

on competition.[6] By this reform regulation, the European Community entirely abandoned the system of prior notification/authorization of restrictive agreements qualifying for an exemption and, most importantly, withdrew the Commission's privilege of having exclusive competence to apply Article 81(3) EC Treaty (now Article 101(3) TFEU).[7] It thus made the exemption work again as an exception by law. This meant not only that the parties to the agreement had to themselves assess the validity of their agreement and that the Commission, being relieved of the notification/authorization workload, could re-focus its administrative activity on actual enforcement.[8]

Also, Regulation No. 1/2003 opened a direct path to private enforcement in that the validity/nullity of restrictive agreements was no longer in any suspense. Depending on whether or not they qualified under Article 81(3) EC Treaty (now Article 101(3) TFEU) agreements were either valid or invalid, and, in the latter case, vulnerable to attack. Parties to the agreement could more easily disregard or withdraw from it; third parties did not have to respect it. Instead, they could directly and immediately hold the parties to the agreement liable under applicable national tort law for damages suffered from the anticompetitive effects of the agreement.

Both the competition authorities of the Member States and the national courts are thus empowered to apply not only Articles 101(1) and 102 TFEU, but the whole of Articles 101 and 102 TFEU.

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[6] Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1/1, 4.1.2003) (hereafter 'Regulation No. 1/2003').

[7] See Article 1(1), (2) and Article 6 Regulation No. 1/2003, Article 6 confirming that national courts have the power to (fully) apply Articles 81 and 82 of the Treaty (now Articles 101, 102 TFEU). The provisions are but a late consequence of the de Haecht II judgment of the CJEU (supra note 8) that confirmed both the retroactive effect of Commission decisions refusing to apply Article 85(3) EEC Treaty (now Article 101(3) TFEU) to an agreement and national civil courts' authority to apply both Article 85(1) and (3) EEC Treaty.

[8] For the Commission, its power to terminate arrangements and practices that infringe Articles 101, 102 TFEU (i.e. that come within Article 101(1) and do not meet the conditions of Article 101(3) TFEU or that constitute an abuse of market power, Article 102 TFEU) became the central piece of its authority. Related to this power is the enforcement option offered by Article 9 Regulation No. 1/2003 (termination of infringement procedures by accepting from the alleged infringer binding commitments to stop or undo the alleged anticompetitive practice or effects). In case it is in the public interest, the Commission may also issue a negative clearance (non-applicability of Article 101(1) or Article 102 TFEU) or a decision confirming that an agreement qualifies for the Article 101(3) TFEU exception, Article10 Regulation No. 1/2003. Since by its Articles 3, 5 and 11 et seq. Regulation No. 1/2003 obliges national competition authorities to always also apply the EU competition rules when they enforce national competition law, the Commission's workload is further reduced so as to allow it to focus on major and/or on non-routine cases.

Whereas Regulation No. 17 did not mention national courts, their role is explicitly recognised in Recital 7 of Regulation No. 1/2003, according to which:

«National courts have an essential part to play in applying the [EU] competition rules. When deciding disputes between private individuals, they protect the subjective rights under [EU] law, for example by awarding damages to the victims of infringements. The role of national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply [Articles 101 and 102 TFEU] in full».

In order to prevent Member States from renationalising competition policy as a result of the abolition of the EU Commission's monopoly to apply Article 101(3) TFEU, Article 3 of Regulation No. 1/2003 obliges both the competition authorities of the Member States and national courts to apply also Articles 101 or 102 TFEU whenever they apply national competition law to agreements or practices that fall within the scope of Articles 101 or 102 TFEU, and precludes the application of national competition laws that are stricter than Article 101 TFEU to agreements falling within the scope of Article 101 TFEU.

Thus, private enforcement became a more generally available alternative to administrative enforcement, particularly as its potential was considerably enhanced by Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of Member States and of the European Union (so-called Damages Directive).[9] Based on Articles 103 and 114 TFEU, this Directive does not merely harmonize Member States' laws as they apply to 'antitrust torts' but considerably strengthens the enforcement of tort claims by obliging Member States to ensure the full recovery of damages suffered and profits lost and to provide for procedural rules, in particular on access to evidence, that facilitate effective enforcement.

In tandem with the Commission's public enforcement regarding the availability and importance of private enforcement, the Courts engaged in complementary efforts to render these actions a concrete reality at national level.

It was already established that the direct effect of (now) Articles 101(1) and 102 TFEU has long been established, with the corollary that these

[9] Directive 2014/104/EU 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, OJEU 2014 L 349, 1.

provisions confer rights upon individuals that national courts must then "safeguard". It was not until the decision in Courage v. Crehan [10] in 2001, however, that the Court of Justice confirmed the existence of a distinct right to claim damages before national courts for breach of EU competition law, albeit formulated within the constraints of the doctrine of national procedural autonomy. Thus, EU law – and in particular, the principle of the effectiveness of competition law – requires that individuals must be able to claim compensation for losses incurred as a result of infringements of Articles 101 or 102 TFEU, [11] where a causal link between the harm suffered and the competition infringement can be established. [12] The existence of such a right, the Court argued, «strengthens the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition», so that, «actions for damages before the national courts can make a significant contribution to the maintenance of effective competition», [13] a point of view that it has reiterated in multiple occasions.

In the Manfredi judgement, the Court confirmed that the right to damages extends not only to actual loss (*damnum emergens*) but also to any loss of profit (*lucrum cessans*) plus interest. [14] In this regard, the Court made reference to the Marshall (II) judgment, in which it articulated a requirement of "full compensation" for harm suffered as a result of breach of EU law. [15] The right to claim compensation from undertakings that infringe the competition rules even extends, as a matter of principle, to losses due to 'umbrella pricing,' that is, where competitors outside the cartel raise their prices as a result of diminished competition within the overall market. [16] The now "settled" nature of the right to damages for competition infringements has, moreover, been confirmed by a number of recent decisions of the Court of Justice, including, apart from Kone, Pfleiderer, Otis, Donau Chemie preliminary rulings. [17]

[10] Case C-453/99 Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. v. Others, EU:C:2001:465; Joined Cases C-295 to 297/04 Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA etc., EU:C:2006:461, para. 31.

[11] Courage, para. 26.

[12] Manfredi, para. 63.

[13] Courage, para. 27.

[14] Manfredi, para. 61.

[15] Manfredi, para. 97, citing Case C-271/91 Marshall, EU:C:1993:335, para. 31.

[16] Case C-557/12 Kone AG and Others, ECLI:EU:C:2014:1317.

[17] Namely, Case C-360/09 Pfleiderer AG v. Bundeskartellamt, EU:C:2011:389; Case C-

Yet, in the absence of harmonised EU law governing application of the right to damages, the judicial procedures and remedies by which this right is realised at national level are determined by Member States – the principle of national procedural autonomy – with the proviso that the relevant domestic rules must respect the principles of effectiveness and equivalence.[18] An interesting, and unresolved question, arises as to whether the Courage judgment articulated a freestanding right to damages against infringing private parties analogous to Francovich[19] claims for State liability, or merely reflects a more detailed exposition of the general rule that national courts must provide effective protection for rights derived from EU law. In principle, EU law does not require the creation of new remedies within national legal systems to ensure realisation of directly effective rights at Member State level,[20] and it is clear that Courage did not establish a generally applicable rule of liability in damages for private parties that breach directly effective rights granted by EU law. Nonetheless, although Francovich was referenced in Courage only in support of the fundamental principle of direct effect,[21] more recently the Court of Justice has drawn an oblique analogy between these strands of case law,[22] while Advocate General Kokott has highlighted the inherent similar of liability under both Francovich and Courage, insofar as they have in common a «direct anchoring in European Union law […] notwithstanding all the conceptual differences which may otherwise exist between those instruments».[23] From this perspective, the existence of claims to compensation for infringements of Articles 101 or 102 is a matter of EU law, although rules and procedures for enforcing such claims continue to be dictated by national law.[24]

The elevation of the Charter of Fundamental Rights following the Lisbon Treaty has introduced the language of effective judicial protection – guaranteed by Article 47 of the Charter – into the private enforcement de-

199/11 Europese Gemeenschap v. Otis NV and Others, EU:C:2012:2390; Case C-536/11 Bundeswettbewerbsbehörde v. Donau Chemie AG and Others, EU:C:2013:366.

[18] Courage, para. 29; reiterated more recently in Pfleiderer, para. 30, and Donau Chemie, para. 25.

[19] Joined Cases C-6 & 9/90 Francovich, EU:C:1991:428.

[20] See e.g. Case C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern, EU:C:2007:163, paras. 40-41.

[21] Courage, para. 19.

[22] Donau Chemie, para. 20.

[23] See Opinion of Advocate General Kokott in Case C-557/12 Kone AG and Others, EU:C:2014:45, para. 24.

[24] See Opinion of Advocate General Kokott in Kone, para. 23.

bate.[25] On the one hand, the right to damages is said to constitute, or at least to assist in realising, effective protection against adverse effects of any antitrust breach.[26] On the other, questions have been raised regarding the compatibility of the Commission's administrative fining procedures with the requirements of Article 47. This issue is of relevance in the context of private enforcement insofar as Article 16(1) of Regulation No. 1/2003 prohibits national courts from taking decisions "running counter" to decisions taken, or contemplated, by the Commission in relation to the application of Articles 101 and 102 TFEU. This means, in practice, that a Commission decision finding breach pursuant to Article 7 of Regulation No. 1/2003 constitutes conclusive proof of a competition law infringement for the purposes of follow-on litigation.[27] In the curious case of Otis, in which the Commission sought to bring follow-on litigation premised upon its own Elevators and Escalators cartel decision[28] for private losses incurred by the EU institutions, the Court of Justice held that the Commission's administrative procedures are compliant with Article 47 of the Charter due to the availability of full merits review by the Union Courts on issues of law and facts, including unlimited jurisdiction in respect of the amount of the fine under Article 31 of Regulation No. 1/2003.[29]

## 3. Public and Private enforcement in light of the Digital Markets Act

It is important to recapitulate that in the DMA the EU legislator opted for centralized enforcement. Initially, NCAs had a very limited role in the enforcement of the DMA. Rather, the Commission was entirely in charge of stimulating the process. Eventually, the role of the NCAs is reinforced in the final version of the DMA. Yet, the Commission remains the "sole enforcer" of the DMA and therefore the enforcement framework remains highly centralized.[30]

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[25] See e.g. Opinion of Advocate General Mazák in Case C-360/09 Pfleiderer, EU:C:2010:782; Otis, paras. 45-48; and Donau Chemie, para. 24.

[26] Donau Chemie, para. 24.

[27] Otis, paras. 50-54.

[28] Commission Decision of 21 February 2007 in Case COMP/E-1/38.823 – Elevators and Escalators (summary at OJ C 75/19, 26.3.2008).

[29] Otis, para. 63.

[30] See e.g. Article 38(7) DMA.

Such a system of centralized enforcement system is not a novelty. Rather, the system resembles the centralized system of competition law enforcement before Regulation No. 1/2003. Moreover, similar systems can be found in EU Merger Control, where the Commission is exclusively competent to assess concentrations with an EU dimension.[31] In other areas of EU law, similar systems are present. Under the Single Supervisory Mechanisms, the European Central Bank has the sole competence to supervise systemically significant banks.[32]

Consequently, it is to be welcomed that the final version of the DMA does address the relationship between the Commission and national authorities. According to Article 37 DMA, the Commission and Member States «shall work in close cooperation and coordinate their enforcement action». Article 38(1) DMA stresses that the Commission and NCAs «shall cooperate with each other and inform each other [...] through the European Competition Network». The NCAs get a role in the investigative stage of DMA procedures. In order to realize this cooperation, the DMA establishes (amongst others) mechanisms for the exchange of (confidential) information (e.g. Article 21(5) DMA), stresses the possibility to ask NCAs for support in market investigations (Article 38(6) DMA) and allows officials from NCAs to assist the Commission to conduct interviews (Article 22 DMA) and to be appointed as independent external experts (Article 26(5) DMA). Furthermore, NCAs may (jointly) request the Commission to open a market investigation (Article 41 DMA). On top of this, NCAs may – insofar they have the competences and powers to do so under national law – conduct an investigation into non-compliance with the substantive obligations and prohibitions of the DMA. However, once the Commission opens proceedings, NCAs are relieved of this competence (Article 38 (7) DMA). NCAs are thus merely competent to facilitate the investigative stage of DMA enforcement. They cannot impose any decisions or fines on gatekeepers for violating the DMA. However, this investigative power may still be relevant in practice, since starting investigations may impact the agenda setting of the Commission.

In the final version of the DMA, the role of the NCAs is thus strength-

[31] Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation), L 24/3.

[32] Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, L 287/63.

ened and improved. The European legislator acknowledges the relevance of NCAs in the regulation of tech market actors and grants them with several competences.

Yet, it is important to stress that the Commission remains the "sole enforcer" of the DMA. On top of this, the DMA also curbs the position of NCAs. If competent NCAs for example start an investigation involving a gatekeeper under national competition law, they have the obligation to inform the Commission of their investigative measures (Article 38(2) DMA). Moreover, where an NCA intends to impose obligations on gatekeepers it should communicate the draft measure to the Commission. It remains to be seen how this will work out in practice. Experience with Regulation No. 1/2003 shows that coordination between the Commission and the NCAs can be rather effective in practice.

Regulation No. 1/2003 and the European Competition Network (ECN) provide a well-established and successful model for cooperation and coordination, which continues to be deepened and strengthened. This system allows for early coordination between enforcement authorities and prevents contradictory decisions. Within the ECN, DG COMP enjoys a privileged position as it can take over enforcement at any time. Contrary to the GDPR, jurisdiction of national competition authorities does not hinge on the place of a company's establishment, but on the place(s) where a company's behavior has substantial effects; thus, there is no national authority having jurisdiction for specific companies due to their respective place of establishment. ECN members benefit from broad capacities for information exchange and support each other, for example in inspections. As the ECN procedures have been tried and tested for over 15 years now, a plethora of experience and best-practices have been developed.[33]

In addition, the necessary cooperation between the Commission and NCAs has already started, since Member States have initiated (and in some cases already concluded) the process for establishing the necessary legal basis under Article 38(7) of the DMA in their respective national laws. This would empower national competition authorities to conduct their independent investigations into possible non-compliance with Articles 5 to 7 DMA in their national territory. The corresponding legislative process has already been concluded in Hungary and is currently ongoing in Germany

[33] In this regard, see the joint position of the heads of the national competition authorities of the European Union, *How national competition agencies can strengthen the DMA* (22 June 2021), available at: https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network_en.

and the Netherlands. While Hungary has given its competition authority the investigative power to conduct such an investigation in its most recent amendment to the Hungarian Competition Act,[34] Germany and the Netherlands plan to go further and equip their competition authorities with more investigative powers.[35] Also Italy has recently approved the 2022 Annual Law for Market and Competition (Law No. 214/2023) which has designated the Italian Competition Authority ("AGCM") as the Italian national competent authority to cooperate and coordinate with the Commission in the enforcement of the DMA.[36]

However, as set out before, the relationship between the DMA and competition law is not fully crystalized. This may result in difficulties in terms of coordination and the final use of these cooperation mechanisms remains at the discretion of both the Commission and NCAs.

Furthermore, the DMA looks beyond the cooperation between competition law authorities by introducing a "High-Level Group of Regulators" (henceforth: the High-Level Group or Group) (Article 40 DMA). This group will consist of regulators in the digital sectors, and in particular representatives of the European Commission, NCAs, and representatives in the area of data protection, consumer protection and telecommunication law and shall meet at least once a year (Article 40(4) DMA). The Group can provide the Commission with advice and expertise, e.g. on general matters relating to the enforcement of the DMA or to promote a «consistent regulatory approach across different regulatory instruments».

The Group may in particular «identify and assess the current and potential interactions between the DMA and other rules». Furthermore, the Group can provide expertise to the Commission in the context of market studies (Article 40(5)(6)(7) DMA).

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[34] HUNGARIAN COMPETITION AUTHORITY, *Changes in Competition Law: expanding GVH toolbox and less administrative burden for undertakings* (1 January 2023), available at: https://www.gvh.hu/en/press_room/press_releases/press-releases-2023/changes-in-competition-law-expanding-gvh-toolbox-and-less-administrative-burden-for-undertakings.

[35] GERMAN FEDERAL GOVERNMENT, *Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze* (5 April 2023), available at: https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/aenderung-des-gesetzes-gegen-wettbewerbsbeschraenkungen.pdf?__blob=publicationFile&v=6. The Netherlands have begun the legislative process to establish the legal basis in their national law to conduct investigations under Article 38(7) DMA, available at: https://www.internetconsultatie.nl/uitvoeringswetdma/b1.

[36] See Article 18 of the Law 30 December 2023, No. 214, available at: https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2023-12-30&atto.codiceRedazionale=23G00220&elenco30giorni=true.

In this light, it is interesting to see that the European legislator looks beyond the field of traditional public enforcement of competition law.

As opposed to the role of Commission as the 'sole enforcer' of the DMA, with the NCAs left with the only possibility to assist the Commission and only be an ancillary instrument in the enforcement's activities, the DMA envisages decentralized private enforcement and shapes the role of national courts in this regard,[37] as already outlined in the CJEU's Courage decision.

Notably, it does not include a provision on the compensation for damages caused by an infringement of the DMA, unlike Article 54 of the parallel EU Digital Services Act, which confirms that «[r]ecipients of the service shall have the right to seek [...] compensation from providers of intermediary services, in respect of any damage or loss suffered due to an infringement by those providers of their obligations under this Regulation».

However, it becomes clear from the Regulation that its effectiveness implicitly relies on private enforcement activities by, for example, business users and end users. The final DMA sets forth at least some provisions regarding the contribution of private actors to the enforcement of gatekeepers' obligations. Firstly, Article 27 provides for the possibility of any third party informing the NCAs or the Commission of any gatekeeper practice or behaviour falling within the scope of the DMA.

Secondly, according to Article 39(1) of the DMA, national courts may ask the Commission to transmit «information in its possession or its opinion on questions concerning the application of this Regulation». The provision resembles Article 15 of Regulation No. 1/2003 regarding the implementation of Articles 101 and 102 of TFEU and only makes sense if the court adjudicates on private actions. In addition, Article 39(2) requires the Member States to forward to the Commission a copy of any judgement rendered in this respect, while Article 39(5) stipulates that national courts «shall not give a decision which runs counter to a decision adopted by the Commission» under the DMA. Additionally, the Commission may also intervene in the national proceedings resulting in the application of the DMA in the capacity of an amicus curiae by making written and oral observations to the national courts (Article 39(3)). Thus, the provision in conjunction with Recital 92 establishes a mechanism of cooperation between the Commission and national courts that is highly similar to their cooperation in competition cases.

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[37] Articles 39, 42 DMA.

Thirdly, in view of facilitating private actions for damages following non-compliance with DMA obligations, Article 42 extends the applicability of Directive (EU) 2020/1828 to «representative actions brought against infringements by gatekeepers' of provisions of the DMA 'that harm or may harm the collective interests of consumers». Following the same line, Article 43 clarifies that Directive (EU) 2019/1937 shall apply to the reporting of all breaches of the DMA and the protection of whistle-blowers.

## 4. Specifications of the role of national courts

More in detail, national courts will decide on follow-on actions and grant due compensations to those that have been damaged by infringing conduct previously found by the Commission. They will also play a complementary role to the Commission in stand-alone actions, identifying violations of the obligations under Articles 5, 6 and 7 of the DMA and ordering infringers to cease and desist.

As widely known, the substantive provisions of the DMA are mainly in Article 3 (on the criteria for designating "gatekeepers"), and Articles 5 and 6 (which include lists of obligations). The other provisions of the DMA are mostly of a procedural nature and relate to the enforcement of the DMA by the Commission.

The provisions of Articles 5 and 6 rely on the notion of "gatekeepers" and Article 3 is both a substantive and a procedural rule. Paragraphs 1 and 2 relate to the qualitative and quantitative criteria/conditions that need to be fulfilled for an undertaking to be designated as a "gatekeeper". Paragraphs 3 to 10 relate to the mechanism for that designation. From the latter paragraphs, it is clear that only the European Commission would have competence to designate "gatekeepers" and this is an exclusive competence.

The designation of "gatekeepers" would take place by means of an individual decision by the Commission, addressed to the undertaking concerned, pursuant to Article 3(3), (4), (8), (9). It is only after the Commission has designated a "gatekeeper" that the latter will be bound by Articles 5 and 6. Indeed, under Article 3(10), «the gatekeeper shall comply with the obligations laid down in Articles 5 and 6 within six months after a core platform service has been included in the list pursuant to paragraph 9 of this Article». Paragraph 9 states that «for each gatekeeper […] the Commission shall list in the designation decision the relevant core platform services that are provided within that undertaking and

which individually are an important gateway for business users to reach end users [...]».

This is clearly an unavoidable background information for the functioning of a system of private enforcement. In fact, after the Commission designates a gatekeeper according to Article 3, victims could request an injunction before a national court to enforce the directly applicable obligations as set out in Article 5 (and 6). These obligations could, in principle, be easily argued before a court. Moreover, private enforcement could also provide very effective and quick protection through interim measures. Indeed, following the example of the Broadcom case, individual victims could request an interim measure before a national court, providing even faster relief in the market than in the case of interim measures adopted by the Commission under Article 24 DMA. Last, national courts could also play a complementary role in cases of obligations specified or updated after the regulatory dialogues provided for by Articles 8 and 12 of the DMA. In these scenarios, when a decision by the Commission under these articles establishes certain remedies or limitations on the behavioural commitments of the designated gatekeeper, victims could request enforcement before a national court.

Moreover, national judicial bodies should also contribute, together with the CJEU, to determining the proper implementation of the DMA by the Commission, thus providing a judicial review of the (still wide) discretion attributed to the Commission in this matter. For example, when assessing an infringement, a national court might request a preliminary ruling under Article 267 TFEU on the validity (or the interpretation) of an implementing act specifying the obligations provided under Articles 6 and 7 of the DMA, should it have any doubts on the legitimacy of such an act. Under Article 265 TFEU, the CJEU will instead have exclusive jurisdiction in remedying a failure by the Commission to designate as a gatekeeper an undertaking meeting the criteria established by Article 3 of the DMA.

## 5. Risk of decentralization leading to fragmentation and under-utilization

From the above, it is obvious that private enforcement is something that is intended to last. National courts would have full competence to apply Articles 5 and 6 and decide whether there has been an infringement of the obligations contained therein. Other than adjudicating on claims for damages or other restitutionary or declaratory relief, they would also be com-

petent to grant permanent or interlocutory injunctions and order the gatekeepers to take specific measures of a negative or positive nature, to the extent the applicable national procedural law gives them such powers. Such judicial pronouncements will not obviously have *erga omnes* declaratory effect, like a non-compliance decision of the Commission pursuant to Article 25. They would constitute res judicata inter partes, i.e. as between the gatekeeper and the claimant. However, such national decisions may inevitably result in a considerable degree of fragmentation within the EU. In parallel to and notwithstanding the centralized system of enforcement by the Commission, there will be full decentralization to the level of countless national courts of a generalist nature deciding on countless cases, leading to countless "mini-regulations" with inter partes effects within the EU. They may not produce *erga omnes* effects and would only bind the parties to the litigation, but, from a practical point view, their disintegration and fragmentation effects are obvious.

These concerns, which are linked to the fear of additional national legislative action leading to further fragmentation in private enforcement, could be conducive to multiple preliminary ruling references, delaying private enforcement and impacting the deterrent effect of enforcing gatekeeper obligations.

These risks are amplified by the fact that, by its very nature of sectoral regulation regime, two set of rules are applicable to the DMA: EU law (the Treaty, the jurisprudence of the CJEU, and the DMA) and national law in application of the principle of procedural autonomy, subject to the usual limits set out by the principles of effectiveness and equivalence. In addition, as a result of the principle of direct application of Regulations from Article 288 TFEU and existing in the European legal doctrine established in the Van Gend & Loos case, a decentralised system of private enforcement is part of the common heritage of the European Union and part of the ongoing process of regional integration, which is expected to lessen the risk of fragmentation. This is even more clear since the DMA's private enforcement architecture builds on and resembles that of Regulation No. 1/2003.

On the other hand, the ideas of harmonization and avoidance of fragmentation are central to the DMA. Indeed, since its legal basis is Article 114 TFEU and aimed from the beginning at adopting a harmonized legal regime at Union level, the DMA is quite definitive and explicit on why there should be no national competence to legislate and enforce the DMA rules. For instance, while Recital 91 affirms the Commission as the sole enforcer of the DMA and Recital 92 emphasises the importance of national

courts having access to all relevant information, a broad interpretation of Article 1(5) DMA in conjunction with Article 39(5) DMA could affect the principle of division of powers and the fundamental right to a fair trial. This provision could require national courts to pause proceedings until the delivery of a decision from the Commission, thereby delaying private enforcement. Therefore, a narrow interpretation of Article 1(5) DMA, as previously stressed, is also crucial from a private enforcement perspective.

Furthermore, it will be important to coordinate any lessons learned and improvements derived from the revision of Regulation No. 1/2003 with national legislatures and courts.

Secondly, private enforcement's potential may be under-exploited due to the bifurcated enforcement system that the DMA has inaugurated. As opposed to established procedures of private enforcement in competition law, the DMA requires administrative steps to be taken exclusively by the EU Commission to make the DMA applicable. This is again due to the designation of undertakings as gatekeepers and the listing of core platform services in the designation decision according to Article 3 of DMA. Stand-alone private enforcement cases will depend on these administrative procedural steps undertaken by the Commission.

By implementing such a bifurcated system, the legislature missed the opportunity to establish a fully-fledged private enforcement which would eventually serve to rebalance potentially long administrative procedures and a lack of action by the Commission.

In addition, there is a wider concern that the DMA requirements for triggering private enforcement would become much stricter on other potentially conflicting legal regimes than EU competition law.

As previously highlighted, Article 39(5) DMA provides that 'national courts shall not give a decision which runs counter to a decision adopted by the Commission and that 'They shall also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated under this Regulation. To that effect, the national court may assess whether it is necessary to stay its proceedings.

At first sight, this may sound similar to the wording and the division of competences between the EU and Member States as outlined under Article 16(1) of the Regulation No. 1/2003. Actually, a more careful analysis shows that the DMA is much more complex in this regard than competition law. Under Regulation No. 1/2003, other legal regimes remain applicable, such unfair competition laws for instance. This issue is approached differently in the DMA scenario and Article 1(5) DMA underlined this assumption unequivocally when preventing Member States from imposing obligations

on undertakings, including undertakings providing core platform services, for matters falling inside the scope of application of the DMA. Article 39(5) DMA promote this hypothesis from an enforcement perspective: in fact, it is easier to evaluate and 'anticipate' what may be counter to a decision by the Commission from the competition law angle since Article 16(1) of the Regulation No. 1/2003 is limited to competition law proceedings and other legal regimes are typically exempt from this provision. As a result, only within these competition-related boundaries national courts are entitled to assess whether there are ongoing administrative proceedings at the national or European level and, if there are, they may stay proceedings.

The same approach, however, could be hard to implement when it comes to other legal regimes that may share similar (albeit not the same) goals as the DMA. There might be an overlap regarding already existing provisions or future provisions under the broad delegated competences of the Commission, so that a stay of proceedings may become necessary also when approaching legal regimes other than competition law-related cases. This leaves national courts with less transparency than in private enforcement proceedings of competition law. The result is that, since the scope of the DMA overlaps with multiple other laws, Article 39(5) DMA may prolong and stay the proceedings in a plethora of cases and potentially discourage private enforcement endeavours.

## 6. The effect on legal certainty

It can be argued that the DMA facilitates private enforcement and enjoys some advantages.

First of all, stand-alone private enforcement actions are likely to be more effective than in competition law, due to the per-se nature of most of the prohibitions imposed by the DMA. Contrary to consolidated procedures of private enforcement in competition law, the DMA requires administrative procedural steps to be undertaken exclusively by the Commission to ensure the full applicability of the DMA applicable. The above-described designation of undertakings as gatekeepers and the listing of core platform services in the designation decision according to Article 3 DMA are a case in point. Likewise with the obligations, the blacklisted clauses of Article 5 are meant to be self-executing, so referring a case to courts is much more simple in case business and consumers affected by potential infringements of the DMA believe there has been no compliance with the list of obligations and want to pursue potential claims. Likewise, Article 6 ob-

ligations will be subject to a system of specification, ideally involving the Commission.

Secondly, relying on the gatekeepers' designation by the Commission seems to simplify the functioning of private enforcement, since there is no need for a claimant to delimit relevant markets and establish dominance. Likewise with the obligations, the blacklisted clauses of Article 5 are meant to be self-executing so there is nothing that prevents a business who considers that these have not been complied with to use the courts. Likewise, Article 6 obligations will be subject to a system of specification, ideally involving the Commission. because a subset of these raise concerns about uniformity of interpretation. In this case, claimants will be unlikely to initiate litigation in cases where the infringement is a matter of controversy. In these circumstances, the claimant may wait for a Commission decision and initiate a follow-on damages action after an infringement decision is reached.

## 7. Conclusions and general remarks

Although the Commission is considered as the "sole enforcer" of the DMA, it is expected that private enforcement will develop as an important pillar of the overall DMA enforcement. The effectiveness of the DMA, beyond the centralised model of public enforcement, even requires a decentralised model of private enforcement. Given the innovative and specific character of the obligations imposed on large digital platforms which provide core platform services and qualify as gatekeepers, many aspects of private actions are far from being settled. In any event, the core principles as formulated by the CJEU and as set out in the Damages Directive seem to be applicable and can contribute to the proper functioning of the DMA.

It remains to be seen whether the Commission will one day introduce an instrument similar to the Damage Directive that complements the DMA. Until then, it is for the Member States to establish the rules for actions intended to safeguard individual rights (e.g., of business users and end users). To avoid any fragmentation across the EU, the cooperation mechanism provided for in Article 39 of the DMA will be important, particularly in terms of the Commission submitting written and oral observations in procedures before national courts. In addition, national courts are expected to clarify questions under the DMA via requests for a preliminary ruling by the CJEU pursuant to Article 267 TFEU.

**Nicola M.F. Faraone** [*]

# The *ne bis in idem* principle in digital markets: a tentative test for reconciling the European and Italian legislation

SUMMARY: 1. Introduction: Past and future challenges of the principle of *ne bis in idem*. – 2. An overview of the case law of the ECHR and the CJEU, including the recent judgments in BPost and Nordzucker. – 3. The process of growth and contradiction of the DMA and its concurrent application with (European and national) competition law. – 4. An additional layer of complication for the duplication of proceedings/sanctions: the case of the 2021 Annual Law for Market and Competition and the new Italian legislation on abuse of economic dependence in digital markets. – 5. Concluding remarks.

## 1. Introduction: Past and future challenges of the principle of *ne bis in idem*

The tumultuous history of the principle of *ne bis in idem* has been marked by profound interpretative contradictions, especially at the jurisprudential level. The involved Courts – the Court of Justice of the European Union ("CJEU"), the European Court of Human Rights ("ECHR"), and many national courts – have engaged in a laborious process of deconstructing and then re-assembling the principle at stake.

As widely known, the principle of *ne bis in idem* consists of a prohibition expressing a fundamental right of legal culture aimed at restricting the possibility of a defendant being prosecuted repeatedly based on the the same offense, act, or facts. [1] This principle has been enshrined in Article 50

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[1] For the definition of *ne bis in idem* as a general principle of EU law see, e.g., CJEU, 15 Oc-

of the EU Charter of Fundamental Rights (the "Treaty of Nice" or the "Charter"),[2] Article 4 of Protocol No. 7 to the European Convention on Human Rights, Art. 54 of the Convention implementing the Schengen Agreement ("CISA") and, in the Italian legal system, Article 649 of the Italian Code of Criminal Procedure.

Contradictions and interpretive misalignments have arisen on the elements characterizing the principle in question, namely the "bis" and the "idem". Without presuming to trace the troubled history of the EU legal system, as to the "bis" element, it has been established that a second proceeding is allowed on the same facts, in the presence of a close material and temporal connection with the first one, while, as to the "idem" element, it has been interpreted over time both as the identity of the person prosecuted, tried or punished (unity of the offender condition) and the identity of the conduct involved (*idem* condition). Over time, the idem condition has undergone changing interpretations before the European Court on Human Rights (ECtHR) and the CJEU, especially in competition law.

More recently, the Digital Markets Act ("DMA")[3] has contributed to bringing back to new light the "evergreen" topic of the *ne bis in idem*, "inaugurating" a new era of debate (and further fragmentation). It has been discussed whether the two set of instruments are of such a resemblance

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tober 2002, Case C-238/99P, Limburgse Vinyl Maatschappij and Others v. Commission, EU:C:2002:582, para. 59, and B. VAN BOCKEL, *The "European" Ne Bis in Idem Principle. Substance, Sources, and Scope*, in B. VAN BOCKEL (eds.), *Ne Bis in Idem in EU Law*, Cambridge, 2016, 15. See also M. LUCHTMAN, *The ECJ's Recent Case Law on Ne Bis in Idem: Implications for Law Enforcement in a Shared Legal Order*, in *Common Market Law Review*, 55, 2018, 1717. See also among others J. VERVAELE, *The Transnational Ne Bis in Idem Principle in the EU: Mutual Recognition and Equivalent protection of Human Rights*, in *Utrecht Law Review*, 1, 2005, 2; M. WASMEIER, N. THWAITES,'*The Development of Ne Bis in Idem into a Transnational Fundamental Right*, in *European Law Review*, 31, 2006, 565; B. VAN BOCKEL, *The Ne Bis in Idem Principle in EU law*, Kluwer Law International, 2010, 267 and J. VERVAELE; *Ne Bis in Idem: Towards a Transnational Constitutional Principles in the EU?*, in *Utrecht Law Review*, 9, 2013, 211; J. LELIEUR, *"Transnationalising" Ne Bis in Idem: How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal Certainty*, in *Utrecht Law Review*, 9, 2013, 198; and A. TURMA, *Ne Bis in Idem in European Law: A Difficult Exercise in Constitutional Pluralism*, in *European Papers*, 9, 2020, 1341.

[2] The CJEU already recognised it as a fundamental principle before the Charter becoming a binding legal instrument, see CJEU, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij and Others v. Commission, ECLI:EU:C:2002:582, para. 59.

[3] Regulation of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (DMA), 2020/0374 (COD).

that it will make the principle at stake applicable. Due to these existing concerns and new case law from the CJEU, it is interesting to examine how the *ne bis in idem* principle is enforced in EU competition law and if the principle would apply to the relationship between the competition rules and the DMA. The conflict between the EU Commission (responsible for the centralized enforcement of the DMA) and national competition authorities (which retain competence to prosecute potentially anti-competitive conducts by tech companies under European and national competition law) is evident. Furthermore, the DMA is expected to create an additional layer of overlap and "incoherence" with national rules "inspired" by the DMA itself, aimed at regulating businesses operating in digital markets (such as Germany's introduction of Section 19(a) of the Gesetz gegen Wettbewerbsbeschränkungen ("GWB"), the German Competition Act, and Italy's recent legislation on abuse of economic dependence).[4]

Against this backdrop, in March 2022, the CJEU issued two judgments of fundamental importance for the interpretation of the principle of *ne bis in idem* in EU competition law in the cases of bpost, C-117/202,[5] and Nordzucker, C-151/203,[6] respectively addressing the relationship between antitrust investigations and sector-specific enforcement (in the case of bpost, regulation of the postal sector) and the relationship between investigations initiated by competition authorities of different Member States concerning the same conduct.

In this contribution, it will be briefly retraced the troubled path of the principle of *ne bis in idem* and will then be proposed a tentative framework for allocating cases among the DMA, national legislation inspired by it, and competition law to prevent a proliferation of parallel investigations and/or overlaps in proceedings regarding the same conduct. This paper

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[4] A few examples of these solutions include the introduction of the German regime directed at undertakings with paramount significance across markets in Section 19(a) of the German Competition Act in Bundeskartellamt, Amendment of the German Act against Restraints of Competition (19 January 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html (accessed 10 March 2024). The GWB entrusts the Bundeskartellamt with the power of declaring that a firm is of "paramount significance for competition across markets", thus prohibiting it from certain specified practices presumed to be unlawful. It has to be anticipated that the recent Italian Annual Competition Law (5 August 2022, No. 118) introducing a rebuttable presumption of economic dependence when dealing with digital platforms that play a "key role" in reaching end-users and/or suppliers (Article 33).

[5] CJEU, 22 March 2022, Case C-117/20, BPost, ECLI:EU:C:2022:202 (hereafter, BPost).

[6] CJEU, 22 March 2022, Case C-151/20, Nordzucker, ECLI:EU:C:2022:203 (hereafter Nordzucker).

will also address specific critical issues (as the new formulation of the abuse of economic dependence in digital markets recently approved in Italy) that will challenge the practical application of the DMA.

## 2. An overview of the case law of the ECHR and the CJEU, including the recent judgments in BPost and Nordzucker

This paragraph will firstly examine to examining the case law of the European courts that has been developed over the years regarding the principle of *ne bis in idem*, and then conceptualize the new approach inaugurated by the CJEU in BPost and Nordzucker.

As already highlighted, the right not to be prosecuted or punished twice for the same offence is a fundamental principle of criminal law and has a twofold rationale. On the one hand, it is a crucial guarantee for the individual against abuses of the *ius puniendi*, and, on the other hand, a means to ensure legal certainty and the stability of the *res iudicata*.[7] Since, at the European level, the *ne bis in idem principle* is enshrined in Art. 4 of Protocol No. 7 to the ECHR, in Art. 50 of the Treaty of Nice and in Art. 54 of the CISA and despite their different wording and the broader scope of the principle at the EU level, according to all the other texts, the following four elements are necessary to trigger its application: 1) two sets of proceedings of criminal nature ("bis"), 2) concerning the same facts ("idem"), 3) against the same offender, and 4) a final decision. The *ne bis in idem* principle therefore represents an ideal lens through which one can observe the relationship between the ECHR and the Treaty of Nice and how the judicial dialogue between the respective Courts is evolving in constructing a European system of fundamental rights.[8]

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[7] In *Gutman*, the CJEU recognised the existence of *ne bis in idem*. In this ruling, the applicant complained that two decisions, which ordered a fresh disciplinary inquiry to be held concerning him, violated the principle *ne bis in idem.* The Court found a violation by stating that neither in the terms of the contested decision nor in the items in the file submitted to it has the Court been able to find any assurance that the principle of *ne bis in idem* had been respected. See CJEU, 5 May 1966, Joined Cases C-18 and 35/65, Gutman ECLI:EU:C:1966:24.

[8] The ECtHR specifically designed a three-pronged test in *Engel and Others v. The Netherlands.* Firstly, the legal definition of the offence under national law is considered as a starting point. Secondly, the very nature of the offense is examined. This factor is of greater importance than the national legal definition of the offense (i.e., whether it belongs to criminal law or disciplinary law). Thirdly, the degree of severity of the penalty that the person risks incurring is considered. The last two criteria have led the ECtHR to consider that administrative proceedings

Furthermore, although it has relatively rapidly been settled that the criminal proceedings notion extends to punitive administrative proceedings as well,[9] the *idem* condition gave rise to more controversy and different contradictory interpretations, depending on whether it pertains to criminal law[10] or competition law.[11] Throughout the case law of the CJEU, an *idem factum* and an *idem crimen* interpretation had appeared simulta-

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and administrative sanctions at the national level can be of a 'criminal nature'. In *Engel and Others* v. *the Netherlands*, the ECtHR stated that in determining the fundamental nature of a conduct one should look not only at the legal qualification of the offence under the internal law of a given State, but also at the nature of the act, together with the repressive and deterring character of the penalty, and the type and the degree of affliction (severity) of the penalty for which a given individual is liable. In applying these criteria, the ECtHR has thus attributed a greater importance to the second and third criterion which eventually outweighed the first criterion, i.e. the formal classification of the act under national law. Yet, this interpretation was complexified by the fact that it needs to be applied in a systematic manner by the ECtHR. However, it is essential to underline that the *Zolothukin* v. *Russia* case delivered by the Grand Chamber of the ECtHR in 2009 has eventually united the definition of the "idem" in the ECtHR case law. Two other cases of the ECtHR are also crucial for this issue: *Menarini* v. *Italy*, and *A and B* v. *Norway. In Menarini Diagnostics S.R.L.* v. *Italy*, the ECtHR found that a fine imposed under competition law was a criminal penalty resulting in the applicability of Article 6(1) of the ECHR. This explicit finding sharply contrasts with the CJEU law in competition law proceedings as we will study in detail in the next section. The CJEU avoided mentioning the *Engel* criteria in important judgments that followed *Menarini*. In *A and B* v. *Norway,* the ECtHR provided extensive reasoning as to both the interpretation of the *bis* element and to the proportionality of the interference by the public authorities (by looking at whether the duplication of proceedings is limited to what is strictly necessary). A sufficiently close connection in substance and in time between the two sets of proceedings is required to render the duplication of proceedings strictly necessary. See Engel and Others v. The Netherlands, App 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, judgment of 8 June 1976; Application No. 14939/03 Zolotukin, 10 April 2009, paras. 78-84; ECtHR, 27 September 2011, A. Menarini Diagonstics S.R.L. v. Italy, Application No. 43509/08; ECtHR, 15 November 2016, A and B v. Norway, CE:ECHR:2016:1115JUD002413011.

[9] See, in this regard, CJEU, 5 June 2012, Case C-489/10, Bonda, ECLI:EU:C:2012:319, para. 37; CJEU, 20 March 2018, Case C-524/15, Menci, ECLI:EU:C:2018:197, para. 26; CJEU, 26 February 2013, Case C-617/10, Fransson, ECLI:EU:C:2013:105, para. 35. The Court aligns this notion with the ECHR one, see ECtHR 23 November 1976, Engel and Others v. the Netherlands, *supra* note 8, para. 82.

[10] See, among others, G. LASAGNI, S. MIRANDOLA, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, in *EUCrim*, Issue 2, 2019, 126-135.

[11] See R. NAZZINI, *Parallel Proceedings in EU Competition Law – Ne Bis in Idem as a Limiting Principle*, in B. VAN BOCKEL (eds.), *Ne Bis in Idem in EU law*, cit.,129; W. WILS, *The Principle of "Ne Bis in Idem" in EC Antitrust Enforcement: A Legal and Economic Analysis*, in *World Competition*, vol. 26, Issue 2, 2003, 131-148; W. DEVROE, '*How General Should General Principles Be? Ne Bis In Idem in EU Competition Law*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK (eds.), *General Principles of EU Law and European Private Law*, Aphen aan de Rijn, 2013, 401-442; G. DI FEDERICO, *EU Competition Law and the Principle of "Ne Bis in Idem"*, in *European Public Law*, 17, 2011, 241-260.

neously. The *idem factum* interpretation implies that the same offender cannot be prosecuted or convicted again for the same material facts.[12] By contrast, the *idem crimen* interpretation states that the same person cannot be sanctioned or prosecuted more than once for a single unlawful course of conduct designed to protect the same legal asset.[13] In the latter case, double proceedings, each with a different legal interest justifying them, would not amount to *ne bis in idem*, even when the facts giving rise to both prosecutions were identical.

The latter interpretation was relied on by the Court in EU competition law, whereas *ne bis in idem* discussions in EU criminal law and in the context of the Schengen acquis were analysed by the *idem factum* approach. More specifically, in the case of competition law – which has maintained its autonomy over time in the application of the principle under consideration – the CJEU used to apply a three-fold test and has instead recognized that the requirement of "idem" is to be considered met if the simultaneous presence of three elements is demonstrated: the identity of the facts, the unity of the offender, and the unity of the protected legal interest.[14]

This diverging approach has been subject to a lot of criticism in the past and BPost and Nordzucker offered the Court an opportunity to settle whether both approaches still co-existed in EU law.[15]

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[12] See, *inter alia*, CJEU, 9 March 2006, Case C-436/04, van Esbroeck, ECLI:EU:C:2006:165, para. 36; CJEU, 28 September 2006, Case C-467/04, Gasparini and Others, ECLI:EU:C:2006:610, para. 54; CJEU, 28 September 2006, Case C-150/05, van Straaten, ECLI:EU:C:2006:614, para. 48; CJEU, 18 July 2007, Case C-367/05, Kraaijenbrink, ECLI:EU:C:2007:444, para. 26; CJEU, 16 November 2010, Case C-261/09, Mantello, ECLI:EU:C:2010:683, para. 39.

[13] It goes back to the Walt Wilhelm case, which concerns the parallel application of Community (now EU) competition rules and those of the national authorities and where the Court held that EU and national competition laws did target restrictive behaviour from different points of view and with a different focus. Their parallel application was therefore possible, although consecutive sanctions needed to consider that a sanction had already been imposed for the same behaviour under another legal norm: CJEU, 13 February 1969, Case 14-68, Walt Wilhelm, ECLI:EU:C:1969:4, para. 3. See also CJEU, 7 January 2004, Case C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland *et al.* v. Commission, ECLI:EU:C:2004:6, para. 338.

[14] CJEU 14 February 2012, Case C-17/10, Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, ECL:EU:C:2012:72; see also B. VAN BOCKEL, *Ne Bis in Idem in EU Law*, Cambridge, 2018 and G. MONTI, *Managing decentralized antitrust enforcement: To shiba*, in *Common Market Law Review*, 51, 2014, 261-279.

[15] For a critical review of the two judgments, see P. VAN CLEYNENBREUGEL, *BPost and Nord zucker: Searching for the Essence of Ne Bis in Idem in European Union Law: ECJ 22 March 2022, Case C-117/20, BPost v. Autorité belge de la concurrence Case C-151/20, Bundeswettbewerbsbehörde v. Nordzucker AG e.a.*, in *European Constitutional Law*, vol. 18, Issue 2, 2022, 357-374; M. MAYR, *Redefining the Ne Bis in Idem Principle in EU Competition Law: bpost and Nor-*

The first case involves the company BPost, the Belgian postal service provider and incumbent, successively sanctioned by two Belgian authorities; first, by the Belgian Postal Regulator for failing to respect EU postal regulations in awarding specific discounts for services it offered and then by the Belgian competition authority, which, some years after the sector regulator's decision, imposed a fine on BPost for abusing its dominant economic position under Article 102 TFEU. After the Belgian Postal Regulator's fine was annulled on appeal, resulting in an acquittal for BPost under sectoral regulation, the Brussels Court of Appeal and the Belgian Supreme Court (Cour de Cassation) differed in opinion about whether the competition law fine constituted *bis in idem* and asked the CJEU to clarify the legal test to be used in this context. BPost contested the legitimacy of this second proceeding, invoking the principle of the *ne bis in idem*. In essence, it was asked whether the protected legal interest is relevant, as also requested by the Commission, which intervened as an *amicus curiae*.

In *Nordzucker*, the issue at stake concerned two administrative enforcement procedures in two different member states based on a parallel application of EU competition law and its national equivalent. Two German two sugar-manufacturing businesses, Nordzucker and Südzucker, were challenged before the German Bundeskartellamt, first, and then before the Austrian competition authority, for the violation of Article 101 TFEU, apparently based on the same facts, namely for having colluded to partition the market in Germany and Austria. Following Nordzucker's application for leniency, the German Bundeskartellamt imposed a fine on the businesses concerned for partitioning the German market in the 2004-2006 period. As part of that decision, reference was made to a phone call between the two businesses' sales directors on anticompetitive activities in Austria as well. In the meantime, the Austrian competition authority had also taken similar enforcement action against businesses and Agrana, a Südzucker subsidiary in Austria. Before the Austrian courts, the fact that the behaviour at stake had already been penalized by another national competition authority raised questions as to when and whether *ne bis in idem* would apply. Like the Belgian court, the Austrian Supreme Court invoked Article 267 TFEU to refer the matter to the CJEU, asking the same questions. In

*dzucker*, in *Journal of European Competition Law & Practice*, vol. 13, Issue 8, 2022, 553-557; M. CAPPAI, G. COLANGELO, *Applying ne bis in idem in the aftermath of bpost and Nordzucker: The case of EU competition policy in digital markets*, in *Common Market Law Review*, 60(2), 2023, 431-456; B. ZELGER, *The Principle of ne bis in idem in EU competition law: The beginning of a new era after the ECJ's decisions in bpost and Nordzucker?*, in *Common Market Law Review*, vol. 60, Issue 1, 2022, 239-261.

particular, the CJEU was asked about the value to be attributed to the criterion of the protected legal interest and whether the principle of *ne bis in idem* precludes parallel or subsequent proceedings in competition matters in other Member States for, at least in part, the same conduct.

In his Opinions to both *BPost* and *Nordzucker*, Advocate General Bobek proposed unifying the existing idem factum and idem crimen tests accompanying *ne bis in idem* tests in EU law.[16] He suggested generalizing the *idem crimen* approach, which used to be referred to explicitly only in competition law cases. In his opinion, an *idem* situation could only exist when the two enforcement actions at stake are aimed at protecting the same legal interest.[17] To not frustrate this possibility from the outset, an *ex-ante* and general criterion excluding procedures covering different legal interests from *ne bis in idem* would be necessary.[18]

The CJEU did not follow AG Bobek's thesis. Although the CJEU still seemed to rely on the triple identity test in the recent Slovak Telekom case,[19] in BPost it endorses a two-fold focusing on a prior final decision (the *bis* condition) and the requirement that both decisions must concern the same facts (the *idem* condition). The identity of the legal interest is thus no longer mentioned as a separate criterion for the application of the ne bis in idem principle. In Nordzucker, the CJEU takes a similar approach. This means that the CJEU seems to shift towards a more uniform application of the ne bis in idem principle in EU law. Although the CJEU moved away from the three-fold test, the protected legal interest remains relevant for assessing *ne bis in idem*. It instead opted for an *idem factum* approach. It only allowed the protection of legal interests to be invoked as part of an *ex-post* proportionality assessment under Article 52(1) of the Charter, after the *bis in idem* had been established. In its rulings, the CJEU established that the only relevant criterion to assess the existence of the same offense (idem) is the identity of the material facts, understood as the

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[16] See Opinion of AG Bobek in CJEU, 2 September 2021, Case C-117/20, BPost, ECLI:EU:C:2021:680 and Opinion of AG Bobek in Case C-151/20, Nordzucker, ECLI:EU:C:2021:681.

[17] Opinion of AG Bobek in BPost, paras. 132-141 and Opinion of AG Bobek in Nordzucker, para. 39. According to AG Bobek (Opinion in BPost, para. 127), «[s]tating that […] a second set of proceedings is always inadmissible because it relates to the same facts precludes the possibility of different legal interests being pursued in parallel».

[18] Opinion of AG Bobek in BPost, para. 119.

[19] CJEU, 25 February 2021, Case C-857/19 Slovak Telekom, ECLI:EU:C:2021:139, para. 43. For a case comment, see P. WHELAN, *Applying Ne Bis in Idem to Commission Proceedings Implicating Article 11(6) of Regulation 1/2003: Case C-857/19 Slovak Telekom*, in *Journal of European Competition Law & Practice*, vol. 12, Issue 10, 2021, 746-749.

existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned.[20] The CJEU also stated that those circumstances must stem from events which are essentially the same, in that they involve the same perpetrator and are inextricably linked together in time and space.[21] Therefore, Article 50 of the Charter prohibits the imposition concerning identical facts, of several criminal penalties as a result of different proceedings brought for those purposes.[22] That identity of material facts test, on which the Court had relied in previous cases of double-track administrative law and criminal law procedures, such as *Fransonn*,[23] *Menci*,[24] *Garlsson*,[25] *Di Puma*,[26] was therefore equally deemed to be applicable in the context of dual punitive administrative procedures, one based on competition law and the other based sectoral regulation.[27] In addition, the Court in Nordzucker also confirmed that the test applies as well in double-tracked EU competition law enforcement concerning the same anticompetitive behaviour.[28] Both judgments refrain from referring to previous competition law cases in which the *idem crimen* test was proposed when elaborating on the *idem* condition. The Court thus implicitly overruled its previous *ne bis in idem* case law in competition law and also applied the *idem factum* test to that field.

It follows from the previous argument that, contrary to its earlier *ne bis in idem* case law in competition law, the legal classification under national law of the facts and the legal interest protected is no longer considered relevant for establishing the presence of "idem".[29] The Court made clear that

[20] BPost, *supra* note 5, para. 33; Nordzucker, *supra* note 6, para. 38.

[21] BPost, *supra* note 5, para. 37. The Court more particularly referred to ECtHR 10 February 2009, Sergey Zolotukhin v. Russia, *supra* note 8, para. 83 and 84, and ECtHR 20 May 2014, Pirttimäki v. Finland, CE:ECHR:2014:0520JUD003523211, paras. 49-52.

[22] BPost, *supra* note 5, para. 33; Nordzucker, *supra* note 6, para. 38.

[23] Aklagaren v. Hans Åkerberg Fransson, *supra* note 9, para. 34.

[24] Menci, *supra* note 9, para. 26. See. For a comment, see M. VETZO, *The Past, Present and Future of the Ne Bis in Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma*, in *Review of European Administrative Law*, 11, 2018, 70-74.

[25] CJEU, Grand Chamber, 20 March 2018, Case C-537/16, Garlsson Real Estate and Others, EU:C:2018:193,

[26] CJEU, Grand Chamber, 20 March 2018, Joined cases C-596/16 and C-597/16, Di Puma v. Consob and Consob v. Zecca, EU:C:2018:192.

[27] BPost, *supra* note 5, para. 37.

[28] Nordzucker, *supra* note 6, para. 38.

[29] *Ibid.*, para. 41.

the protection conferred by Article 50 of the Charter cannot vary from one Member State to another[30] and also cannot vary from one EU law domain to another.[31] Thus arguing in this way, the Court indirectly overruled earlier competition law cases, in which the *idem* condition was only deemed to be satisfied when, in addition to the same material facts, the legal interest protected by the two rules relied on to prosecute the same person was also identical. That requirement is no longer relevant: whenever there is an identity of material facts, the *idem* condition will be met, thus rising to the "rank" of *ne bis in idem* protection for the person(s) concerned.[32]

The Court's *idem factum* approach implies that no double prosecutions for identical material facts can occur. According to Article 50 of the Charter, which the Court adopts as the starting point for *ne bis in idem* protection in both cases, the principle applies within the EU as a whole. The question therefore arose regarding the notion of material acts when multiple territories are at stake and the question of whether enforcement in one territory always preclude acting against that behaviour in a different Member State. In Nordzucker, the Court nevertheless stated that nothing would impede a Member State from limiting its prosecution to the effects produced by specific behaviour on its own territory.[33] In that scenario, the facts prosecuted in different territories would be similar rather than identical, as they do not involve the same territory affected.[34] As a result, the same substantive market partitioning behaviour could give rise to sanctions in both Germany and Austria, as long as competition authorities limit their enforcement activities to the effects produced on their own territory.[35] The mere reference to another Member State's territory without assessing the anticompetitive effects on that territory would not be sufficient to establish the presence of identical facts. The Court made clear that it is for the national Courts to verify, on a case-by-case basis, the territorial scope of the enforcement action initiated in the first Member State.[36]

It follows from that reasoning that only subsequent prosecutions of the same material facts covering the same territory could give rise to *ne bis in idem* as matter of EU law. However, even in those cases, the Court subse-

[30] BPost, *supra* note 5, para. 34; Nordzucker, *supra* note 6, para. 39.

[31] BPost, *supra* note 5, para. 35; Nordzucker, *supra* note 6, para. 40.

[32] *Ibid.*

[33] Nordzucker, *supra* note 6, para. 41.

[34] *Ibid.*, para. 44.

[35] *Ibid.*, para. 46.

[36] *Ibid.*, para. 47.

quently confirmed previous case law according to which *ne bis in idem* is not an absolute fundamental right but suffers some limitations, as long as they are compatible with Article 52(1) of the Charter.[37]

In BPost, the Court maintained that the two sets of rules in place pursued different legitimate interests and had been foreseen in other legal acts.[38] That could justify a duplication of proceedings, «provided that those proceedings are complementary and that the additional burden that duplication represents can be justified by the two objectives pursued».[39] To establish whether such duplications are justified, it is necessary to assess: (1) (a) whether there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and (b) to predict that there will be coordination between the different authorities; (2) whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe; and (3) whether any penalty that may have imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty. As such, the overall penalties imposed must correspond to the seriousness of the offenses committed.[40] If and when those criteria are met, the resulting burden, for the persons concerned, of the duplication would be limited to what is strictly necessary. Applied to the cases at hand, the Court indicates that this could be the case for BPost.[41]

In sum, both judgments's constitutional significance lies in their ability to shed light on what constitutes – in the Charter language – the essence of *ne bis in idem*.[42] The Court only addresses that question indirectly, but allows the very core of the ne bis in idem fundamental right to be identified. With both judgments, the Court consolidated a *ne bis in idem* standard applicable across all fields of EU law enforcement. The only test underlying Article 50 of the Charter is an *idem factum* test, which extends to all

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[37] According to the Court in BPost, *supra* note 5, para. 41 and Nordzucker, *ibid.*, para. 50, «any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. According to the second sentence of Article 52(1) thereof, subject to the principle of proportionality, limitations on those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others».

[38] BPost, *supra* note 5, para. 43.

[39] *Ibid.*, para. 49.

[40] *Ibid.*, para. 51.

[41] *Ibid.*, paras. 55-58.

[42] See P. VAN CLEYNENBREUGEL, *supra* note 15, 374).

fields of EU law, including EU competition law. It also confirmed that its *ne bis in idem* framework applies to national (two proceedings within the same member state) and transnational (two proceedings in two different Member States) situations. *Ne bis in idem*'s applicability is nevertheless conditioned upon different cumulative criteria being fulfilled. Whenever applicable, *ne bis in idem* is not absolute, but can be limited by Article 52(1) of the Charter.

However, the issue still needs to be resolved, especially concerning the role that the requirement of the protected legal interest would still play. It follows that the crucial importance of the two rulings for the future interaction between the DMA and EU and national competition law becomes clear precisely because the departure from the latter criterion has opened the way to the proliferation of scenarios in which a company could be subjected to two separate proceedings (for example, DMA and national competition law), each of them initiated by a different authority.[43] As a result, it will be up to national Courts to settle the dispute in the light of the Menci criteria, based on *idem factum*, and to verify that the two proceed-

[43] More recently, on 14 September 2023, the CJEU delivered its ruling in Case C-27/22, Volkswagen Group Italia and Volkswagen Aktiengesellschaf, providing further clarifications on the application of the *ne bis in idem* principle in transnational disputes and its relation with the res judicata principle. The preliminary reference originated from a proceeding involving Volkswagen Group Italia S.p.A. ("VWGI") and Volkswagen Aktiengesellschaft ("VWAG"). On 4 August 2016, the Italian Competition Authority ("AGCM") imposed a fine of EUR 5 million on VWGI and VWAG for an unfair commercial practice consisting of the marketing and disseminating misleading advertising of vehicles fitted with an illegal defeat in Italy. The vehicles were indeed equipped with systems designed to alter the measurement of pollutant emissions for their approval under Regulation (EC) No. 715/2007. The AGCM's decision was challenged before the Italian Regional Administrative Court ("TAR"). On 13 June 2018, the German Public Prosecutor's Office of Brunswick ("GPPO") imposed a fine of EUR 1 billion on VWAG based on the circumvention of emissions requirements. VWAG decided not to appeal the GPPO's decision, which became final. Crucially, the contested decision was still pending before the TAR. Based on the final decision of GPPO, VWGI and VWAG invoked Article 50 of the Charter before the TAR, claiming that the contested decision had become unlawful and breached the *ne bis in idem* principle in different EU member States. The dispute reached the Italian Supreme Administrative Court, which requested a preliminary ruling to the CJEU under Article 267 TFEU posing the following questions: I) whether the fine imposed by the AGCM was criminal in nature; II) whether Article 50 of the Charter precludes proceedings and the imposition of a final administrative sanction in respect of unlawful conduct, for which a final criminal conviction has been handed down in the meantime in a different Member State, where the latter criminal conviction became final before the former administrative penalty became res judicata; III) whether a limitation of the *ne bis in idem* principle under Article 52 of the Charter is possible in circumstances such as those of the present case. The judgment does not diverge from the Court's previous case law as established in BPost and Nordzucker. However, it offers an interesting clarification on the relation between the *res judicata* and *ne bis in idem* principles, the analysis of which is outside the scope of the present contribution.

ings pursue complementary objectives of general interest relating, depending on the cases, to different aspects of the same unlawful behaviour.[44]

## 3. The process of growth and contradiction of the DMA and its concurrent application with (European and national) competition law

The European Union is on the verge of introducing and "grounding" an "ambitious reform of the digital space"[45] of an *ex-ante* nature and will most likely significantly impact on the digital world. Sharing the widespread opinion that the economic features of digital markets and the strategic role played by large platforms require a general revision of the current regime of competition rules, in December 2020, the Commission presented two proposals for Regulations, namely the Digital Service Act ("DSA")[46] and the DMA, which was approved by the Council and the Parliament in September 2022 and will start to apply in March 2024.[47]

Since traditional competition law has not been considered capable of effectively addressing the challenges and the "structural" problems posed by the platform ecosystem,[48] the Commission established a regulatory framework that complements traditional competition law provisions to ensure contestability[49] and fairness[50] in digital markets. In this regard, although,

[44] BPost, *supra* note 5, paras. 51-54.

[45] Press Release European Commission 15 December 2020, Europe fit for the Digital Age: Commission proposes new rules for digital platforms, IP/20/2347, 1.

[46] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) L 277/1. The DSA focusses on rules to safeguard responsible and diligent behaviour of providers of online intermediary services.

[47] See, among the various contributions, A. DE STREEL, B. LIEBHABERG, A. FLETCHER, R. FEASEY, J. KRÄMER, G. MONTI, *The European Proposal for a Digital Markets Act: A First Assessment*, in *CERRE Assessment Paper*, 2021, 22-23; N. PETIT, *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*, in *Journal of European Competition Law & Practice*, vol. 12, Issue 7, 2021, 529-541; H. SCHWEITZER, *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal*, in 3 *ZEuP*, 503 (2021); P. IBAÑEZ COLOMO, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, in *Journal of European Competition Law & Practice*, vol. 12, Issue 7, 2021, 561-575; F. BOSTOEN, *Understanding the Digital Markets Act*, in *The Antitrust Bulletin*, vol. 68, Issue 2, 2023, 263-306.

[48] See, in general terms, J. CRÉMER *et al.*, *Competition policy for the digital era*, Final report. European Commission, Directorate-General for Competition, (2019).

[49] See, for a general overview, A. RIBERA MARTINEZ, *The DMA's Ithaca: Contestable and Fair*

Articles 101 and 102 TFEU remain applicable,[51] the DMA introduces a new set of *ex-ante* obligations for online platforms designated as gatekeepers and exempts competent authorities from defining relevant markets, demonstrating any dominant positions, and measuring potential anti-competitive effects.[52] On the other hand, in digital markets, the definition of relevant markets has always been subject to harsh controversy, given the conglomerate nature of platform intermediaries operating in multi-sided markets. Equally complex has resulted to be the identification of a clear consumer theory of harm, precisely because the majority of the services in the digital space are offered "free of charge" and are based on the reduction of search and transaction costs due to their markets' business models.

In other words, rather than affecting the "merits" of competition law provisions, the new DMA regime has committed to reforming the general procedural and institutional framework to "capture" specific conducts that, in the past, have been the subject of previous investigations by the Commission and national competition authorities (NCAs) and that, now, require more flexible regulatory/legislative tools to be "neutralized".

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*Markets*, in *World Competition*, vol. 46, Issue 4, 2023, 1-30; J. CRÉMER, G.S. CRAWFORD, D. DINIELLI, A. FLETCHER, P. HEIDHUES, M. SCHNITZER, F.M. SCOTT MORTON, K. SEIM, *Fairness and Contestability in the Digital Markets Act*. Yale Tobin Center for Economic Policy Discussion Paper No. 3 1, 16 (2021).

[50] See G. COLANGELO, *In Fairness We (Should Not) Trust: The Duplicity of the EU Competition Policy Mantra in Digital Markets*, in *The Antitrust Bulletin*, 68(4), 2023, 618-640. Against assessing fairness as a standalone goal in competition law, see A. LAMADRID DE PABLO, *Competition Law as Fairness*, in *Journal of European Competition Law & Practice*, vol. 8, Issue 3, 2017, 147-148, building upon Margrethe Vestager, Fairness and Competition (GCLC Annual Conference, Brussels 25 Jan. 2018) and Johannes Laitenberger, Fairness in Unilateral Practice Cases (GCLC Conference, Brussels 26 Jan. 2018).

[51] This is explicitly stated in Recital 5 of the DMA, which reads as follows: «Although Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs *ex-post* and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition law terms».

[52] Recital 5 explains that the evidentiary standards that need to met for an infringement of competition law to be found are high, and that intervention comes only after a gatekeeper has engaged inharmful conduct. The DMA addresses those issues by setting concrete thresholds for a platform to fall under its scope (arguably lower than those set by competition law) and establishing *ex-ante* obligations. See G. MONTI, *The Digital Markets Act-Institutional Design and Suggestions for Improvement*, in *TILEC*, Discussion Paper 4/2021, Section 6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730.

The final result was to leave the various existing national legislations unchanged without preventing Member States from adopting new legislative and/or regulatory provisions that potentially diverge.

Therefore, the application of the DMA does not preclude the application of competition law. The DMA is "without prejudice" to the application of EU and national competition law.[53] This means that gatekeepers are subject to both (i) the DMA and (ii) traditional competition law.

In the DMA, the EU legislator opted for centralized enforcement and the Commission remains the "sole enforcer" of the DMA.[54] Hence, when choosing to "centralize" the DMA enforcement activity at the Commission level and not to "hinder" Member States' areas of legislative production on the same matters (provided that ideally new legislation also applies to entities other than gatekeepers), the ultimate effect of the DMA would be to stimulate the proliferation of parallel national legislations, with the risk of further regulatory fragmentation (which is exactly what was intended to be avoided at the beginning when adopting as a legal basis Article 114 TFEU for the purposes of harmonization[55] instedad of Article 352 TFEU). This is exactly the scenario that has already occurred following the entry into force, on January 2021, of the aforementioned tenth amendment to the Act against Restraints of Competition ("GWB"), which introduced the new Section 19(a).[56]

From an operational standpoint, the strong centralized enforcement by the Commission distinguishes the DMA from the competition's institutional framework, which is based on Regulation (EC) No. 1/2003 ("Reg. No. 1/2003"), and is indeed characterized by a decentralized implementation, which also applies to other pro-competitive regulatory frameworks, such as electronic communications, whose implementation is decentralized

[53] Article 1(6) and Recital 12, DMA.

[54] See e.g. Article 38(7) DMA. Such a system of centralized enforcement system is not a novelty. Instead, the system resembles the centralized system of competition law enforcement before Regulation 1/2003. Moreover, similar systems can be found in EU Merger Control, where the Commission is exclusively competent to assess concentrations with an EU dimension. In other areas of EU law, similar systems are present. Under the Single Supervisory Mechanisms, the European Central Bank has the sole competence to supervise systemically significant banks. See Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR), L 24/3.101 and Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, L 287/63.

[55] The illegality of the legal basis of the DMA is presented in A. LAMADRID DE PABLO, N. BAYÓN FERNÁNDEZ, *Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It*, in *J. Eur. Competition L. & Prac.*, vol. 12, Issue 7, 2021, 576-589.

[56] See *supra* note 4.

at the national level to allow regulatory authorities to tailor the application of rules to domestic market peculiarities and operators of national size.[57]

That being said, the existence of an ideal continuum between competition provisions and the DMA is undeniable,[58] to the point that the European Competition Network ("ECN") and certain Member States have advocated in favour of NCAs' more involvement in the DMA's implementation and enforcement of the obligations imposed on gatekeepers following the DMA's designation process. This assumption was at the centre of the ECN's "defense" in its Joint Paper dated June 2021,[59] but evidence of it was already available in a contribution back to May 2021 (later "transposed" into an official letter published on September 2021, which engaged Governments collectively), in which the Ministers of Economy of France, Germany, and the Netherlands, self-defined (not without emphasis) "Friends of an effective Digital Markets Act"[60] drew attention to the need to ensure greater "room for maneuver" for NCAs in the DMA application, strengthening their role, suggesting the introduction of a stricter mechanism of coordination and cooperation, borrowed from the complementarity of enforcement of Article 3 of Reg. No. 1/2003.

Consequently, it is to be welcomed that the final version of the DMA does address the relationship between the Commission and NCAs. Ac-

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[57] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) OJ L 321/36.

[58] On the contrary, it is clear that no tension between the DMA and the EU merger control rules is expected to arise. The DMA does not establish a sector-specific merger regime. It only introduces a reporting requirement whereby gatekeepers are required to inform the Commission of any intended "concentration" within the meaning of the EUMR if the acquired entity provides core platform services, or any other services in the digital sector, or enables the collection of data. In other words, the DMA does not give the Commission the power to investigate and block mergers; those mergers the Commission is notified about under the DMA can only be examined under the EUMR or national merger rules (if the conditions set by those rules are met). See Article 14(1), DMA. This obligation applies irrespective of whether the concentration is notifiable to a Union competition authority under the EUMR or to a competent national competition authority under national merger rules.

[59] See "Joint paper of the heads of the national competition authorities of the European Union, How national competition agencies can strengthen the DMA". The paper was endorsed by national competition authorities at the ECN Directors General's meeting of 22 June 2021 and can be found at the following *link*: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/DMA_ECN_Paper.pdf?__blob=publicationFile&v=1 (accessed on 10 March 2024).

[60] See Germany, France and the Netherlands, Strengthening the Digital Markets Act and its Enforcement, 7 September 2021, available at the following *link*: https://www.economie.gouv.fr/files/2021-05/1055%20-%20Strengthening%20the%20Digital%20Markets%20Act%20and%20Its%20Enforcement.pdf (accessed on 10 March 2024).

cording to Article 37 DMA, the Commission and Member States «shall work in close cooperation and coordinate their enforcement action». Article 38(1) DMA stresses that the Commission and NCAs «shall cooperate with each other and inform each other [...] through the European Competition Network». The NCAs get a role in the investigative stage of DMA procedures. In order to realize this cooperation, the DMA establishes, *inter alia*, mechanisms for the exchange of (confidential) information (e.g. Article 21(5) DMA), stresses the possibility to ask NCAs for support in market investigations (Article 38(6) DMA) and allows officials from NCAs to assist the Commission to conduct interviews (Article 22 DMA) and to be appointed as independent external experts (Article 26(5) DMA). Furthermore, NCAs may (jointly) request the Commission to open a market investigation (Article 41 DMA). On top of this, NCAs may-insofar as they have the competences and powers to do so under national law-conduct an investigation into non-compliance with the substantive obligations and prohibitions of the DMA. However, once the Commission opens proceedings, NCAs are relieved of this competence (Article 38(7) DMA). NCAs are thus merely competent to facilitate the investigative stage of DMA enforcement. They cannot impose any decisions or fines on gatekeepers for violating the DMA. However, this investigative power may still be relevant in practice, since starting investigations may impact the agenda-setting of the Commission. In the final version of the DMA, the role of the NCAs is thus strengthened and improved. The European legislator acknowledges the relevance of NCAs in regulating Big Tech and grants them several competences. Yet, it is important to stress that the Commission remains the "sole enforcer" of the DMA. On top of this, the DMA also – to a certain extent – curbs the position of NCAs. If competent NCAs, for example, start an investigation involving a gatekeeper under national competition law, they have the obligation to inform the Commission of their investigative measures (Article 38(2) DMA). Moreover, where an NCA intends to impose obligations on gatekeepers it should communicate the draft measure to the Commission. It remains to be seen how this will work out in practice. Experience with Reg. No. 1/2003 shows that coordination between the Commission and the NCAs can be rather effective in practice. However, as set out before, the relationship between the DMA and competition law is not fully crystallized. This may result in difficulties in terms of coordination and cooperation.[61]

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[61] Furthermore, the DMA looks beyond the cooperation between competition law authorities by introducing a "High-Level Group of Regulators" (henceforth: the High-Level Group or

In summary, the Commission is thus in the privileged position whereby the enforcement of competition law will, at least in principle, occur in parallel with the supervision and enforcement of the DMA. It will be quite possible, therefore, for a digital platform to be subject to multiple proceedings following the commission of the same conduct – each initiated based on a different legal framework – raising the question of whether this is compatible with the principle of *ne bis in idem*. It has been stressed above that NCAs should play a complementary role to that of the Commission, along with establishing a virtuous mechanism of coordination and cooperation, borrowed from the ECN and inaugurated by Reg. No. 1/2003 that may serve as a *forum* to facilitate cooperation in the areas of competition law and the DMA. This is a positive development, which is necessary to make dual enforcement of the DMA and competition law possible without violating *ne bis in idem* (insofar as the CJEU will accept that the respective frameworks pursue sufficiently different objectives, which is not self-evident). It should also be noted that continuous coordination may prevent *ne bis in idem* concerns altogether. If coordination is effectively "orchestrated" at the ECN level, the opening of parallel proceedings may be prevented early. Against this backdrop, however, the fact that coordination of the DMA and competition law is realized in a competition law forum confirms that the DMA and competition law are very closely related and this will prove not to be enough to solve all the potential elements of conflict.

The Commission has tried to evade the issue, invoking the circumstance that the DMA is a complementary – but a different – regulatory tool to competition law enforcement and «it should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualized assessment of market positions and behaviour».[62] In practice, this means that the same platform could be subject to proceedings under different rules for the same conduct and it cannot exclude a duplication of proceedings under the DMA and (EU and na-

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Group) (Article 40 DMA). This group will consist of regulators in the digital sectors, and in particular representatives of the European Commission, NCAs, and representatives in the area of data protection, consumer protection and telecommunication law and shall meet at least once a year (Article 40(4) DMA). The Group can provide the Commission with advice and expertise, e.g. on general matters relating to the enforcement of the DMA or to promote a «consistent regulatory approach across different regulatory instruments». The Group may in particular «identify and assess the current and potential interactions between the DMA and other rules». Furthermore, the Group can provide expertise to the Commission in the context of market studies (Article 40(5)(6)(7) DMA).

[62] Recital 10, DMA.

tional) competition rules with a view to investigating the same practice in which a specific gatekeeper engages. This raises a particular set of issues, relating to whether the *ne bis in idem* principle applies.[63]

First of all, it is very unlikely that the Commission will bring both sets of proceedings will both be brought by the Commission, since, contrary to Articles 101 and 102 TFEU, the DMA establishes *per se* prohibitions and the Commission may impose fines and remedies.[64] In this regard, the DMA offers the Commission the most straightforward and swiftest path instead of the long (and painful) route of competition law enforcement to address the same conduct. However, NCAs and national Courts may decide to apply competition law to the same conduct that may have already been subject to DMA proceedings. Alternatively, the Commission may decide to initiate proceedings under the DMA after an NCA has decided (or a national Court ruled) on the same matter. The question here is whether the *ne bis in idem* principle applies in such cases, thereby requiring the second set of proceedings to be discontinued as incompatible with Article 50 of the Charter.[65]

It is postulated that the "bis" condition is satisfied (i.e. that there is a prior final decision). As to the "idem" condition, it has to be assumed that the offender is the same, which is fairly easy to assess. However, assessing whether the facts are the same is more complex. Based on Nordzucker, the CJEU held that the facts must be "identical"[66] and this needs to be examined by reference to the territory, the relevant product market, and the period during which the conduct in question restricted competition.[67] Issues on

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[63] In this regard, for a reconstruction of the issues at stake, see A. ANDREANGELI, *The Digital Markets Act and the enforcement of EU competition law: Some implications for the application of Articles 101 and 102 TFEU in digital markets*, in *European Competition Law Review*, vol. 43, Issue 11, 2022, 496-504; B. BEEMS, *The DMA in the broader regulatory landscape of the EU: an institutional perspective*, in *European Competition Law Journal*, vol. 19, Issue 1, 2023, 1-29; K. BANIA, *Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause*, in *European Competition Law Journal*, vol. 19, Issue 1, 2023, 116-149; D. KATSIFIS, *Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I*, in *The Platform Law* (28 March 2022), available at the following link: https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/; and D. KATSIFIS, *Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II*, in *The Platform Law* (29 March 2022), available at the following link: https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/; A. RIBERA MARTINEZ, *An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement*, in *European Competition Journal*, vol. 19, Issue 1, 2023, 86-115.

[64] Articles 18 and 29, DMA.

[65] See, for a detailed discussion, K. BANIA, *supra* note 63, 145-148.

[66] Norzucker, *supra* note 6, para. 38.

[67] *Ibid.*, para. 41.

the period are clear. Concerning the territory, the national proceedings would presumably be referred to the domestic market and the "idem" condition would not be met for the other Member States' territories. It follows that the Commission would allowed enforcing the DMA in (at least) those other territories (and perhaps the territory of the Member State where the first proceedings were brought, if the conditions discussed below are met). As to the product market, even if the DMA does not require a definition of the relevant product market, thereby raising questions as to how fulfillment of this condition should be assessed, the core platform services it entails (e.g., online search, social networks) have been found to constitute distinct markets in competition law proceedings.[68] As a result, the definition of the product market under national proceedings likely reflects the core platform service falling under the scope of the DMA. However, this may not apply to all possible scenarios and a product market in competition proceedings may have been defined more narrowly than the notion of core platform service for the DMA.[69] If a strict approach were followed, it could be argued that, to the extent that the product market does not correspond to the definition of the core platform service, the ne bis in idem is not triggered and duplicate proceedings are possible. If the "idem" condition is satisfied, it would still be necessary to ascertain whether the duplicate proceedings comply with Article 52(1) of the Charter. The criteria set in BPost are helpful to verify:

1. that the possibility of duplicate proceedings must be provided for by law, as explicitly stated by Article 1(6) of the DMA;
2. that the possibility of duplicate proceedings must respect the essence of the rights and freedoms affected;[70]
3. the proportionality of duplicating proceedings.[71]

The framework set in Nordzucker and BPost raises doubts as to whether duplicate proceedings under the two instruments are (possibly as being) compatible with Articles 50 and 52(1) of the Charter, for it is unclear whether the conditions those judgments establish are fulfilled (e.g., whether the DMA and competition pursue distinct legitimate objectives).

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[68] See, *inter alia*, Bundeskartellamt B6-22/16 Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (Bundeskartellamt Facebook decision), 3, available at the following link: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4; Commission's decision of 27 June 2017, Case AT.39740, Google Shopping, para. 154.

[69] See, for instance, Bundeskartellamt Facebook decision, 5.

[70] BPost, *supra* note 5, paras. 41 and 43.

[71] BPost, *supra* note 5, para. 51.

For this reason, Recital 11 of the DMA may constitute the "north star" for "navigating through the storm". It states that the DMA «*pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper* [...] *on competition on a given market*» and «[...] *aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application*».

The critical matter here is whether the DMA pursues the same objective as competition law. Since most of the provisions of the DMA reflect ongoing or completed competition investigations, it could be argued that the ideological premise on which this instrument rests is the protection of undistorted competition. Moreover, Recital 7 of the DMA provides that its purpose is to «contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector». In the same vein, in Nordzucker, the Court held that Article102 TFEU is «a provision that pertains to a matter of public policy which prohibits abuse of a dominant position and pursues the objective – which is indispensable for the functioning of the internal market – of ensuring that competition is not distorted in that market».[72] It could be argued that the ultimate objective of the DMA and competition law is the same (even if pursued through different means).

On the contrary, Articles 1(5) and 1(6), read in conjunction with Recitals 10, 11 and 12 – which require an interpretation of the application of the DMA "without prejudice" to competition rules – would suggest that all these legislative/regulatory instruments regulating the conduct of platforms and gatekeepers (both at the Union and national levels) still coexisted harmoniously and complement each other.

Not only that but, from a theoretical point of view, such a solution may alleviate any concerns regarding possible duplication of proceedings, starting from the assumption that the different legal frameworks (DMA and competition rules, mainly) oversee and protect different legal interests.

Suspending judgment on the appropriateness of the "technical" solution identified by the Commission, if both instruments will indeed apply simultaneously, the fact that the first investigation is likely to be triggered by the Commission under the DMA, while the second one by NCAs under European and/or national competition law represents by far the most

[72] Nordzucker, *supra* note 6, para. 46.

probable scenario in practice. This issue actually goes beyond applying the *ne bis in idem principle*.

NCAs may have the aspiration to "achieve more ambitious results" under national or EU competition law than the Commission under the DMA and use "domestic" competition law antitrust legislation (applicable "without prejudice" as provided for by Recitals 10 and 11 of the DMA) to achieve a more striking result in terms of the sanctioning impact of the investigation. This is precisely what happened in the Amazon case, sanctioned by the AGCM in November 2021, with an almost €1.3 billion fine for abusive conduct in the form of self-preferencing falling under Article 102 TFEU.[73] The recent case law of the AGCM represents, therefore, in essence, a privileged test on the "state of health" of the *antitrust* enforcement in digital markets at the national level and further anticipation of the duplication of proceedings that will be witnessed following the entry into force of the DMA. This conclusion is sufficiently robust even if the DMA is considered as a *lex specialis* to competition law and we elaborate latter provisions' relationship in terms of hierarchy of norms.[74] First, the hierarchy of norms, since Articles 101 and 102 TFEU are Treaty provisions and thus superior to secondary legislation, including the DMA, and the DMA's application "without prejudice" to competition law clearly indicates parallel application of both instruments. The *lex specialis* principle should be applied in absence of priority clauses or a hierarchy of norms. However, in this case, the reference to "without prejudice" in Article 1(6) DMA constitutes an explicit priority clause. On top of these arguments, there are also substantive indicators that justify parallel application. The closed list of Articles 5, 6 and 7 facilitates speedy intervention but compromises flexibility to a certain extent. Consequently, it will remain challenging to determine the relationship between the DMA and the framework of (EU and national) competition law.

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[73] See, *inter alia*, AGCM, caso A528 – FBA Amazon, 30 November 2021, in *Bollettino*, 49, 2021. As the AGCM explains in its 250-page decision, Amazon allegedly leveraged its dominant position in the Italian market for e-commerce intermediation services (or "marketplace services") to favor the adoption of its own logistics service – Fulfillment by Amazon ("FBA") – by third-party retailers active in its marketplace. More specifically, the AGCM found Amazon had abusively arranged for access to a set of exclusive advantages on Amazon's online marketplace to be conditional upon purchasing its logistics services, thus hampering competition from alternative providers of logistics and marketplace services.

[74] See for further discussion, B. BEEMS, *supra* note 63, 17-21.

## 4. An additional layer of complication for the duplication of proceedings/sanctions: the case of the 2021 Annual Law for Market and Competition and the new Italian legislation on abuse of economic dependence in digital markets

Following what has been argued so far, it is highly likely that, shortly, digital platforms (possibly also not falling under the "gatekeeper" category) will be subject to different potentially overlapping regulatory frameworks within the European Union, namely: (i) the DMA; (ii) EU competition law; and (iii) national competition rules (including competition rules specifically designed for digital markets).[75]

The potential scenarios of intersection with the DMA do not end with mere competition law provisions, as the interaction of the DMA with the P2B Regulation,[76] the Unfair Commercial Practices Directive ("UCPD"),[77] the GDPR,[78] the Audiovisual Media Services Directive ("AVMS"),[79] and the Copyright Directive[80] are still to be explored and likely to occur.

In addition to those mentioned above, another scenario of potential conflict and overlap can be expected to take place with the new Article 33

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[75] See Recital 12, DMA.

[76] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services ("P2B Regulation") [2019] OJ L 186/57.

[77] 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (Unfair Commercial Practices Directive or UCPD) as amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] L328/7.

[78] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) ("GDPR"), [2016] OJ L 119/1.

[79] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L 95/1.

[80] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

of the Law. No. 118 of 5 August 2022 (the "2021 Annual Law for the Market and Competition"), which complemented the notion of abuse of economic dependence ("AED") in subcontracting agreements by inserting into Article 9 of Law No. 192 of 18 June 1998 (hereinafter, "Law No. 192/1998") a specific amendment aimed at making the AED framework more effective and suitable to the characteristics and, in particular, the intermediation power of large digital platforms vis-à-vis their business users.[81]

The prohibition of abuse of economic dependence was introduced in Italy in 1998 as a provision of contract law.[82] However, as noted above, since 2001 the Italian Competition Authority ("AGCM") has been empowered to sanction abuses that are «relevant to the protection of competition and the free market».[83]

The assessment of economic dependence is essentially based on the «real possibility for the abused subject to find satisfactory alternatives in the market».[84] Nevertheless, the importance of such a prohibition gradually in-

[81] Not surprisingly, some Member States have taken concrete steps to "update" their national provisions on the abuse of economic dependence. The 10th amendment to the German Competition Act in 2021 is of particular importance, as it aims to modernise national rules on abuse of economic dependence by explicitly addressing digital markets (*Gesetz gegen Wettbewerbsbeschränkungen Digitalisierungsgesetz*). See *Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen – Gwb Digitalisierungsgesetz*, 18 January 2021, based on H. SCHWEITZER, J. HAUCAP, W. KERBER, R. WELKER, *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen*, Baden-Baden, 2018, *passim*, and H. SCHWEITZER, J. HAUCAP, W. KERBER, R. WELKER, *Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)*, 9 October 2018. See *supra* note 4.

[82] See V. FALCE, *The Italian Regulation Against the Abuse of Economic Dependence at the Crossroads*, in F. DI PORTO, R. PODSZUN (eds.), *Abusive Practices in Competition Law*, Cheltenham, 2018, 378-380; ID., *Abuse of Economic Dependence and Competition Law Remedies: A Sound Interpretation of the Italian Regulation*, in *ECLR*, vol. 36, Issue 2, 2015, 73-75; V. BACHELET, *Abusi "contrattuali" tra imprese: per una rilettura dell'art. 9 della legge sulla subfornitura industriale*', in *Riv. dir. comm.*, III, 2021, 587; M.R. Maugeri, '*Subfornitura e abuso di dipendenza economica*, Torino, 2022; ID., *Le modifiche alla disciplina dell'abuso di dipendenza economica*, in *Le Nuovi Leggi Civili Commentate*, vol. 5, 2001, 1062; ID., *Le recenti modifiche della disciplina dell'abuso di dipendenza economica in una prospettiva comparatistica*, in *Europa e diritto privato*, 2002, 494; ID., *Abuso di Dipendenza Economica e Autonomia Privata*, Milano, 2003; M. GRANIERI, *Subfornitura industriale: l'esordio (mancato) di una disciplina*, in *Foro italiano*, 1999; C. OSTI, *L'abuso di dipendenza economica*, in *Mercato Concorrenza Regole*, 1, 1999, 9; R. NATOLI, *L'abuso di dipendenza economica*, Napoli, 2004; ID., *Brevi note sull'abuso di dipendenza economica "contrattuale"*, in *Giurisprudenza italiana*, 2003, 724; Ph. FABBIO, *L'Abuso di Dipendenza Economica*, Milano, 2006; G. COLANGELO, *L'Abuso di Dipendenza Economica tra Disciplina della Concorrenza e Diritto dei Contratti. Un'Analisi Economica e Comparata*, Torino, 2004.

[83] Article 9(3-*bis*), Law No. 192/1998, as amended by Article 11, Law No. 57 of 5 March 2001.

[84] As provided for by Article 9(2) of Law No. 192/1998, the definition of dependence as a

creased in case law and experienced a revival, influencing the AGCM's decisions as well. Outside digital markets, interest in the abuse of economic dependence has recently grown in Italy thanks to the change in attitude of the AGCM and, in recent years, the trend has been reversed not only because the AGCM has issued numerous decisions in this area, [85] but also because it has called on the Italian Government to step up the fight against abuses in digital markets. [86]

By amending Article 9 of Law No. 192/1998, Article 33 of the 2021 Annual Law for the Market and Competition entitled "Strengthening measures against the abuse of economic dependence" [87] introduced:

1. a rebuttable presumption – and, as such, not absolute – of economic dependence of business users on digital platforms that play a key role in reaching end users or suppliers, including in terms of network effects or data availability;

2. a non-exhaustive list of typical forms of abusive conduct with specific examples concerning digital platforms, integrating the new paragraph 2, namely: (i) providing insufficient information or data on the scope or quality of the service provided; (ii) requiring undue unilateral benefits that are not justified by the nature or content of the activity performed; (iii) engaging in practices that impede or hinder the use of other providers for the same service, including through the application of unilateral conditions or additional

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condition that occurs when an entity «finds itself in a position to bring about excessive imbalance in the rights and obligations about its commercial relations with another business» proved inapplicable or misleading. In this regard, see V. BACHELET, *Abuso di dipendenza economica e squilibrio nei contratti tra imprese*, Milano, 2020, 231.

[85] See, *inter alia*, AGCM, 20 December 2019, No. 28043 ("A525-Mercato distribuzione quotidiani e periodici nell'area di Genova e Tigullio"), in *Bollettino AGCM*, n. 3, 2020, 36; AGCM, 20 July 2021, No. 29782 ("A539-Poste italiane/contratti fornitura servizio recapiti"), *Bollettino AGCM*, n. 32, 2021, 8; AGCM, 14 June 2022, No. 30199 ("A546-Franchising di McDonald's"), *Bollettino AGCM*, n. 25, 2022, 5; AGCM, 5 April 2022, No. 30084 ("A550-Catena di Franchising Original Marines"), 4 August 2022, No. 30276 ("A547-Condotte di Wind Tre a danno dei rivenditori"), 2 November 2022, No. 30351 ("A543-Rapporti contrattuali tra Benetton e i suoi rivenditori"), *Bollettino AGCM*, respectively nn. 28, 33, 40, 2022.

[86] In accordance with AGCM's Proposals for Competition Reform for the Purpose of the Annual Law for Market and Competition 2021 ("Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021"), 22 March 2021 (AS1730), *Bollettino AGCM*, n. 13, 2021, 99.

[87] See, *inter alia*, V. BACHELET, *The abuse of economic dependence "digitalization": the Italian novella in context*, in *ECLR*, Issue 7, 2023, 44; S. SCALZINI, *Economic Dependence in Digital Markets: EU Remedies and tools*, in *Market and Competition Law Review*, 5(1), 2021, 81, 88-89; M.R. MAUGERI, *Ddl concorrenza e piattaforme digitali. Brevi considerazioni sulla proposta di modifica della disciplina sull'abuso di dipendenza economica*, in *Persona e mercato*, 1, 2022.

costs that are not included in the contract or license. Therefore, the new Article 9(2) complements the open general list of abuses of economic dependence, enriching them with scenarios formulated in general terms, but suggested by the practical experience of business relationships between large digital platforms and undertakings that use their intermediary services; [88]

3. the 2022 amendment specifies that civil actions for abuse of economic dependence must be brought before specialised commercial courts [89] and that the Presidency of the Italian Council of Ministers, in agreement with the Ministry of Justice and after consultation with the AGCM, may issue specific guidelines to smooth the application of the new provisions in accordance with the EU law principles to prevent litigation and promote good market practices as well.

A further scenario of overlap between the DMA and the new AED provision on digital markets may arise.

Therefore, it is necessary to inquire about the fate of behaviours that potentially constitute abuse of economic dependence following the initiation of proceedings under the DMA.

It is apparent how the DMA, (EU and Italian) competition law provisions, and AED aim at protecting different interests. It follows from that the plain and straightforward parallel application of all the latter legislation. While an abuse of a dominant position entails the need, as a first step, to delineate the relevant market and the competition's purpose seeks to protect undistorted competition on any given market, AED, rather than focusing on the undertaking's dominant position in the market, centre its attention only on the notion of dependence, which is defined slightly differently by national legislation and generally consists in the fact that the dependent company has no other possibility to sell or buy its product on the market. [90] In this re-

[88] According to Article 9(2), first part, «Abuse may also consist in refusing to sell or buy, imposing unjustifiably burdensome or discriminatory contractual conditions, or arbitrarily interrupting an existing business relationship». The conjunction "also", with which the enumeration is introduced, provides that other forms of abuse of economic dependence than the "typical" ones are also conceivable.

[89] Article 9(3), first part: «Any agreement prohibited under this Article shall be automatically void. Actions for abuse of economic dependence, including actions for injunctive relief and damages, shall be brought before the ordinary courts».

[90] See, *inter alia*, R. ALIMONTI, M. JOHNSON, *Abuse of Economic Dependence and its Interaction with Competition Policy: The Economic Perspective*, in *Compet. Law J.*, 21(2), 2022, 87; M. LIBERTINI, *Posizione dominante individuale e posizione dominante collettiva*, in *Rivista di diritto commerciale*, vol. 9-10, 2003, 543-584; M.S. SPOLIDORO, *Riflessioni critiche sul rapporto fra abuso di posizione dominante e abuso dell'altrui dipendenza economica*, in *Rivista di diritto industriale*, 4, 1999, 191; M. BAKHOUM, *Abuse without dominance in competition law: Abuse of economic*

gard, Article 9(1) of the Law. No. 192/1998 characterizes a relationship of economic dependence as one where an undertaking can impose "an excessive imbalance between the rights and obligations" of the parties. The absence of alternative counterparties for the economically dependent undertaking shall be factored into assessing economic dependence. Not to mention that the DMA pursues another different objective,[91] namely ensuring "contestability" and fairness in digital markets, regardless of the actual, potential, or presumed effects of a particular gatekeeper's conduct.[92]

These represent three different objectives of public interest, which may justify and legitimate their parallel application and the potential accumulation of sanctions and eventually fines.

In light of the above, this is the exact demonstration of the potential overlap of legislation which it has been analyzed in the previous paragraph. As recalled, while the DMA prohibits Member States from imposing further obligations on gatekeepers to ensure contestable and fair markets,[93] it allows the application of EU and national antitrust laws through their public and private enforcement mechanisms.[94] Particularly important in this context is that the permissible national legislation includes competition rules for unilateral conduct based on an individualised assessment of market position and behaviour:[95] a definition under which the new Italian prohibition of AED could fall, as the presumption of dependence it contains does not preclude a concrete examination of digital platform's position and conduct.[96]

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*dependence and its interface with abuse of dominance*, in F. DI PORTO, R. PODSZUN (eds.), *Abusive Practices in Competition Law*, Cheltenham, 2018, 157-184.

[91] See Recital 11 of the DMA, and more generally Recital 9, as highlighted *supra.*

[92] Accordingly, a gatekeeper must rely on something other than economic justifications for its conduct that deviates from the DMA rules. Differently in the competition scenario, it would be allowed to demonstrate that its conduct does not constitute an abuse of a dominant position in light of a different definition of the relevant market or the resulting efficiencies. See Recital 23, second part of the DMA (but also Recital 5).

[93] See Article 1(5) of the DMA.

[94] Provided that this does «not affect the obligations imposed on gatekeepers under this Regulation and their uniform and effective application in the internal market» (Recital 10).

[95] See *supra* note 62, Recital 10 of the DMA.

[96] As explained in the preceding paragraphs (*supra* note 53), accordingly, under Article 1(6)(b) of the DMA, the Regulation is without prejudice, among other, the application of «national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers».

## 5. Concluding remarks

Starting from 2024, the DMA, from its *sui generis*, work-in-progress character, will become fully operational, and it will be seen in practice whether the obligations imposed on gatekeepers under Articles 5-7 of the DMA will replace Articles 101 and 102 of the TFEU, or whether, with Recital 86 in mind, the Commission will use the DMA as a truly complementary regulatory instrument to (EU and domestic) competition law.

That being said, this paper aimed at retracing the tortuous path, starting from a jurisprudential overview of the principle of *ne bis in idem* culminating in the CJEU's "historic" rulings in BPost and Nordzucker.

As highlighted throughout the paper, the EU jurisprudence on the *ne bis in idem* principle has been consistently conflicting depending on the field involved, and, as to competition law, a formalistic and conservative approach has prevailed over the years, keen to apply a three-fold test where not only the identity of the offender and the facts of the case were taken into account, but the identity of the protected legal interest also constituted a relevant factor.

The peculiar criterion applied to competition law has traditionally been welcomed with great concern, which has made urgent clarifications regarding the increasing risk of parallel proceedings and potential overlaps of decisions, especially due to the new "wave" of EU reforms in the regulation of digital markets.

The same logical "short circuit" occurs with the approval of the new Article 33 of the 2021 Annual Law for Market and Competition (Law No. 118/2022) concerning the AED in digital markets. In the context of the fourth paragraph, it was argued that the DMA and the economic dependence pursue different objectives and, instead of overlapping, both disciplines complement each other. Furthermore, there is no formal overlap or contrast, as the DMA clarifies that EU regulation does not affect national legislation. Nevertheless, although the CJEU in BPost and Nordzucker provided detailed instructions, the issue still needs to be unraveled, and it is expected that the potential accumulation of proceedings and sanctions under the DMA will provide ground for initiating lengthy litigation.

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