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The anticompetitive conduct for the monopoly of display advertising and search advertising: the case of Google LLC

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Contents

Introduction

This thesis has set itself the goal of describing the Italian and American antitrust investigations that involved Google in 2020, and which have not yet been concluded.
Google has been legally prosecuted since 2010, but this thesis will discuss about the Italian and American proceedings of 2020, in which the company has been accused of abusing its dominant position in several advertising markets.

The first chapter will be about how antitrust laws were born from the economic analysis in order to ensure competitive economies and social welfare. The second chapter will explain the different antitrust systems and their laws in Europe, Italy and the US.
The third chapter will identify the main four Big Tech firms, Amazon, Apple, Facebook and Google, and their problems with the antitrust authorities.
Chapters four and five will discuss the antitrust cases of Google, accused of abusing its dominant position in the advertising markets in Italy, in violation of Article 102 TFEU and Law No. 287/90, and in the US, against Section 2 of the Sherman Act, which will be followed by a comparison between the lawsuits in the following chapter.
The seventh chapter will mention two legislative initiatives proposed by the European Commission with the aim of creating a safer digital space: the Digital Services Act and the Digital Markets Act.

1. An introduction to antitrust economics: the objectives of antitrust law to assure a competitive economy and its social welfare.

Antitrust laws are based on concepts and notions borrowed from economic theory, making efficiency a crucial objective.

The aim of competition policy is to ensure that the market is not restricted in any detrimental way by competition. Including antitrust laws, man other tools are used to protect and promote competition: control of state aids, sector regulations and competition advocacy.

However, the implementation of antitrust laws is the most important tool at the disposal of public authorities to ensure the proper working of competition policy. Three main practices are used to enable it: restrictive agreements[1], unilateral anticompetitive conduct[2] and concentrations[3]. Those three practices will be discussed in the second chapter with respect to the European, Italian and American markets.

The objective of antitrust law is to assure a competitive economy, based on the notion that competition enables consumers to satisfy their needs at the lowest prices while consuming the least amount of scarce resources. That is, competition maximises both allocative efficiency[4] and productive efficiency[5].

Antitrust laws are legislative acknowledgments whose purpose is to shorten the gap between ideal perfect competition and the reality of private rule. Antitrust laws, however, are not applicable to the entire economy: indeed, their primary concern is with the manufacturing and service sectors and generally do not apply to labor unions, agricultural and fisherman organisations, governmental units or other types of activities of regulated industries. Nevertheless, antitrust is central to the entire economy.

Even where its enforcement has not been particularly effective, antitrust law and the potential threats of its application are significant in determining the standard of living available to all, the purchasing choices to all, and the allocation of productive resources affecting all of us[6].

The notions of market system, allocation of resources among the various factors of production and the distribution of the products produced are at the base for the construction of antitrust laws.

According to the market system, consumers have the power to decide what and how much shall be produced and competition among producers can determine who will manufacture it.

The decision to introduce and maintain competition policy is based on the assumption that competition is able to promote productivity, innovation and consumer welfare. Indeed, open and competitive markets are able to boost the economic development.

Competition law has two main types of objectives: non-economic and economic.

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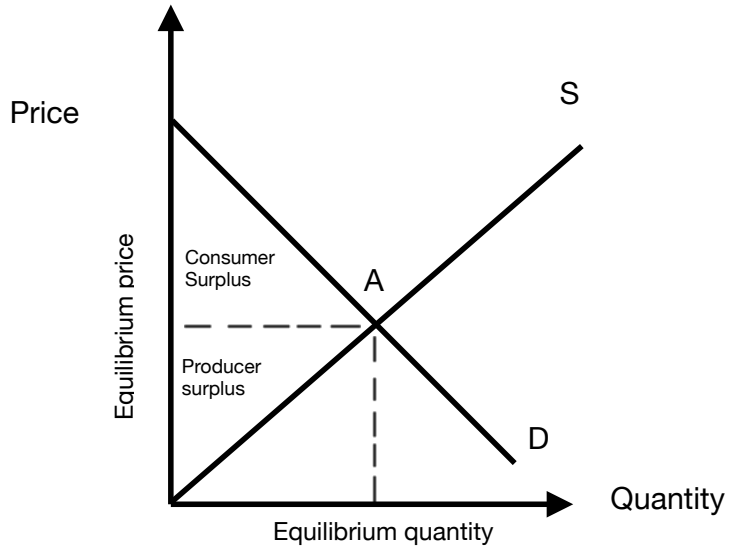
[1] Section 1 of the Sherman Act, Article 101 TFEU, Articles 2 and 4 of Law No. 287/1990.
[2] Section 2 of the Sherman Act, Article 102 TFEU, Article 3 of Law No. 287/1990.
[3] Section 7 of the Clayton Act, Regulation No. 139/2004, Article 6 of Law 287/1990.
[4] Making what consumers want.
[5] Using the least amount of resources.
[6] Frederic M. Scherer, David Ross, *Industrial Market Structure and Economic Performance*, Rand McNally, first edition, 1970, page 464. (Scherer & Ross, Industrial Market Structure and Economic Performance, 1970)

Non-economic objectives have been associated with antitrust rules. They include protecting SMEs and the fairness of the competitive process, protecting the democratic system, and other socio-political purposes such as industrial and environmental ones. Moreover, in Europe they are one of the tools to promote the integration of national markets.

Economic objectives aim at maximising economic efficiency, consumer welfare, and, more generally, total welfare.

Under economic efficiency, it is possible to identify allocative efficiency, productive efficiency and dynamic efficiency. Allocative efficiency is reached only if existing resources are employed in a way that the economic needs of the whole society are fully satisfied. Allocative efficiency means that firms are able to produce what buyers want and are willing to pay for. Productive efficiency is achieved when output production is maximised thanks to the use of the most effective combination of inputs. Finally, dynamic efficiency is achieved through the creation and diffusion of new products and production processes that are able to increase social welfare. Consumer welfare is the perceived welfare that buyers have in a market, it is measured with the consumer surplus and it focuses of prices paid by buyers in the said market.

Total welfare, finally, refers to the welfare perceived by both buyers and sellers in the market.



The study of microeconomics, the analysis of the behaviour of individual economic units, falls within the antitrust lawyer's province and, hence, the notions of antitrust laws find their pillars in this economic analysis. The starting point for economic analysis begins with the notion of scarcity. With a plentiful supply of goods, everyone could fully satisfy their own needs, however, there would exist no economic theories. All societies have to deal with the fact that resources are not unlimited and hence all the goods and services that they could consume cannot be produced. Therefore, they have to develop a compromise to deal with the production and distribution of scarce goods and resources. Due to this scarcity, it is always necessary to allocate resources in the best possible way, that is, most efficiently.

The scarcity of resources means that we are constrained in the choices we can make about the goods and services we produce, and thus also constrained about which human wants we will ultimately satisfy. That is why economics is often described as the science of constrained choice[7].

In a market system this allocation is the result of millions of decisions made independently by consumers and producers. In this sense, prices act as a coordination mechanism that limits the amount consumers will purchase and sellers will sell. In this system, prices determine the quantities and the types of goods and services that can be produced and how they can be distributed[8].

It is possible to identify four basic points regarding the market system and its functioning.

First, the market mechanism works without anyone - the producer, the consumer, or the government - having power to change the price level by his own individual action. Second, the price system and its adaptation to shifts in consumer demands or producer supplies is the result of uncoordinated and separate decisions by large numbers of sellers and buyers, each responsive to a desire for private gain, and all reacting to changes in prices. Third, in the free market, prices are determined by demand and supply. The price mechanism gives sovereignty to two groups, consumers and producers, and the decisions of both groups determine the allocation of resources. Fourth, the market system framework is based upon each individual economic unit - that is, each firm and each consumer - seeking to maximize its own welfare. The consumer is expected to attempt to maximize his total satisfaction (or "utility"); the business firm to maximize its total profit[9].

These operations of the price system rely on the behaviour of markets, which are made up of individual consumer and business firms. Their preferences represent a key aspect in understanding the problems of resource allocation.

Indeed, firstly, each person desires the greatest possible amount of economic goods. Secondly, for each person, some goods are scarce: this means that everyone has less of something that he would like to have at no cost. Third, goods can be substituted; this means that a person is willing to sacrifice some, or all, of his goods in order to obtain more of other goods. Finally, the fourth behavioural theory is the law of diminishing marginal utility. This theory states that the value which a consumer will attach to successive units of a particular commodity diminishes as his total consumption of that commodity increases, ceteris paribus.

The theory of the business firm helps better understand those concepts: indeed, it assumes that the main goal of firms is to maximise its profits. This ultimate objective is not influenced by the firm's manager or the type of firm involved, indeed, the motive of generating profits is peculiar to all types of firms.

Moreover, in making production decisions, firms will adhere to the principle of substitution, that is, given a set of technological constraints, profit-maximising production is able to substitute cheaper factors for more expensive ones. Consequently, the firm's production process will change with shifts in the relative prices of

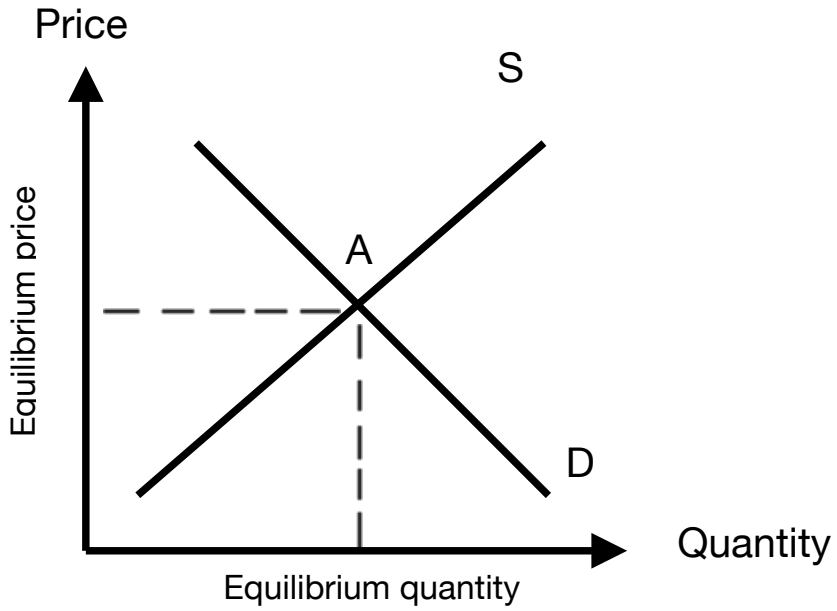
[7] David Besanko, Ronald R. Braeutingam, *Microeconomics*, Wiley, fifth edition, 2014, pages 4-6. (Besanko & Braeutingam, 2014)

[8] Ernest Gellhorn, *An Introduction to Antitrust Economics*, Duke Law Journal, March 1975, page 3. (Gellhorn, An Introduction to Antitrust Economics, 1975)

[9] Ernest Gellhorn, *An Introduction to Antitrust Economics*, Duke Law Journal, March 1975, pages 3-5. (Gellhorn, An Introduction to Antitrust Economics, 1975)

the factors taken into consideration. For example, if labor costs increase, the firm will become capital intensive, conversely, if capital costs increase, it will become labor intensive. Therefore, the theory of the business firm suggests that firms have to organise their factors efficiently if they want to maximise their profits. However, it is merely a suggestion of the final result: whether this result is likely to be attained depends on the operation of the market in which the firm is operating.

To determine the market price, that is the equilibrium price at which quantity demanded equals quantity supplied, we must look at the interactions between supply and demand on the same commodity within a market.
Graphically, the equilibrium price (A) is determined by the intersection of the supply curve (S) and the demand curve (D):



The equilibrium price is the one toward which the actual market price will gravitate. At prices below equilibrium, there will be an excess demand. Conversely, at prices above equilibrium, there will be an excess supply and prices will fall since sellers try to dispose their surplus until the equilibrium price is again reached. This equilibrium is a market-clearing price: it does not depend on interventions, but merely on self-adjusting economic forces.

Changes in equilibrium price can be due to movements along or shifts of the demand curve. Movements along the demand curve indicate changes in the amount demanded and occurs as a result of a price change. Shifts of the demand curve, instead, are due to changes in factors other than prices. Changes can occur also on the supply curve since it is not necessarily constant.
For sellers, it is particularly important to know how much quantities will change in response to a change in price, ceteris paribus. *Price elasticity of demand is a measure of how much the quantity demanded of a good*

responds to a change in the price of that good, computed as the percentage change in quantity demanded divided by the percentage change in price: $\varepsilon = \frac{\Delta Q}{\Delta P} \times \frac{P}{Q}$ [10].

Demand can be elastic ($\varepsilon > 1$), which means that the quantity moves proportionately more than the price, and inelastic ($\varepsilon < 1$), that is when the quantity moves proportionately less than the price.

Price elasticity has been considered particularly important in defining the operating market for the seller to establish his market power, yet, at the same time, the extent of price elasticity depends on how widely or narrowly a good is defined[11].

Theoretically, the market price can lead to demand and supply satisfaction since the first would be fully satisfied and the latter exhausted and, hence, there would be no shortages nor surpluses.

In reality, this is not always the case: indeed, price is not determined exclusively by supply and demand curves. The analysis of the equilibrium price is able to show how prices emerge from the marketplace, but it does not describe the basic condition for the formation of these prices nor the central role that competition plays.

In fact, different types of markets exist: perfect competition, monopoly, monopolistic competition and oligopoly.

Under perfect competition, there is a large number of buyers and sellers, each of them acts as a price-taker, since they passively accept whatever price happens to prevail in the market, products are homogeneous, there is complete freedom to enter the market and all buyers and sellers have perfect information about goods and prices.

In monopolistic markets, instead, a single seller occupies the entire market and sells a unique product, there are substantial barriers to entry for other firms and market knowledge in the industry is imperfect. In this industry, the seller acts as a price-maker: he takes into account price in determining his output. This condition of sellers is also sometimes called price-searching because they must search for the market price which will maximize their profits.

The primary effects of monopoly, in comparison with perfect competition, are reduced output, higher prices and a transfer of income from consumers to producers. Moreover, in monopolies, there is a dead-weight welfare loss, which is a decrease in the welfare of both consumers and producer that is not being captured neither by both of them.

However, monopolies are not always to be condemned: monopolies may rise because they may allow the market to realise economies of scale and produce a product variety which consumers desire and that perfect competition might preclude: in this case we talk about natural monopoly.

[10] N. Gregor Mankiw, Principles of Economics, Cengage Learning, seventh edition, 2015, page 90. (Mankiw, Principles of Economics, 2015)

[11] N. Gregor Mankiw, Principles of Economics, Cengage Learning, seventh edition, 2015, pages 89-94. (Mankiw, Principles of Economics, 2015)

Under monopolistic competition, which tries to reconcile the contending forces of perfect competition and monopoly, a firm can differentiate its product from the product of competitors and takes the prices charged by its rivals as given[12]. In this model, sellers will not engage in price competition, but in the so-called nonprice competition, that is, in advertising, product quality and sales techniques.
In an oligopoly market, firms are in a payoff interdependency: the profits of a firm depend on the behaviour of its competitors. *To determine its profit maximizing quantity, each firm has to figure out how much its competitor is going to produce, while recognizing that its competitor is going through the same process*[13].

All these notions help understand that the antitrust laws aim at maximising consumer welfare by controlling private economic powers. Those laws have at their base the assumptions that competitive markets are not always self-policing, and some profit-maximising firms try to destroy competition unless otherwise constrained.

The economic rationale for antitrust laws is to promote competitive markets by making efforts to exercise monopoly power illegal[14].
Indeed, monopolies cause an inefficient allocation of resources which leads to a deadweight loss in welfare and gains are redistributed from consumers to producers by exploiting some consumer surplus by transforming it into profits.
Sometimes firms can also collude and form a cartel in order to restrict even further output and to raise price. However, cartels are difficult to sustain since individual firms have incentives to cheat on the agreements.
The Sherman Act was enacted in 1890 as the first anti-monopoly law enacted by the American Congress with the aim of prohibiting the formation of monopolies and cartels. Following this act, in 1924, the Clayton Act declared illegal other several anti-competitive practices, but still there is considerable discretion among different cases in courts, where antitrust laws are interpreted following the "rule of reason" test, which is a way to determine the anti-competitive and pro-competitive effects of the laws enacted on specific cases, in contrast with the old "per se rule", which forbids a prohibited practice regardless of ani pro-competitive effects it might have.
The optimal fine for antitrust violations, according to courts, is given by the sum of the deadweight loss and the monopoly transfer from the prohibited practice, divided by the probability of detection, plus the cost of the plaintiff of bringing the suit[15].

[12] Paul R. Krugman, Maurice Obstfeld, Marc J. Melitz, *International Economics Theory and Policy*, Pearson, eleventh edition, 2018, pages 202-207. (Krugman, Obstfeld, & Melitz, 2018)
[13] Jeffrey R. Church, Roger Ware*, Industrial Organisation: A Strategic Approach*, McGraw-Hill, 2000, pages 231-233. (Church & Ware, 2000)
[14] Thomas J. Miceli, *The Economic Approach to Law*, second edition, Stanford University Press, 2009, page 320. (Miceli, The Economic Approach to Law, 2009)
[15] Thomas J. Miceli, *The Economic Approach to Law*, second edition, Stanford University Press, 2009, pages 320-323. (Miceli, The Economic Approach to Law, 2009)

2. Antitrust in Europe (TFEU), in Italy (AGCM) and in USA (Sherman Act, Clayton Act and FTCA).

2.1. Antitrust in Europe: The Treaty on the Functioning of European Union.

In the nineteenth-century Europe, the economic system was characterised by the presence of cartels. After War World II, a wave of protectionism of competition started spreading across Europe.

However, the introduction of a proper competition policy is not seen until the 50s, when a process of integration started developing in Europe.

Indeed, in 1951, the ECSC Treaty[16] was first issued, with the aim of ruling cartels, abuses of dominant position and concentrations. Following this, in 1957 the EEC Treaty[17] was published and entered into force the following year. This treaty later became the EC and was finally integrated into the EU by the Treaty of Maastricht[18] in 1992.

The EEC Treaty had as main objective the creation of a common European market that could be able to allow firms to specialise, grow and operate in large markets. Competition law became the fundamental tool in order to facilitate this integration and became a constitutional principle of the EU.

Competition rules were incorporated in the TFEU[19] after the entry into force of the Lisbon Treaty on 1 December 2009, identifying the protection of competition as one of the main objectives to be reached in order to implement a well-functioning internal market.

The basic principles of EU competition law are found in Articles 101 and 102 of the TFEU, which are set out below:

Article 101

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

[16] European Coal and Steel Community Treaty. It brought together six countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) in order to organize the free movement of coal and steel and to free up access to sources of production.

[17] European Economic Community Treaty. It made it possible for six countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) to work towards integration and economic growth through trade. It is sometimes also called the Roman Treaty since it was signed in Rome. In 2007, it changed name to Treaty on the Functioning of the European Union (TFEU).

[18] This treaty laid the foundations for the European Union as we know it today, it was signed by 12 countries and it laid the foundations for the euro. In 2007 it became the Treaty on European Union (TEU).

[19] Treaty on the Functioning of European Union.

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[20]

Article 102

(ex. Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. [21]

[20] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML (Consolidated version of the Treaty on the Functioning of the European Union, 2008)

[21] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML (Consolidated version of the Treaty on the Functioning of the European Union, 2008)

2.2. Antitrust in Italy: Law No. 287/90 and the Autorità Garante della Concorrenza e del Mercato.

The origins of Italian competition law are more recently dated with respect to the EU ones: indeed, the first Italian antitrust law, Law No. 287/90[22], was introduced only in 1990.
Still, this delay allowed Italy to benefit from the already existing experience of the European Union. The Italian antitrust laws have been modelled according to the EU rules and have to be interpreted in light of the European law principles.

Law No. 287/90 was published on the *Gazzetta Ufficiale* of the Italian Republic on October 13, 1990 with the aim of blocking the abuse of dominant position by one or more firms in the national market or in one of its relevant parts. It might be possible to think that this law allows the government to impose its own decisions in the market and to limit the conquest of a dominant position, that is becoming a monopolist. However, as directly mentioned in art. 3 Law No. 287/90, this law "*does not allow the abuse of a dominant position by one or more firms in the national internal market or in its relevant part*"[23].
The authority responsible for the control and the implementation of Law No. 287/90 is the *Autorità Garante della Concorrenza e del Mercato* (AGCM), simply mentioned from now on as the Authority. "*The Authority works in total autonomy and independence of judgment and it is a collegiate body composed by the president and four members chosen with determination adopted in agreement by Presidenti della Camera dei Deputati and Senato della Repubblica.*"[24]

This law prevents the abuse of such dominant positions because it would otherwise hurt competition in the market by damaging its competitive structure and, consequently, the right of other firms to compete with the monopoly.
Therefore, the dominant position is declared as abusive when it is used to put obstacles in the well-functioning and competitive market by the Authority whose verification has to look for the "virtual competition", which is the competition left if the dominant position was not exercised in an abusive way, by defining the reference market, its geographical extension, the area of substitutivity of the products and services in question so that the behaviour of the of the dominant firm could be judged according to these aspects[25].

[22] Norme per la tutela della concorrenza e del mercato. Practices for the safety of the competition and the market.
[23] "Nel vietare l'abuso da parte di una o più imprese di una posizione dominante all'interno del mercato nazionale o in una sua parte rilevante." Art. 3 Law No. 287/90.
[24] Art. 10 Law No. 287/90, "L'Autorità opera in piena autonomia e con indipendenza di giudizio e di valutazione ed è organo collegiale costituito dal presidente e da quattro membri nominati con determinazione adottata d'intesa dai Presidenti della Camera dei Deputati e dal Senato della Repubblica".
[25] Alfonso Maria Parisi, "Tutela della concorrenza e del mercato. Profili comunitari e civilisti ed aspetti anche penali dell'impresa. Principali esperienze straniere e nazionali", Diritti & Diritti rivista giuridica online, September 2001, pages 4-5. (Parisi, 2001)

2.3. Antitrust in the USA: Sherman Act, Clayton Act and the Federal Trade Commission Act.

Almost the entire edifice of U.S. federal antitrust law rests upon three foundation statutes: the Sherman Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act of 1914 [26].

These three core federal antitrust laws, with some revisions during the years, are still in effect today.

The objective of the adoption of the Sherman Act is the protection of consumers from the excessive monopolistic power while ensuring the American ideal that everyone has the possibility to pursue his own economic interests with his own business without being excluded by hegemonic players.

The Congress passed the Sherman Act as a *"comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade"*[27]. Its scope is not to impede every restraint of trade, but simply those considered unreasonable. That is, the Act outlaws all the conducts that restrain trade or attempt at monopolisation with the aim of restraining trade or harming competition.

The penalties for the violation of the Sherman Act can be severe since its enforcement actions are both civil and criminal because of the possibility of prosecution by the Department of Justice of individuals and businesses that violate it.

The Sherman Act is divided into three sections.

The first section is about the anti-competitive practices that restrain trade. All anti-competitive practices that restrain trade are to be considered illegal and these include agreements to fix prices, limit output production, favouring the creation of cartels and exclusion of certain types of competitors. Individuals or firms found guilty of anti-competitive practices are convicted to pay a fine of maximum $350,000 for an individual and of $10 million for a corporate entity, or to imprisonment up to three years, or even both if the court establishes it as the right punishment.

Section two prohibits monopolisation or every attempt to monopolise trade in the U.S. Such conducts include acquisitions and mergers that enable one entity to have too much power at disposal to the disadvantage of smaller enterprises.

Finally, the third provision extends all the above provisions to the District of Columbia and the US territories[28].

[26] Frederic M. Scherer, David Ross, *Industrial Market Structure and Economic Performance*, Rand McNally, second edition, 1980, page 492. (Scherer & Ross, Industrial Market Structure and Economic Performance, 1980)

[27] Federal Trade Commission, The Antitrust Laws https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws. (The Antitrust Laws, s.d.)

[28] Corporate Finance Institute, https://corporatefinanceinstitute.com/resources/knowledge/finance/sherman-antitrust-act/. (What is the Sherman Antitrust Act?, s.d.)

The 1914 Clayton Act was enacted with the aim of strengthening the Sherman Act in order to fully prevent anti-competitive behaviours in the U.S. market. Hence, this Act expanded the list of prohibited practices such as tie-in[29], price fixing, exclusive dealings and price discrimination.

The Clayton Act allows the injured parties to sue for damages individuals and corporations that violate the Act for three times the amount of damages suffered by the victim.

However, the Act makes some exceptions: indeed, labor unions and agricultural activities are exempted from the regulation since they do not represent a trade or a commodity and so they should not be subject to the same regulations as trading companies and individuals. As such, the Clayton Act prohibits companies from preventing labor union activities since they can negotiate for better employment benefits and wages without being accused of price fixing, but they can be sued by courts if they threaten to cause property damages with their activities[30].

The Federal Trade Commission Act (FTCA) was adopted in 1914 to create the Federal Trade Commission (FTC) [31] and to give the U.S. government a full complement of legal tools to use against anticompetitive, unfair and deceptive practices in the marketplace.

The Act is the primary statute of the Commission.

It was designed to achieve two main goals: fairness in competition among enterprises and consumer protection against fraudulent business practices.

If the Clayton Act was enacted to enforce the Sherman Act, the FTCA became necessary for empowering the provisions of the two previous Acts, with the requirement of impeding the use of deceptive advertising[32].

Under this Act the Commission is empowered, among other things, to prevent unfair acts of competition or deceptive acts that might affect commerce, seek monetary redress and other relief for injured consumers, prescribe rules defining unfair or deceptive practices and establish proper requirements to prevent such acts[33].

[29] An illegal arrangement where, in order to buy one product, the consumer is forced to purchase another product that exists in a separate market.

[30] Corporate Finance Institute, https://corporatefinanceinstitute.com/resources/knowledge/finance/clayton-antitrust-act/. (What is the Clayton Antitrust Act?, s.d.)

[31] The Federal Trade Commission has the objective of protecting consumers and promote competition.

[32] Brian Duignan, Federal Trade Commission Act, https://www.britannica.com/event/Federal-Trade-Commission-Act. (Britannica & Duignan, 2017)

[33] Federal Trade Commission, https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act. (Federal Trade Commission, s.d.)

3. The four Big Tech firms and their antitrust fight: Amazon for the role of the largest online retailer, Apple for its monopoly on apps, Facebook for its antisocial networks monopoly and Google for its abuse of dominant position in the information sector.

In recent years, both in Italy and U.S.A. the main four Big Tech firms, Amazon, Apple, Facebook and Google, have been sued by the antitrust authorities to protect digital consumers from their excessive monopolistic powers.

American lawmakers that are part of the House Judiciary Committee said they found multiple problems with each of the four giant tech companies, which been accused of having abused their dominant position in the digital frontier, by dictating prices and commercial rules, research engines, advertisements, social network and editorial services.

Indeed, the American Subcommittee on Antitrust, Commercial and Administrative Law has conducted an investigation of competition in digital markets regarding the four Big Tech firms:

"In June 2019, the Committee on the Judiciary initiated a bipartisan investigation into the state of competition online, spearheaded by the Subcommittee on Antitrust, Commercial and Administrative Law. As part of a top-to-bottom review of the market, the Subcommittee examined the dominance of Amazon, Apple, Facebook, and Google, and their business practices to determine how their power affects our economy and our democracy. Additionally, the Subcommittee performed a review of existing antitrust laws, competition policies, and current enforcement levels to assess whether they are adequate to address market power and anticompetitive conduct in digital markets. Over the course of our investigation, we collected extensive evidence from these companies as well as from third parties—totaling nearly 1.3 million documents. We held seven hearings to review the effects of market power online—including on the free and diverse press, innovation, and privacy—and a final hearing to examine potential solutions to concerns identified during the investigation and to inform this Report's recommendations. A year after initiating the investigation, we received testimony from the Chief Executive Officers of the investigated companies: Jeff Bezos, Tim Cook, Mark Zuckerberg, and Sundar Pichai. For nearly six hours, we pressed for answers about their business practices, including about evidence concerning the extent to which they have exploited, entrenched, and expanded their power over digital markets in anticompetitive and abusive ways. Their answers were often evasive and non-responsive, raising fresh questions about whether they believe they are beyond the reach of democratic oversight. Although these four corporations differ in important ways, studying their business practices has revealed common problems. First, each platform now serves as a gatekeeper over a key channel of distribution. By controlling access to markets, these giants can pick winners and losers throughout our economy. They not only wield tremendous power, but they also abuse it by charging exorbitant fees, imposing oppressive contract terms, and extracting valuable data from the people and businesses that rely on them. Second, each platform uses its gatekeeper position to maintain its market power. By controlling the infrastructure of the digital age, they have surveilled other

businesses to identify potential rivals, and have ultimately bought out, copied, or cut off their competitive threats. And, finally, these firms have abused their role as intermediaries to further entrench and expand their dominance. Whether through self-preferencing, predatory pricing, or exclusionary conduct, the dominant platforms have exploited their power in order to become even more dominant. To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons. Although these firms have delivered clear benefits to society, the dominance of Amazon, Apple, Facebook, and Google has come at a price. These firms typically run the marketplace while 7 also competing in it—a position that enables them to write one set of rules for others, while they play by another, or to engage in a form of their own private quasi regulation that is unaccountable to anyone but themselves. The effects of this significant and durable market power are costly. The Subcommittee's series of hearings produced significant evidence that these firms wield their dominance in ways that erode entrepreneurship, degrade Americans' privacy online, and undermine the vibrancy of the free and diverse press. The result is less innovation, fewer choices for consumers, and a weakened democracy. Nearly a century ago, Supreme Court Justice Louis Brandeis wrote: "We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we cannot have both." Those words speak to us with great urgency today. Although we do not expect that all of our Members will agree on every finding and recommendation identified in this Report, we firmly believe that the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform. These firms have too much power, and that power must be reined in and subject to appropriate oversight and enforcement. Our economy and democracy are at stake. As a charter of economic liberty, the antitrust laws are the backbone of open and fair markets. When confronted by powerful monopolies over the past century—be it the railroad tycoons and oil barons or Ma Bell and Microsoft—Congress has acted to ensure that no dominant firm captures and holds undue control over our economy or our democracy. We face similar challenges today. Congress—not the courts, agencies, or private companies—enacted the antitrust laws, and Congress must lead the path forward to modernize them for the economy of today, as well as tomorrow. Our laws must be updated to ensure that our economy remains vibrant and open in the digital age. Congress must also ensure that the antitrust agencies aggressively and fairly enforce the law. Over the course of the investigation, the Subcommittee uncovered evidence that the antitrust agencies failed, at key occasions, to stop monopolists from rolling up their competitors and failed to protect the American people from abuses of monopoly power. Forceful agency action is critical. Lastly, Congress must revive its tradition of robust oversight over the antitrust laws and increased market concentration in our economy. In prior Congresses, the Subcommittee routinely examined these concerns in accordance with its constitutional mandate to conduct oversight and perform its legislative duties. As a 1950 report from the then-named Subcommittee on the Study of Monopoly Power described its mandate: "It is the province of this subcommittee to investigate factors which tend to eliminate competition, strengthen monopolies, injure small business, or promote undue 8 concentration of economic power; to ascertain the facts, and to make recommendations based on those

findings." 1 Similarly, the Subcommittee has followed the facts before it to produce this Report, which is the product of a considerable evidentiary and oversight record. This record includes: 1,287,997 documents and communications; testimony from 38 witnesses; a hearing record that spans more than 1,800 pages; 38 submissions from 60 antitrust experts from across the political spectrum; and interviews with more than 240 market participants, former employees of the investigated platforms, and other individuals totaling thousands of hours. The Subcommittee has also held hearings and roundtables with industry and government witnesses, consultations with subject-matter experts, and a careful—and at times painstaking—review of large volumes of evidence provided by industry participants and regulators. In light of these efforts, we extend our deep gratitude to the staff of the Subcommittee and Full Committee for their diligent work in this regard, particularly during the COVID-19 pandemic and other challenging circumstances over the past year. Finally, as an institutional matter, we close by noting that the Committee's requests for information from agencies and any non-public briefings were solely for the purpose of carrying out our constitutionally based legislative and oversight functions. In particular, the information requested was vital to informing our assessment of whether existing antitrust laws are adequate for tackling current competition problems, as well as in uncovering potential reasons for under-enforcement. The Report by Subcommittee staff is based on the documents and information collected during its investigation, and the Committee fully respects the separate and independent decisional processes employed by enforcement authorities with respect to such matters. Although the companies provided substantial information and numerous documents to the Subcommittee, they declined to produce certain critical information and crucial documents we requested. The material withheld was identified by the Committee as relevant to the investigation and included, primarily, two categories of information: (1) documents the companies' claimed were protected by common law privileges; and (2) documents that were produced to antitrust authorities in ongoing investigations, or that related to the subject matter of these ongoing investigations. Institutionally, we reject any argument that the mere existence of ongoing litigation prevents or prohibits Congress from obtaining information relevant to its legislative and oversight prerogatives. We strongly disagree with the assertion that any requests for such materials and any compliance with those requests interfere with the decisional processes in ongoing investigations. Furthermore, while Congress is fully subject to constitutional protections, we cannot agree that we are bound by common 1 H. REP. NO. 255, at 2 (1951) (Aluminum: Report of the Subcomm. On Study of Monopoly Power of the H. Comm. on the Judiciary). 9 law privileges as asserted by the companies. While we determined that insufficient time exists to pursue these additional materials during this Congress, the Committee expressly reserves the right to invoke other available options, including compulsory process, to obtain the requested information in the future. The views and conclusions contained in the Report are staff views and do not necessarily reflect those of the Committee on the Judiciary or any of its Members."[34]

[34] Jerrold Nadler, David N. Cicilline, Investigation of competition in digital markets, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519, U.S House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law, October 2020, United States, pages 6-9. (Nadler & Cicilline, 2020)

The inquiry conducted by the House Judiciary Antitrust Subcommittee on Antitrust, Commercial and Administrative Law is one of the most important report regarding competition in digital markets. The Report's 459 pages contain detailed case studies of Amazon, Apple, Facebook and Google, a set of policy recommendations and an appendix of mergers and acquisitions undertaken by the four companies.

The deeper aim of this inquiry is not only about the antitrust treatment of big tech firms, but rather to call for basic changes in the American antitrust regime as a whole.

Indeed, the Majority Staff Report is the joining up of two documents: the collection of the case studies of the above-mentioned companies that will serve as an important reference for years to come, and the body of recommendations set out with various levels of completeness.

In this sense, it can be said that the last pages of the Report are considered a new starting point for new deliberations at whose base are the institutional foundations of the U.S. antitrust regime[35].

The four firms have transformed themselves from brave start-ups to monopolies that, if the one side brought clear social benefits, on the other one produced huge costs for competing businesses.[36]

They have been declared as dominant in the decision-making process of the whole economy and society. They control data markets and online retailing by imposing their strategies and abusing their dominant position. This is considered a way too high power that is actually damaging and destroying competition and violating users' privacy. De facto, those Big Tech firms can be compared to a State.[37]

They abused such dominant position so much that they have been called "self-proclaimed gatekeepers".

Amazon has been accused of abusing its dominant position in the e-commerce: here the firm sells products that directly compete with independent retailers that use Amazon's platform. Moreover, the firm promotes its own services at other businesses' expenses. Indeed, more than 2.3 million retailers sell through Amazon, which account up to 37% sources of entry for the firm.

Apple is believed to be a monopolist in the market of apps for iPhones and iPads, a reality able to earn up to 30% of commissions while selling apps on its AppStore. This, obviously, damaged not only developers, but also consumers, who found themselves paying higher prices for the download of the apps.

Facebook's excessive control in the social networking world has been enforced by its continuous acquisition of rivals, such as WhatsApp and Instagram, or imitations of its rivals' products, such as Snapchat.

Finally, Google has been accused of its monopolistic actions in the search and display advertising and the related data collection. It has been demonstrated that the firm had used anticompetitive conducts such as the

[35] William E. Kovacic, D. Daniel Sokol, Understanding the House Judiciary Committee Majority Staff Antitrust Report, https://ssrn.com/abstract=3765627, January 2021. (Kovacic & Sokol, SSRN, 2021)

[36] Mike Isaac, Steve Lohr, Jack Nicas and Daisuke Wakabayashi, 12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google, The New York Times, October 6, 2020, updated October 20, 2020. (Isaac, Lohr, Nicas, & Wakabayashi, 12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google, 2021)

[37] Jaime D'Alessandro, Il Congresso mette sotto accusa i grandi dell'hi-tech: Amazon, Apple, Facebook e Google, La Repubblica, July 29, 2020. (D'Alessandro, 2020)

insertion of information without the permission of third parts in order to improve the quality and the outcomes of users' research.

Obviously, the four Big-Tech firms have reacted to these accusations. Apple and Google declared that they want to study the report, while Amazon stated that its practice is not meant to damage millions of retailers, but rather to help small businesses gain more visibility through online stores. For what regards Facebook, the firm stated that acquisitions are part of every sector and represent the way it is possible to bring on new technologies and value to final users[38].

3.1. Amazon

As previously mentioned, Amazon uses its market power as the leading online retailer and e-commerce marketplace. The firm, hence, is able to set the rules for about 2.3 million third-party sellers that operate within Amazon's marketplace at international level.

Amazon is able to elaborate all the data given by third parties in order to produce and offer its own Amazon-brand competing products at lower prices[39].

Market participants that depend on Amazon's retail platform are forced to accept the firm's demand, even in markets where Amazon would otherwise lack the power to set the terms of commerce.

The problem of Amazon's anticompetitive conduct can be summarised in one phrase: Amazon is running too many businesses at once[40].

Amazon is being accused of abusing its dominant double position as online retailer and e-commerce marketplace by systematically exploiting information derived from private assets of data collected by enterprises that are attributable to independent vendors working in Amazon's marketplace. In this way, Amazon is able to gain advantages for its own selling at the expenses of third parties.

Moreover, according to the accusations, Amazon is using one of the most well-known anticompetitive practices, that is, predatory pricing. It is an illicit tariff strategy that consists in an initial lowering of prices of the firm's goods and services in order to make them highly competitive. The scope of this lowering of prices is to limit, and in some cases even destroy, competition, which will enable the firm to subsequently raise prices in order to make markets more vulnerable to monopolies.

[38] Marco Valsania, Big-Tech, il rapporto antitrust del Congresso USA prescrive la fine dei monopoli, Il Sole 24 Ore, October 7 2020. (Valsania, 2020)

[39] Mike Isaac, Steve Lohr, Jack Nicas and Daisuke Wakabayashi, 12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google, The New York Times, October 6, 2020, updated October 20, 2020. (Isaac, Lohr, Nicas, & Wakabayashi, 12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google, 2020)

[40] Russell Brandom, What Google, Apple, Amazon and Facebook have at stake in the antitrust fight, The Verge, October 8, 2020. (Brandom, What Google, Apple, Amazon and Facebook have at stake in the antitrust fight, 2020)

In addition, Amazon has been accused of reserving preferential treatments with its fidelity programme "Prime" towards its own products and to the ones of the vendors present on the market who use Amazon's logistic services[41].

These aspects are extremely relevant, especially in Europe, where they will be disciplined in the new laws that the European Commission has announced to implement as part of the European Digital Strategy capable of upgrading the rules governing digital services in the EU, the Digital Services Act (DSA) and the Digital Markets Act (DMA), which will be discussed in chapter 7 of this thesis.

3.2. Apple

Apple is able to exert its monopoly power in the mobile app store market, which leads to harms to competitors by reducing quality and innovation among app developers and increasing prices and reducing choices for consumers[42].

With its monopoly on the app marketplace, Apple was able to charge a 30% commission on the majority of the apps present in the AppStore, forcing developers to raise prices for consumers. Moreover, Apple is able to modify the rankings of its rivals in search results, leading to a worsening in customers' communication, or even to remove them from the store. This is possible for the firm thanks to its shady rules, which leave developers few possibilities to complain. In this context of anticompetitive conduct, Apple is able to favour its own apps and services on the devices it sells, that is mainly iPhones and iPads, by pre-installing them and enabling them as default options. This practice has, obviously, consequences also for final users, who are not allowed anymore to choose cheaper alternatives in the market, altering competition and leading to a forced increase of prices in other developers' apps[43].

Moreover, in Italy, the AGCM has fined Apple for €10 million for two anticompetitive practices.

The first is about the diffusion of deceptive advertisements of waterproof iPhones, in which it was not made clear that their ability of being waterproof was able only with specific water conditions, present only in tests made in laboratories and not in normal users' conditions. In addition, the indications present in the disclaimer[44] have been considered as misleading consumers because they did not clarify which type of guarantee it refers to, conventional or legal one, and were not deemed capable of adequately contextualising the conditions and limitations of the assertive claims of water resistance.

[41] Alessia Carbonara, Amazon e Antitrust: l'indagine sul colosso dell'e-commerce, iusinitinere.it, February 16, 2021, updated April 25, 2021. (Carbonara , 2021)

[42] Russell Brandom, What Google, Apple, Amazon and Facebook have at stake in the antitrust fight, The Verge, October 8, 2020. (Brandom, What Google, Apple, Amazon and Facebook have at stake in the antitrust fight, 2020)

[43] Mike Isaac, Steve Lohr, Jack Nicas and Daisuke Wakabayashi, 12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google, The New York Times, October 6, 2020, updated October 20, 2020. (Isaac, Lohr, Nicas, & Wakabayashi, 12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google, 2020)

[44] "The guarantee does not cover damage caused by liquids".

The second anticompetitive practice considered by the AGCM was the refusal to provide warranty assistance when those iPhone models were damaged due to the introduction of water or other liquids, thus hindering the exercise of the rights recognised to them by the law regarding the guarantee or by the Consumer Code[45].

3.3. Facebook

Facebook's monopoly power in social networking is based on strategic acquisitions and copying mechanisms of other companies' products. Because of the huge lack of competition that the firm was able to create, user's privacy has been damaged and misinformation has spread across all of the company's services used by more than three billion people each day.

Facebook has been accused of deceptively inducing consumers to register on its platform without first informing them about the collection activity of personal data with commercial scopes. Moreover, the information provided by Facebook have been considered too generic and incomplete and did not give a proper definition of the data necessary for personalising the experience and the ones necessary to create specific advertising campaigns[46].

In addition, in USA, the Federal Trade Commission accused Facebook of buying up competitors, specifically Instagram and WhatsApp, to wipe out competition in the social media industry.

Moreover, in this coronavirus pandemic context, the firm is seeing an opportunity to expand its position as a shopping platform with Marketplace for small businesses that have been forced to close their physical locations due to the pandemic.

Still, the core concern for antitrust authorities is the acquisition of Instagram and WhatsApp, which represented major competitors for Facebook. With these two giant acquisitions, the firm was able to consolidate its direct control over a vast portion of the social media landscape and, at the same time, to establish an even-closer data integration between the integrated platforms[47].

In addition, Facebook has engaged in the systematic strategy of imposing anticompetitive conditions on software developers to eliminate threats to its monopoly. Obviously, this conduct, together with the acquisition of the previously mentioned companies, leaves consumers with fewer choices for personal social networking and deprives advertisers of benefitting from competition. This unmatched position as world's dominant personal social networking service has provided Facebook with profits of more than $18.5 billion in 2019.

There are strong network effects associated with Facebook that have tipped the market toward monopoly such that the firm competes way more among its own products, such as Instagram and WhatsApp, rather than with actual competitors.

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[45] Apple, multa di 10 milioni dall'Antitrust per pubblicità ingannevole sugli iPhone, Il Sole 24 Ore, November 30, 2020. (Apple, multa da 10 milioni dall'Antitrust per pubblicità ingannevole sugli iPhone, 2020)

[46] Facebook, multa da 7 milioni dall'Antitrust: "Pratica scorretta sui dati degli utenti", La Repubblica, February 17, 2021. (Facebook, multa da 7 milioni dall'Antitrust: "Pratica scorretta sui dati degli utenti", 2021)

[47] Kelly Anne Smith, What You Need To Know About The Facebook Antitrust Lawsuit, Forbes, January 28, 2021. (Smith, 2021)

For what regards anticompetitive conditions imposed on third-party software developers', Facebook allegedly has made key APIs (Application Programming Interfaces) available to third-party applications only if they refrain from developing specific competing functionalities linked to the promotion or connection to other social networking services[48].

3.4. Google

Google has a monopoly in general online search and search advertising markets, which was possible to reach thanks to high entry barriers, such as click-and-query data[49] and the extensive default positions obtained with most of the world's devices and browsers. A huge number of firms depend on Google's traffic and no alternative search engines act as substitutes[50].

Google has been able to maintain its search monopoly by exploiting information received from third parties without any permission to improve its search results. Moreover, it also introduced some changes in its search engine to hamper competitors' offerings.

The monopoly has also forced smartphone makers to install Google search in order to use its Android software and have access to its Google Play app store and pays Apple billions of dollars to be used as the search engine for its products[51].

Due to this monopolistic position obtained by the firm, on October 28, 2020, the Italian competition Authority, the AGCM, has opened an antitrust investigation into Google's display and business, questioning the discriminatory use of huge amounts of data which have been collected through its various applications, preventing rivals from competing effectively and affecting consumers at the same time.

This move by the AGCM comes as Google is being sued by the US Department of Justice, which filed an antitrust case on October 20, 2020, alleging Google has unlawfully maintained a monopoly position in the markets for search and display advertising in the United States.

Google's dominance of the online ad marked can lead to competition risks that might even shut the door on third party data trackers while maintaining its own lucrative access to internet users' data. Indeed, Google has previously been found to be dominant in search by the European Commission, hence the AGCM has suggested that the firm's conduct might lead to significant changes on competition across the digital advertising space and to significant repercussions on both competitors and consumers. What concerns the Italian Authority the

[48] FTC Sues Facebook for Illegal Monopolization, Federal Trade Commission, https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization, December 9, 2020. (FTC Sues Facebook for Illegal Monopolization, 2020)

[49] The number of clicks to a website per search query.

[50] Russell Brandom, What Google, Apple, Amazon and Facebook have at stake in the antitrust fight, The Verge, October 8, 2020. (Brandom, What Google, Apple, Amazon and Facebook have at stake in the antitrust fight, 2020)

[51] Mike Isaac, Steve Lohr, Jack Nicas and Daisuke Wakabayashi, 12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google, The New York Times, October 6, 2020, updated October 20, 2020. (Isaac, Lohr, Nicas, & Wakabayashi, 12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google, 2020)

most, is that the lack of competition in digital advertising might reduce the allocative efficiency[52] of online resources, thus impoverishing the quality of contents directed to end users[53].

In addition, on May 13, 2021, Google has been fined more than €100 million by the AGCM in Italy for abuse of dominant position and, hence, the violation of Article 102 TFEU. Indeed, thorough its Android operating system and its Google Play store, Google has a dominant position that enables the firm to directly control the access of apps developers to final users.

According to the Italian Authority's findings, Google has not allowed the JuicePass app to interoperate with Android Auto, a specific Android feature that allows apps to be used when the user is driving in compliance with safety and traffic reduction requirements. JuicePass allows a wide range of functional services for charging electric vehicles, ranging from finding a charging station to managing the charging; this last function guarantees the actual availability of the infrastructure once the user has reached it.

Google, by refusing Enel X Italia to make JuicePass available on Android Auto, has unfairly limited the possibilities for users to use the Enel X Italia app when they are driving an electric vehicle and need to recharge it. In this way, the firm has favoured its own Google Maps app, which can be used on Android Auto; the continuation of this conduct could definitely compromise the possibility for Enel X Italia to build a solid user base, cause a reduction in consumer choice and become an obstacle to technological progress.

The AGCM, therefore, required Google to make tools for programming interoperable apps with Android Auto available to Enel X Italia, as well as other app developers, and will monitor the effective and correct implementation of the obligations imposed by using an independent export responsible for the implementation and monitoring of the obligations imposed on which Google must provide all the collaboration and information requested[54].

[52] The allocation of a factor across economic units is said to be economically efficient if, at the price that the market of that factor supplies, all economic units equal the marginal revenue product of that factor to its cost.

[53] Natasha Lomas, Google's display advertising business is under antitrust probe in Italy, techcrunc.com, October 28, 2020. (Lomas, 2020)

[54] A529 – Sanzione di oltre 100 milioni di euro a Google per abuso di posizione dominante, Autorità Garante Della Concorrenza E Del Mercato, https://www.agcm.it/media/comunicati-stampa/2021/5/A529, May 13, 2021. (A592 - Sanzione di oltre 100 milioni di euro a Google per abuso di posizione dominante, 2021)

4. Italy: AGCM's A542 lawsuit against Google for the abuse of its dominant position in the Italian market of display advertising.

On October 27, 2020, the Italian Competition Authority, the Autorità Garante Della Concorrenza e Del Mercato (AGCM), with the aid of Guardia di Finanza, opened an investigation against Google for an alleged abuse of dominant position in the Italian market for display advertising.

Google is controlled by Alphabet Inc, whose 2019 revenues worldwide are shown in the tables below in millions of dollars.

	Year Ended December 31,		
	2017	2018	2019
Google Search & other	$ 69,811	$ 85,296	$ 98,115
YouTube ads[1]	8,150	11,155	15,149
Google properties	77,961	96,451	113,264
Google Network Members' properties	17,616	20,010	21,547
Google advertising	95,577	116,461	134,811
Google Cloud	4,056	5,838	8,918
Google other[1]	10,914	14,063	17,014
Google revenues	110,547	136,362	160,743
Other Bets revenues	477	595	659
Hedging gains (losses)	(169)	(138)	455
Total revenues	$ 110,855	$ 136,819	$ 161,857

(1) YouTube non-advertising revenues are included in Google other revenues.

	Year Ended December 31,					
	2017		2018		2019	
United States	$ 52,449	47%	$ 63,269	46%	$ 74,843	46%
EMEA[1]	36,236	33	44,739	33	50,645	31
APAC[1]	16,192	15	21,341	15	26,928	17
Other Americas[1]	6,147	5	7,608	6	8,986	6
Hedging gains (losses)	(169)	0	(138)	0	455	0
Total revenues	$ 110,855	100%	$ 136,819	100%	$ 161,857	100%

(1) Regions represent Europe, the Middle East, and Africa (EMEA); Asia-Pacific (APAC); and Canada and Latin America (Other Americas).

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In 2019, in Italy, online advertising was worth more that 3.3 billion euros, accounting up to 22% of the resources in the media sector, and display advertising generated more than 1.2 billion euros in that same year. In this sense, these two types of advertising represent the most important sources of revenue in the media sector.

The Italian Authority points at issue the discriminatory use of data collected thanks to Google's applications, which allegedly prevent its rivals from competing in an effective way, as well as negatively affecting consumers.

[55] Alphabet Inc., Annual Report, Form 10-K, https://abc.xyz/investor/static/pdf/2019_alphabet_annual_report.pdf?cache=c3a4858, For the Fiscal Year Ended December 31, 2019. (Alphabeth Inc., Annual Report, Form 10-K, 2019)

Google, controlled by Alphabet Inc, is being accused of having violated Article 102 of the Treaty on the Functioning of the European Union and Art. 3 Law No. 287/90[56] with regard to the usage of data collected for the design of display advertising campaigns, which are the spaces made available by online publishers and website owners for the display of advertising content.

For display advertising we mean the making available to advertisers, managers and websites owners of online spaces for the placement and display of formats and creativity in fixed or mobile modes, such as advertising banners.

The markets in which it is possible the acquisition of personal data allow an almost perfect identification of the users who see the advertisement. Those markets include: the market for available smart operating systems under licence, the markets for Internet browsers on pc and the markets for browsers for Internet browsing on mobile devices not dependent on specific operating systems. They are extremely relevant for purposes of the acquisition of the users' data[57].

What concerns the most the Authority is the discriminatory use of the huge amount of data collected through its various applications, which allowed the firm to prevent its online advertising rivals from effectively competing.

In details, Google engaged in an internal/external discriminatory conduct, which consists in the refusal to provide its competitors with Google ID decryption keys and to exclude third-party tracking pixels.

Contemporary, the company used tracking elements that allowed its advertising intermediation services to achieve a targeting capacity that is not replicable by equally efficient competitors.

With the aid of cookies, banners, pop-ups and many other forms of advertising in almost every website that can be visited, advertisers, agencies and advertising intermediaries are able to acquire users' buying choices, allowing for subsequent customised campaigns that are of interest to the final consumers.

Google was able to customise users' experience thanks to its multiple tools, including the Android mobile operating system, which is installed on most smartphones used in Italy, the Chrome mobile device browser, the Chrome personal computer browser, Google Maps, as well as all other services provided through Google ID, such as Gmail, Drive and YouTube.

For the purposes of applying Article 102 of the TFEU, the dominant position consists in the situation of economic power that allows the company to hinder the persistence of one effective competition in relevant markets and to act independently from its competitors, customers and consumers[58].

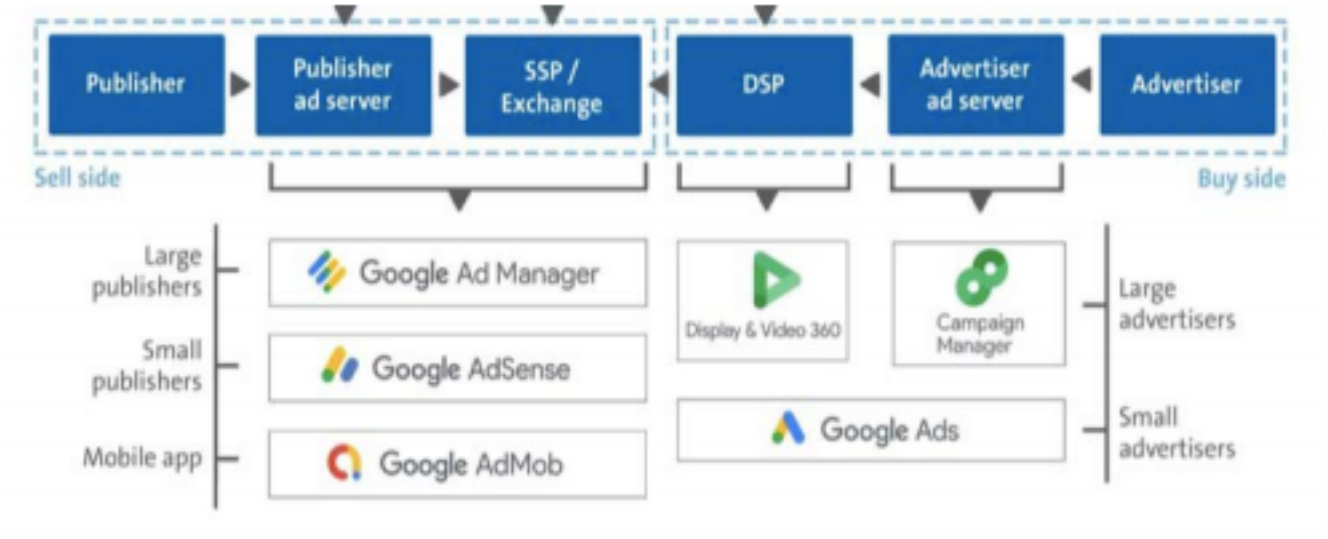
In the case of Google, it is necessary to take into account also the individual markets in which online advertising is divided.

The image below shows the role of Google in the intermediation of online advertisement:

[56] See Chapter 2 of this thesis for these definitions.

[57] Autorità Garante della Concorrenza e del Mercato, A542 provision's text, pages 1-16, https://www.agcm.it/dotcmsdoc/allegati-news/A542_avvio%20istruttoria.pdf, October 28, 2020 (AGCM, A542 testo del provvedimento, 2020)

[58] Autorità Garante della Concorrenza e del Mercato, A542 provision's text, page 16, https://www.agcm.it/dotcmsdoc/allegati-news/A542_avvio%20istruttoria.pdf, October 28, 2020 (AGCM, A542 testo del provvedimento, 2020)



According to IAB[59]'s estimates, Google holds more that 80-90% in the provision of ad server services, both side advertisers and publishers and the provision of SSP[60] and DSP[61] services.

Together with the market share held by the company, there are even more elements that consolidate Google's absolute dominant position, which reside in the vertical and conglomerate integration model adopted by the firm in network effects and economies of scale, as well as the presence of entry barriers and an unparalleled ability to access data.

In this regard, it should be emphasised how the Big Data availability is just one of several contributing factors to the high degree of concentration and the existence of barriers to entry into digital markets. Indeed, other factors including economies of scale and of scope and network externalities continue to play an important role in explaining market power. It is about aspects that are not new in the antitrust analysis, but that acquire particular importance in digital markets, for the effects that they are able to exert on competitive dynamics.

In fact, the conduct in question is strictly connected to the circumstance that the use of Big Data, especially the collection and combination of data of different nature, determine network effects that are capable of generating greater capacity of value creation towards advertisers, bringing the entire market to determine in favour of a specific platform, called "market tipping", consolidating its position[62].

In addition to network effects, the presence of significant economies of scale and scope can contribute to determining the structure of the markets. In the digital sector, indeed, high fixed costs, that can often be exceptionally high and unrecoverable (i.e., sunk costs), are accompanied by reduced, or even zero, variable costs. A further element that can significantly affect the competitive process is given by the eventual presence of switching costs, that is, technical and/or economic limitations that might hinder users the possibility of

[59] The Interactive Advertising Bureau (IAB) is an advertising business organization whose objective is to develop industry standards, conduct research and provide legal support for the online advertising industry.

[60] The Supply Side Platforms are active subjects in the supply of technological instruments that allow editors to proceed to the sale of their advertising spaces according to an automatic allocative mechanism.

[61] The Demand Side Platforms are firms that give technological instruments that enable media agencies and advertisers to access to the negotiations of advertising spaces in an automated way.

[62] IC53, Indagine conoscitiva sui Big Data, AGCM, AGCOM, Garante per la Protezione dei Dati Personali, https://www.agcm.it/dotcmsdoc/allegati-news/IC_Big%20data_imp.pdf, page 72, February 10, 2020. (AGCM, AGCOM, & Garante per la Protezione dei Dati Personali, Indagine Conoscitiva sui Big Data, 2020)

changing supplier. This can happen, for example, due to the absence of interoperability between systems of competing operators, generating phenomena of lock-in, or due to the low propensity of users to change supplier due to the existence of significant network effects.

From the elements illustrated in the report and from the considerations previously mentioned regarding the structure and the characteristics of the relevant markets, it is possible to hypothesise that Google, a vertically integrated subject, present in different markets that compose the online advertising chain, has engaged in commercial conducts that might be able to hinder its non-integrated competitors and to maintain and strengthen its market power in display advertising, as well as in individual markets into which it must be segmented, in violation of Article 102 of TFEU.

As indicated before, the use of profiling data is a crucial element in the planning of advertising campaigns. In the markets of online advertising, the targeting capacity of the subjects is superior with respect to traditional means, as it is possible to have access to more profiling data.

In this sense, online advertising allows companies to engage in intermediation activities in a more deterministic way rather than a probabilistic one, allowing to identify with great precision subjects that view the advertising message. That said, Google would have engaged in an internal/external discriminatory conduct, consisting in the refusal to provide the Google ID's decryption keys and in the exclusion of the possibility of tracking of third-party pixels.

Such conducts are capable of determining restrictive effects of competition, insofar as the refusal to provide such tools determines an unjustified competitive advantage. In particular, from the set of elements provided, it seems to emerge the hypothesis of an overall behaviour aimed at determining an internal/external discrimination in the use of data, to the detriment of active operators in display advertising located in the Italian territory.

At the same time as Google refuses to provide the decrypted IDs of users and to grant pixel tracking by third parties, Google's competitor operators in the offer of SSP, DSP and ad server services are not more able to associate the activity of a user within the "Google System", intended as intermediated advertisements by means of Google services, with respect to the activity of the same user outside of that said system.

Indeed, it should be noted that Google can observe user activities through the multiplicity of the services offered, where use by users of even a single Google service implies the granting of a consent to the processing of data for the entire Google ecosystem. This ability is precluded to the company's competitors as a direct consequence of the conducts in question, which make the activities of users "opaque" and therefore not detectable in a determined manner in an extremely relevant portion of advertising markets.

It follows that, if an advertiser wanted to use a DSP service and Google Ad server, such inability to interoperate in tracking makes the competing service more expensive, as it cannot reduce the redundant advertisements.

Since the failure to provide decrypted IDs and the refusal of access to third party pixels do not allow us to understand whether an advertisement is being viewed by a generic user in the Google system, it will be necessary to employ an increased number of ads to achieve a given advertising coverage, thus creating a

competitive disadvantage for competitors' services consisting in the need to request more advertising passes in order to reach a specific target.

On the contrary, Google, by leveraging on Android devices, on services linked to Google ID and on Chrome browsers for both PCs and mobile devices, is able to acquire data from different non-replicable sources and to associate users' behaviour within and outside the Google System. This is achieved due to the fact that Google can monitor the activity outside the system through the data extracted from the use of different services and devices. This conduct is also reflected on the SSP and Ad server sides of sale, as tracking capabilities also affect the probability of sale of the advertising space and its value, hence favouring the services of Google.

For the collection of data used by its divisions in order to operate an accurate profiling of the recipients of display advertising campaigns, Google uses several tools, such as Gmail and Drive, that allow to reconstruct in a detailed way the activity of the subjects to whom advertising messages should be directed. These tools, offered by Google in the markets in which it holds a dominant position, make it possible to have a set of high-quality data about the characteristics of the subjects viewing advertising spaces, and to obtain from their combination an accurate profiling of the activities carries out on Internet from the target audience, regardless of the circumstances that such activity directly relates to a Google service.

In this regard, it can be noted that such data are collected for services way different that those that typically characterise the online advertising offer, provided that they are not acquired through the user's navigation on sites that offer contents in exchange for advertising, but through very different channels not available to operators active in display advertising, such as the smartphones' operating systems or search web browsers installed on computers which together make up the Google ecosystem. Such services are unrelated to publishing and advertising mediation activities, concerning, in fact, extremely different services. Google's behaviour consists in not allowing third party operators to associate the decrypted Google ID and to use third party tracking pixels, allowing, at the same time, to its own internal divisions to combine the data acquired through services offered in markets in which it holds a dominant position, with the scope of tracking user behaviour in a ubiquitous way. Hence, in this way, the firm could integrate an excluding type of abusive conduct.

The conduct put in place by Google allows it to maintain the ability to offer services in the markets above mentioned under non-replicable conditions and modalities that cannot be replicated by competitors, such as to represent an unjustified competitive advantage. By leveraging data obtained through these tools that are not accessible to third parties, Google allows to its own Google Marketing Platform (i.e., its DSP) and its own Google Ad Manager (SSP) to have great performance in terms of capacity of targeting and identification of users viewing advertisements that are not otherwise reachable by other operators in the market. Indeed, the internal divisions of Google can know if a user has viewed a particular advertisement and, therefore, increase its tracking capacity. The optimisation of the intermediation in the sale of advertising in the display advertising market is precluded to competitors as efficient, as Google does not allow, by not providing the decrypted ID and allowing the use of tracking pixels, to associate the activity of a specific user within and outside the Google

System. It is a discriminatory behaviour between internal divisions and competitors that consists in the combination of users' information through services and products in which Google holds a dominant position[63].

The anticompetitive conducts investigated by the AGCM may have a significant impact on digital advertising competition, with repercussions both on competitors and final consumers. Indeed, a lack of competition in this sector can be able to hurt efficient allocation of resources to website producers and publishers, which, in turn, might lead to the impoverishment of the quality of the contents directed to final users. In addition, the absence of a merit-based competitions is also able to discourage technological innovation for the development of advertising technologies that are less intrusive for consumers[64].

If the Italian Competition Authority will find evidence of the abuse of dominant position, the Codacons[65] will start a legal action against the web colossus on behalf of all the Italian users, who are directly interested in the event. Indeed, when a user opens a web page, he is targeted by a barrage of unsolicited, invasive and harassing advertisements, increasingly personalised on the basis on the information that Google collects every time we access to Internet[66].

Google's spokesman in the investigation replied to the accusations by saying that digital advertising is absolutely necessary because it allows firms to find consumers and supports websites and content creators appreciated by all users. The actions taken into consideration in the investigation are in part measures to protect users' privacy and to respond to the requisites of the GDPR[67].
In addition, the spokesman added that Google will continue to work in a constructive way with the Italian authorities so that everybody can totally benefit from Internet's usage[68].

The investigation that the AGCM has initiated against Google for the abuse of dominant position in the field of online advertising, in addition to arouse strong concerns, reveals the many shadows present in this matter.

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[63] Autorità Garante della Concorrenza e del Mercato, A542 provision's text, pages 16-25, https://www.agcm.it/dotcmsdoc/allegati-news/A542_avvio%20istruttoria.pdf, October 28, 2020 (AGCM, A542 testo del provvedimento, 2020)
[64] A542 – ICA: investigation opened against Google for an alleged abuse of dominant position in the Italian market for display advertising, press release, https://www.agcm.it/media/comunicati-stampa/2020/10/A542, Rome, 28th October 2020. (AGCM, ICA: investigation opened against Google for an alleged abuse of dominant position in the Italian market for display advertising, press release, 2020)
[65] Coordinamento delle Associazioni per la Difesa dell'Ambiente e la Tutela dei Diritti di Utenti e Consumatori.
[66] Comunicato stampa, Google: antitrust apre istruttoria per abuso di posizione dominante, https://codacons.it/google-antitrust-apre-istruttoria-per-abuso-di-posizione-dominante/, October 28, 2020. (Codacons, 2020)
[67] The General Data Protection Regulation (GDPR) is a privacy and security law put into effect on May 25, 2018. It imposes obligations onto organisations anywhere, so long as they target or collect data related to people in the EU and will levy harsh fines against those who violate its privacy and security standards, with penalties reaching into the tens of millions of euros. https://gdpr.eu/what-is-gdpr/ (Wolford, s.d.)
[68] Google e i nostri dati: l'Antitrust apre istruttoria per abuso di posizione dominante, Il Sole 24 Ore, https://www.ilsole24ore.com/art/pubblicita-online-l-antitrust-apre-istruttoria-google-AD5RLky?refresh_ce=1, 28th October 2020. (Google e i nostri dati: l'Antitrust apre istruttoria per abuso di posizione dominante, 2020)

Not only is extremely alarming the amount of data and information that those who work in this sector are able to collect about users, but the fact that such data are concentrated in the hand of a few operators.

The one addressed by the Italian Competition Authority is a matter of primary importance, in which, however, the user is often overshadowed. Federconsumatori[69] has declared of having understood the need to address the discriminatory aspects on an economic and competitive level, but it is convinced that it is not possible to talk about online advertising without considering the abuses committed to the detriment of citizens' privacy. The targeting and the profiling of users must be carried out in compliance with the privacy and transparency regulations: there are still too many irregularities, doubts and incorrectness that overshadow this matter.
Federconsumatori also added that users, increasingly aware of these dynamics and the risks connected to them, often report doubts about applications and devices in their possession, starting with those relating to the smart home. This is even more relevant if we take into consideration the massive use of smart working due to the pandemic.
Since more stringent needs arise in terms of privacy protection, as well as the possession and safeguarding of data, the debate on the construction of a European platform for big data is becoming increasingly topical. It is a fundamental operation if we do not want to remain relegated to marginality in the geopolitical scenarios and to prevent Europe from being squeezed between overbearing ambitions of domination of the infosphere opened between the US and China.
A radical change is also needed in the conception of these issues: correct competition and transparency are welcome, but it is appropriate to put the citizen back at the fore and analyse, in this new perspective, the manipulations and the distorted or illicit uses that such data can be made potentially compromising every area of our life, from health, to work, and to the social sphere[70].

The probe acted by the AGCM follows a complaint by a local ad lobby group, the IAB Italy, which was welcomed by Angela Mills Wade, executive director of the European Publishers' Council, who declared that the investigation must be concluded by November 30, 2021.

The sanctioning regime that regulates the abuse of dominant position is divided into several levels.
First of all, the relevant legislation is represented by Regulation (EC) 1/2003, which disciplines the applications of the rules at European level, entrusting the Commission with the task of implementing Article 102 TFEU.
In particular, the Commission can ascertain, after a complaint or ex officio, an infringement of Article 102 TFEU and consequently oblige, by decision, the companies involved to put an end to the contravention found;

[69] Federconsumatori was established in 1988 with the support of GCIL. It is a non-profit association which has as its priority objectives the information and protection of consumers and users.
[70] Google: l'Antitrust accende un faro sull'abuso di posizione dominante nell'advertising online. Necessaria una svolta nell'approccio alla questione dell'advertising e della raccolta dati: si riporti in primo piano l'utente, Federconsumatori, https://www.federconsumatori.it/Showdoc.php?nid=20201028111743, October 28, 2020. (Federconsumatori, 2020)

to this end it may impose on the companies in question remedies proportionate to the breach committed and suitable for bringing the infringement to an end.
In cases of particular emergency, the Commission can take precautionary measures if it considers that there is a serious and irreparable risk to competition; or may even impose fines pursuant to Article 23 of Regulation 1/2003.
The appeals presented against the decisions of the Commission which has provided for sanctions or penalties will then be within the jurisdiction of the European Court of Justice.
Internally, however, the National Supervising Authorities and the judge are required to apply Article 102 TFEU when the conduct of abuse of a dominant position has an impact at EU level. The reference legislation in Italy is Law No. 287/1990, the same that established the AGCM, which must be applied in any case in compliance with the European principles on competition.
In light of the combination of these two regulations, the Italian Antitrust Authority is granted the same power as the European Commission, therefore ordering the cessation of a detected violation, ordering precautionary measures and imposing fines, penalties and any other type of sanction provided for by the national legislation. In the event that, therefore, there is a violation of Art. 3 Law No. 287/1990, and consequently of Article 102 TFEU, the Italian Authority can directly impose administrative pecuniary sanctions, the value of which must be no less than 1% and no more than 10% of the turnover of the sanctioned company[71].

The Italian investigation looks interesting as, in 2019, Google has announced the development of a project called Privacy Sandbox, focused on the reframing of the debate around online ad targeting vs privacy.
This initiative has been promised by Google as a way to restrict improper tracking while enabling ad targeting within Google's Chrome browser.
This Privacy Sandbox aims at ad targeting, measurement and fraud prevention with the replacement of cookies with five application programming interfaces (API), which will be used by advertisers to enable ad targeting without individual tracking, a mechanism called "privacy-preserving". This allows to receive users' data and personalise digital advertising while maintaining that data collected on the consumers' devices to keep their privacy safe.
"The Privacy Sandbox project's mission is to "Create a thriving web ecosystem that is respectful of users and private by default."
The main challenge to overcome in that mission is the pervasive cross-site tracking that has become the norm on the web and on top of which much of the web's ability to deliver and monetize content has been built. Our first principles for how we're approaching this are laid out in the Privacy Model for the Web explainer. We believe that part of the magic of the web is that content creators can publish without any gatekeepers and that the web's users can access that information freely because the content creators can fund themselves through

[71] Redazione Diritto dell'Informatica, Abuso di Posizione Dominante: Google nel Mirino dell'AGCM Italiana, http://www.dirittodellinformatica.it/consumatori/abuso-di-posizione-dominante-google-nel-mirino-dellagcm-italiana.html, November 6, 2020. (Redazione Diritto dell'Informatica, 2020)

online advertising. That advertising is vastly more valuable to publishers and advertisers and more engaging and less annoying to users when it is relevant to the user. We plan to introduce new functionality to serve the use cases that are part of a healthy web that are currently accomplished through cross-site tracking (or methods that are indistinguishable from cross-site tracking). As that functionality becomes available, we will place more and more restrictions on the use of third-party cookies, which are the most common mechanism for cross-site tracking today and eventually deprecate them entirely. In parallel to that we will aggressively combat the current techniques for non-cookie based cross-site tracking, such as fingerprinting, cache inspection, link decoration, network tracking and Personally Identifying Information (PII) joins."[72]

Google has previously been found to be dominant in the search advertising field by the European Commission, and the AGCM stated that the company's dominance is able to damage both publishers and Internet users.
The same concerns have been raised by the UK's Competition and Markets Authority (CMA). Indeed, in the market study final report of July 1, 2020, the CMA assessed the same concern about Google, and even about Facebook:
"Platforms funded by digital advertising provide highly valuable services, allowing people to find information in an instant and connect with family and friends from around the world – all at no direct cost to the consumer. Google and Facebook are the largest such platforms by far, with over a third of UK internet users' time online spent on their sites. Google has more than a 90% share of the £7.3 billion search advertising market in UK, while Facebook has over 50% of the £5.5 billion display advertising market. Both companies have been highly profitable for many years. Both Google and Facebook grew by offering better products than their rivals. However, they are now protected by such strong incumbency advantages – including network effects, economies of scale and unmatchable access to user data – that potential rivals can no longer compete on equal terms. These issues matter to consumers. Weak competition in search and social media leads to reduced innovation and choice and to consumers giving up more data than they would like. Weak competition in digital advertising increases the prices of goods and services across the economy and undermines the ability of newspapers and others to produce valuable content, to the detriment of broader society."[73]

The investigation opened by the Italian Competition Authority arrived together with the legal proceedings made by the US Department of Justice (DoJ), which filed an antitrust case on October 20, 2020, alleging that Google has maintained an anticompetitive conduct in the markets for search services and advertising in the United States, which will be discussed in the next chapter of this thesis.

[72] The Chromium Projects, https://www.chromium.org/Home/chromium-privacy/privacy-sandbox (The Privacy Sandbox, s.d.)
[73] Competition and Markets Authority, Online Platforms and Digital Advertising, Market Study Final Report, https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf, page 5, 1 July 2020. (Competition and Markets Authority, 2020)

5. USA: multistate lawsuits seeking to end Google's illegal monopoly in the search market.

5.1. Justice Department sues Monopolist Google for Violating Antitrust Laws.

On October 20, 2020, *the Department of Justice, together with eleven state Attorneys General, filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia to stop Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets and to remedy the competitive harms. The participating state Attorneys General offices represent Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina and Texas.*

The Department of Justice decided to enforce the Sherman Act in order to restore competition and allow for innovation in digital markets. Google's global market value is about $1 trillion, being the monopoly gatekeeper for the internet for both customers and consumers worldwide. According to the accusations, Google has accounted, over the years, for almost 90% of all search queries in the US using anticompetitive practices in order to expand its monopoly in search and search advertising.

More specifically, according to the complaint, Google achieved this unlawful monopoly position by entering into: exclusivity agreements that forbid preinstallation of any other competing search service on users' devices, regardless of consumer preference; long-term agreements with Apple that enable Google to be the only default general search engine on Safari[74], and, finally, used its monopoly profits to buy preferential treatments for its search engine on different devices and browsers, thus allowing for the creation of a self-reinforcing cycle of monopolisation.

The lawsuit alleges that those practices are harmful for both competition and consumers because it prevented search competitors from gaining distribution in the sector, which allowed Google to eliminate competition for search queries in the United States. For what regards consumers, Google had been able to reduce the search quality, with issues related to privacy and data protection as well, lowering the possibility of users' choice in search and impeding innovation.

In addition, Google was able, according to the complaint, to suppress competition in advertising so that it could charge advertisers more than its competitors and to reduce the quality of the services provided to them.

As the Department of Justice has done in the past to restore competition in the monopoly cases of Standard Oil and AT&T telephone, as well as in the Microsoft case, with the filed complaint, it declared that Google is being able to engage in anticompetitive agreements to require preinstalled default status, to impede channels distribution to rivals, and to make software undeletable[75].

[74] Apple's browser.

[75] Department of Justice, Office of Public Affairs, https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws, Press Release Number 20-1124, October 20, 2020. (Department of Justice - Office of Public Affairs, 2020)

According to the Complaint, Google is being accused of having violated Section 2 of the Sherman Act, 15 U.S.C §2[76]. Indeed, the company unlawfully enacted monopolistic and exclusionary practices in the markets for general search services[77], search advertising[78] and general search text advertising[79] in the United States.

For years, Google has entered into exclusionary agreements, including tying arrangements, and engaged in anticompetitive conduct to lock up distribution channels and block rivals. Google pays billions of dollars each year to distributors—including popular-device manufacturers such as Apple, LG, Motorola, and Samsung; major U.S. wireless carriers such as AT&T, T-Mobile, and Verizon; and browser developers such as Mozilla, Opera, and UCWeb— to secure default status for its general search engine and, in many cases, to specifically prohibit Google's counterparties from dealing with Google's competitors. Some of these agreements also require distributors to take a bundle of Google apps, including its search apps, and feature them on devices in prime positions where consumers are most likely to start their internet searches.

With its exclusionary agreements, which cover just under 60% of all search queries, and with its owned-and-operated-properties, it has been shows that Google owns and controls almost 80% of all the general search queries, nearly 90% of all general-search-engine queries and 95% of queries on mobile devises, all in the United States. In this way, the company foreclosed competition for internet search. In recent years, indeed, Google's rivals, including Bing, Yahoo and DuckDuckGo, have seen their share shrink away.

Google uses consumer data to sell advertising that can be placed on its search engine results page (SERP). The search advertising monopoly revenues collected by Google are then shared with distributors in return for them to favour Google's search engine. Hence, these huge payments disincentivise distributors to switch and raise entry barriers for rivals: these practices allowed Google to create a self-reinforcing monopoly mechanism in multiple markets.

Google's practices are anticompetitive under long-established antitrust law. Almost 20 years ago, the D.C. Circuit in United States v. Microsoft recognized that anticompetitive agreements by a high-tech monopolist shutting off effective distribution channels for rivals, such as by requiring preset default status (as Google does) and making software undeletable (as Google also does), were exclusionary and unlawful under Section 2 of the Sherman Act. Back then, Google claimed Microsoft's practices were anticompetitive, and yet, now, Google deploys the same playbook to sustain its own monopolies. But Google did learn one thing from Microsoft—to choose its words carefully to avoid antitrust scrutiny. Referring to a notorious line from the Microsoft case, Google's Chief Economist wrote: "We should be careful about what we say in both public

[76] Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.", https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#:~:text=Section%202%20of%20the%20Sherman%20Act%20makes%20it%20unlawful%20for,foreign%20nations%20.%20.%20.%20.%22 (Competition and Monopoly: single-firm conduct under Section 2 of the Sherman Act: Chapter 1, s.d.)

[77] General search services enable consumers to find satisfactory information on the internet by typing key words in general search engines such as Google and Bing.

[78] Search advertising markets consist of ads generated after users type specific search queries, and include general search text ads offered by general search engine and specialized search ads offered both by general and specialized search engines.

[79] General search text advertising is made up of ads sold by general search engines. These ads are placed above or below the results on a search engine results page and appear with the notation of "ads" or even "sponsored".

and private. 'Cutting off the air supply' and similar phrases should be avoided." Moreover, as has been publicly reported, Google's employees received specific instructions on what language to use (and not use) in emails because "Words matter. Especially in antitrust law." In particular, Google employees were instructed to avoid using terms such as "bundle," "tie," "crush," "kill," "hurt," or "block" competition, and to avoid observing that Google has "market power" in any market.

What concerns the most the Department of Justice, now, is the ability of Google to force consumers to accept its privacy policies regarding the use of their personal data and to impede competitors to emerge from its shadow[80].

Normally, having a monopoly is not against the Sherman Act, but, according to the lawsuit, the company built and exerted that dominant position by illegal means.

One difficult aspect in this complaint is that, being Google's product available for free, it is not possible for the Department of Justice to impose higher prices to consumers, since this would hurt them even more than Google's conduct itself. The Department added that consumers are being damaged because they are deprived of the higher-quality online apps and services with better privacy protections.

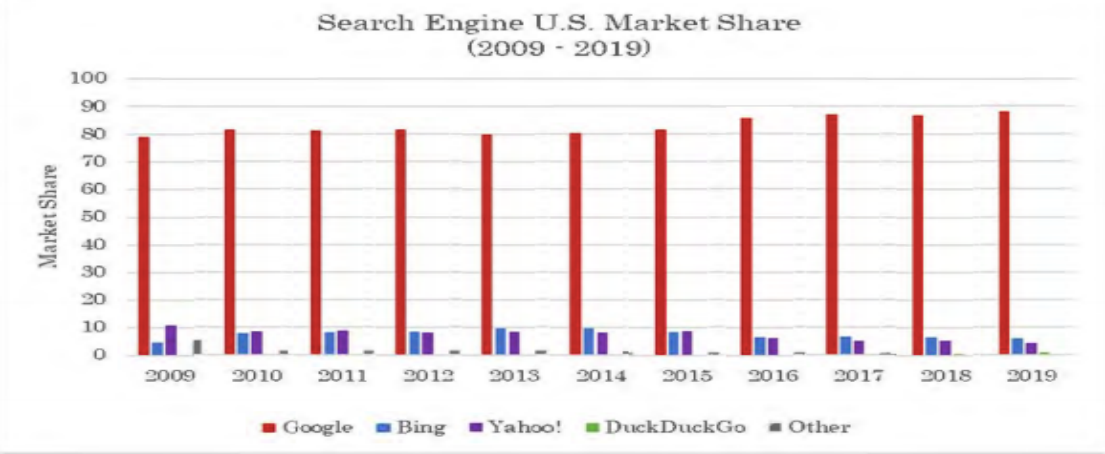
In addition, as in the Italian investigation[81], Google's conduct might impede the development of technological innovations that are able to benefit both consumers and digital advertisers, who would have more choices and would pay less with higher competition. The lawsuit is still not concluded and there is no specific end date, unlike the Italian investigation against Google, which must be concluded by November 30, 2021. It might even take up to several years, as happened in the Department of Justice's lawsuit towards IBM opened in 1969 and ended in 1982 by dropping charges[82].

According to the lawsuit, Google holds a dominant position in the general search services in the United States, which was increased over the years, reaching 90% of market share on computers and 95% on mobiles by 2019.

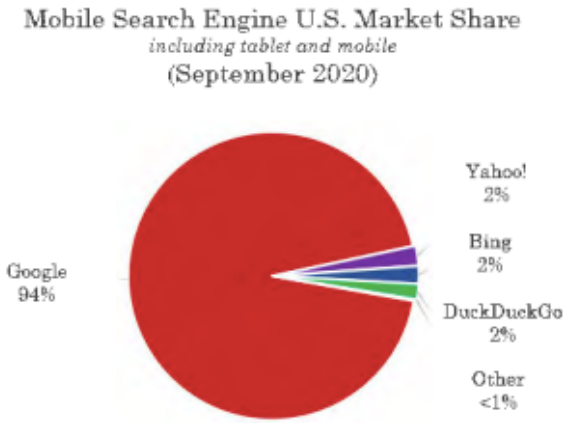
[80] Complaint: U.S. and Plaintiff States v. Google LLC, United States District Court for the District of Columbia, , https://www.justice.gov/opa/press-release/file/1328941/download, pages 1-7, October 20, 2020 (US District Court for the District of Columbia, Complaint: U.S. and Plaintiff States v. Google LLC, 2020)

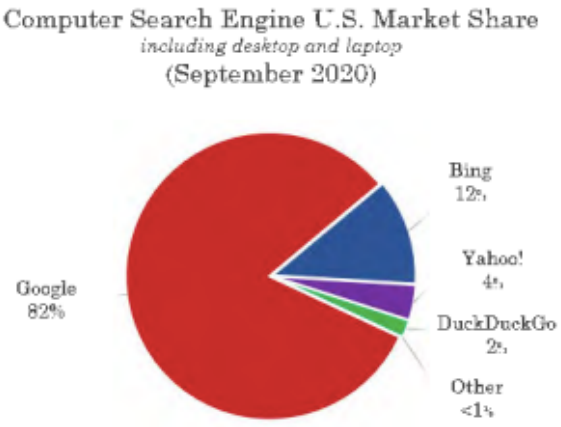
[81] AGCM's A542 lawsuit against Google for the abuse of its dominant position in the Italian market of display advertising

[82] Aaron Pressman, 5 key things to know about the Google antitrust lawsuit, https://fortune.com/2020/10/20/google-antitrust-lawsuit-doj-department-of-justice-sued-search-monopoly-goog-alphabet/, Fortune, October 20, 2020. (Pressman, 2020)



Google was able to obtain this dominant position thanks to the high entry barriers: indeed, the creation and the maintenance of a general search engine require huge capital investments, direct access to new technologies, as well as distribution and scales. It is for the reason that the company was able to sustain these barriers to entry that only Google, together with Microsoft, was capable to maintain a comprehensive search index. Scale is the most significant entry barrier since it affects a general search engine's ability to deliver proper search experience to users, but Google, with its anticompetitive conducts, was able to build the necessary scale that allowed it to become the monopolist of this sector.





As well as in the general search services, Google detains a monopoly power in search advertising and general search text advertising markets in the United States. Its share in these markets is over 70% because other companies compete with Google only in a limited portion of the market since they offer only specialised search ads. Google's advertising monopolies are protected by high entry barriers in these markets, specifically, other firms are not able to acquire and maintain effective user interfaces that allow users to buy ads, software that make the sale process easier, and trained staff that efficiently controls the sales[83].

On December 11, 2020, the Attorney General California filed for permission to join the antitrust lawsuit started in October, followed by the Attorneys General of Michigan and Wisconsin on December 17, 2020. It seems

[83] Complaint: U.S. and Plaintiff States v. Google LLC, United States District Court for the District of Columbia, , https://www.justice.gov/opa/press-release/file/1328941/download, pages 28-35, October 20, 2020 (US District Court for the District of Columbia, Complaint: U.S. and Plaintiff States v. Google LLC, 2020)

clear that the will of these states to join the lawsuit aims at opening the door to a new wave of innovation in digital markets. However, the motion for joinder is still pending, and has not been approved yet[84].

The lawsuit found different alleged violations acted by Google, all going against Section 2 of the Sherman Act.

Google has willfully maintained and abused its monopoly power in general search services through anticompetitive and exclusionary distribution agreements that lock up the preset default positions for search access points on browsers, mobile devices, computers, and other devices; require preinstallation and prominent placement of Google's apps; tie Google's search access points to Google Play and Google APIs; and other restrictions that drive queries to Google at the expense of search rivals.

With these actions, Google was able to capture the larger proportion of market share in the general search services market, search advertising market and general search text advertising market, harming competition and consumers[85].

The U.S. Deputy Attorney General Jeffrey Rosed declared that Google has become the gateway to internet and its related search advertising leader by enacting exclusionary practices that damage competition. The lawsuit is the culmination of an investigation started in 2019 and became the most significant antitrust action authorised by the Department of Justice towards Microsoft in 1990s.

This is not the first antitrust investigation for Google: indeed, the company had previously been the subject for an investigation conducted by the Federal Trade Commission over its search products, but the case got closed in 2013 without any charges.

The crucial point of the complaints is that Google has allegedly used its monopoly powers in the general search, search advertising and general search text advertising services with exclusionary agreements that challenge rivals in the possibility of achieving the necessary scale to challenge Google's dominance. As well as competitors, Google's behaviour has harmed consumers by lowering the quality of search services and reducing choices.

Google is claimed to have locked up distribution with the help of exclusionary contracts with many firms, including Apple and Android system distributors, that made it possible for the monopolist to keep competitors out of the search distribution channel, leading to a suppression of innovation in the search market. These contracts included obligations for Android phone manufacturers to limit on their ability to sell devices that do

[84] Department of Justice, Office of Public Affairs, Three Additional States Ask Court To Join Department Antitrust Suit Against Google, https://www.justice.gov/opa/pr/three-additional-states-ask-court-join-justice-department-antitrust-suit-against-google, December 17, 2020. (Office of Public Affairs, 2020)

[85] Complaint: U.S. and Plaintiff States v. Google LLC, United States District Court for the District of Columbia, , https://www.justice.gov/opa/press-release/file/1328941/download, pages 55-58, October 20, 2020 (US District Court for the District of Columbia, Complaint: U.S. and Plaintiff States v. Google LLC, 2020)

not conform with Google's standards and to force them to provide devices with Google's apps that are difficult to be deleted.

Moreover, Google has used its revenue-sharing model to expand its dominance with agreements with rival browsers and device manufacturers, including Apple. Indeed, the company pays those companies in order to be the default search provider on their platform[86].

Google did not wait too long to reply to the accusations. The company declared that the Department of Justice's lawsuit is deeply flawed for the basic fact that people use Google as search engine because of personal preferences and not because they are obliged to do so since no alternatives are available. To the contrary, this lawsuit, according to Google, would rather hurt consumers because it would allow the diffusion of lower-quality search alternatives, raise device prices and make it harder for people to choose their preferred search services.

Google continues its position against the lawsuit by comparing its business to the one of a supermarket that is paid by different brands in order to be exposed at the end row of a shelf or on a shelf at eye level, that is the best possible level reached by consumers when making purchases.

For digital services, when you first buy a device, it has a kind of home screen "eye level shelf." On mobile, that shelf is controlled by Apple, as well as companies like AT&T, Verizon, Samsung and LG. On desktop computers, that shelf space is overwhelmingly controlled by Microsoft.

So, we negotiate agreements with many of those companies for eye-level shelf space. But let's be clear—our competitors are readily available too, if you want to use them.

Our agreements with Apple and other device makers and carriers are no different from the agreements that many other companies have traditionally used to distribute software. Other search engines, including Microsoft's Bing, compete with us for these agreements. And our agreements have passed repeated antitrust reviews.

Google adds that Americans are not using Google as search engine because they have to, but because decided to do so, and that the lawsuit is implicitly claiming that citizens are not able to switch preferences, while, in reality, this is not true for the simple fact that in 2019 people downloaded 204 billion apps, including as Spotify, Instagram and Facebook.

Moreover, the company adds that it does not compete with other general search engines since Americans are able to find information and products in other ways, such as via Twitter for news, Kayak for travels and Amazon to buy products.

Google concludes its reply to the Department of Justice's lawsuit in the following way: *We understand that with our success comes scrutiny, but we stand by our position. American antitrust law is designed to promote innovation and help consumers, not tilt the playing field in favor of particular competitors or make it harder*

[86] Lauren Feiner, Google sued by DOJ in antitrust case over search dominance, https://www.cnbc.com/2020/10/20/doj-antitrust-lawsuit-against-google.html, CNBC, October 20, 2020. (Feiner, Google sued by DOJ in antitrust case over search dominance, 2020)

for people to get the services they want. We're confident that a court will conclude that this suit doesn't square with either the facts or the law. In the meantime, we remain absolutely focused on delivering the free services that help Americans every day. Because that's what matters most[87].

5.2. AG Paxton Leads Multi-State Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations.

On December 16, 2020, the Attorney General Ken Paxton announced a multistate coalition led by the State of Texas against Google for anticompetitive conduct, exclusionary and deceptive practices in the online display advertising industry.

These types of conduct resulted in harming competition, including the exit of rival firms from the markets and limited their entry rate and market power to the ones left. Moreover, this harm to competition led to an impoverishment of quality in ads both for publishers and consumers, lower transparency and to an increase in prices for advertisers.

The company denied rivals to access to the scale they needed to compete in the advertising market, influencing the demand and supply of the ads in this market.

In addition, Google is being accused of not having been clear regarding its selling processes and, hence, has increased advertisers' costs to advertise, which led to a reduction in the effectiveness of the role of advertising, with repercussions on businesses' abilities to provide proper services and thus reduced output[88].

The lawsuit accuses Google of having unlawfully acquired, tempted to acquire and to maintain a monopoly in the online ad market, also with the help of arrangements between its ad products so that publishers were forced to use necessarily a Google tool.

It is also added that Google, together with Facebook, started harming competition via unlawful agreements that rigged auctions and fixed prices that allowed Facebook to obtain advantages in auctions it runs for mobile apps.

The states that took part in the lawsuit declared that remedies include a breakup and severe fines[89].

[87] Kent Walker, SVP of Global Affairs, A deeply flawed lawsuit that would do nothing to help consumers, https://blog.google/outreach-initiatives/public-policy/response-doj, October 20, 2020. (Walker, 2020)

[88] AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations, https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf, pages 38-100, December 16, 2020. (AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations, 2020)

[89] Lauren Feiner, Texas and nine other states file new antitrust lawsuit against Google – here's the full complaint, CNBC, https://www.cnbc.com/2020/12/16/texas-leads-new-antitrust-lawsuit-against-google-targeting-ad-tech.html, December 16, 2020. (Feiner, Texas and nine other states file new antitrust lawsuit against Google - here's the full complaint, 2020)

After welcoming four more states in the lawsuit in March 2021, the Attorney General Ken Paxton added relevant details about the relationship of Google with Facebook: the two companies teamed up with the excuse of protecting users' privacy in order to act unfairly, leading to a lowering of revenues for publishers. In addition, in the amended complaint, it can be read that Google, with Facebook's aid, was able to identify Apple users and view WhatsApp messages that have been backed up by users on the Google Drive cloud storage system in 2015. The lawsuit adds that users have never been informed for this conduct and that Google Drive even gained almost 250 million new users by June 2016 thanks to a partnership set out with WhatsApp.[90]

5.3. Colorado Attorney General Phil Weiser Leads Multistate Lawsuit Seeking to end Google's Illegal Monopoly in Search Market.

On December 17, 2020, Colorado Attorney General Phil Weiser started a lawsuit against Google for anticompetitive conduct with a bipartisan coalition of 38 Attorneys General, alleging that Google has maintained a monopoly power in the general search engines and its related general search advertising markets with a series of anticompetitive contracts and conducts.

The complaint was filed in the U.S. District Court for the District of Columbia, in conjunction with a Motion to Consolidate seeking to combine the states' case with the pending U.S. DOJ case.

Weiser explained: *"Our economy is more concentrated than ever, and consumers are squeezed when they are deprived of choices in valued products and services. Google's anticompetitive actions have protected its general search monopolies and excluded rivals, depriving consumers of the benefits of competitive choices, forestalling innovation, and undermining new entry or expansion. This lawsuit seeks to restore competition."*

This complaint goes beyond the previous lawsuit filed on October 20 by the U.S. Department of Justice for the fact that this new lawsuit is accusing Google of engaging in a series of illicit actions in order to maintain its monopolies in the above-mentioned markets.

First of all, the company denied consumer choice by entering exclusionary contracts that aimed at depriving competitors from their potential ability to be part of distribution channels and from the scale necessary to develop an effectively competing search engine. Google is adopting these agreements as well in new emerging sectors through which consumers access general search engines, such as home smart speakers or cars.

Moreover, to extend its monopoly position, Google harms advertisers by depriving them of the best choices in search engine advertising thanks to the use of its Search Advertising 360 (SA360) tool that denies interoperability with competing advertising tools.

[90] Diane Bartz, Paresh Dave, More U.S. states join Texas-led antitrust lawsuit against Google, Reuters, https://www.reuters.com/article/us-tech-antitrust-google-idUSKBN2B82E8, March 16, 2021. (Bartz & Dave, 2021)

Finally, Google's ability to acquire and store huge amounts of consumers' data allowed its monopolies to create new barriers to competition and to harm consumers who see themselves lacking in better consumer choice and good privacy protections[91].

Google, one of the largest companies in the world, has methodically undertaken actions to entrench and reinforce its general search services and search-related advertising monopolies by stifling competition. As the gateway to the internet, Google has systematically degraded the ability of other companies to access consumers. In doing so, just as Microsoft improperly maintained its monopoly through conduct directed at Netscape, Google has improperly maintained and extended its search-related monopolies through exclusionary conduct that has harmed consumers, advertisers, and the competitive process itself. Google, moreover, cannot establish business justifications or procompetitive benefits sufficient to justify its exclusionary conduct in any relevant market.

Google was able to obtain such monopoly position thanks to its long-lasting monopoly in general internet searches, accounting for almost 90% of all internet searches done in the U.S., while competing engines had no more than 7% of the market share over the past decade.

The core foundation of Google's monopoly is its ability to collect huge amounts of users' data, which are then used to strengthen barriers of entry and expansion, hurting competitors.

Steadily and over the years, Google has expanded and refined the tactics it uses to harm competition. Instead of simply producing a better service that keeps consumers and advertisers loyal, Google focuses on building an impenetrable moat to protect its kingdom.

The complaint focuses on three anticompetitive conducts acted by Google.

First of all, the company entered in exclusive agreements with other firms, including Apple, in order to be the default general search engine on various devices and to limit the number of consumers who use one of its competitors, such as Bing.

Secondly, Google used its search advertising marketing tool Search Ads 360 (SA360) to limit interoperability with competitors, a scope that goes beyond the one declared as neutral by the company so that both Google and its competitors could purchase and compare their performances in the search advertising market.

Finally, Google limits the ability of consumers, and consequently of advertisers, to bypass its general search engine and go directly to their chosen website because most of the times, those destinations represent a threat to Google's monopoly.

As a result of its monopoly power in the general search services market, Google has been able to construct a durable monopoly in the general search text advertising and general search advertising markets, as described in the Department of Justice's lawsuit of October 2020.

[91] Lawrence Pacheco, Director of Communications, Colorado Attorney General Phil Weiser leads multistate lawsuit seeking to end Google's illegal monopoly in search market, https://coag.gov/press-releases/12-17-20/, December 17, 2020. (Pacheco, 2020)

Google's conduct has denied consumers the possibility of choice in general search services, considered absolutely necessary for surfing the internet, and deprived them of the benefits that usually result from competitive dynamics, including better quality of the search and technological innovations.
Moreover, Google impeded advertisers of enjoying a competitive marketplace capable of allowing the purchase of advertising to everybody in the market, which led to a degradation of advertising choices, going from an increase in prices to a lower quality of ads produced, with repercussions on consumers as well in the end. No benefits can be derived from the challenged conduct; hence Google's behaviour has to be sanctioned[92].

This multistate lawsuit is now considered the biggest antitrust investigation since the 1970s with the accusations towards the big tech leader of the Silicon Valley of illegal monopoly power over search businesses. Indeed, this lawsuit was filed by 38 states with the complaint of maintaining a "de facto exclusivity" and discriminatory conduct in order to become the default search engine on many web browsers and to limit the possibility of competition for search providers.
This case comes after two other lawsuits, the first one filed by the Department of Justice and eleven states on October 20, 2020, and the second one filed by ten states on December 16, 2020.
States are starting to change their vision about big tech companies and to understand how they are exerting monopoly powers that are capable of harming competitors, innovation development and consumers.
The court date set for the end of the lawsuit filed by 38 states has been set for September 2023.
Google's rivals have been mentioned in the suit, including the review site Yelp and the travel site TripAdvisor, and welcomed it after their declarations in which emerged that Google had been using its dominance online to capture as many consumers as possible that could exclusively use its products[93].

All the anticompetitive behaviours identified in the three lawsuits appear to be extremely dangerous for the survival of a fair competition due to the dominant position obtained by Google in the different markets mentioned above. Moreover, as previously said, these practices harm consumers and choke the development of new technologies in the markets as well.
There have always been concerns about Google's way of operating and it has been demonstrated in a test commissioned by Yelp in 2015 that the company gives prior importance to the promotion of its services at the expense of users and competitors rather than to the quality of the research it allows to do[94].

[92] Multistate lawsuit seeking to end Google's illegal monopoly in search market, 5-78 https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf, December 17, 2020. (US District Court for the District of Columbia, Multistate lawsuit seeking to end Google's illegal monopoly in search market, 2020)
[93] Kari Paul, "This is big": US lawmakers take aim at once-untouchable big tech, https://www.theguardian.com/technology/2020/dec/18/google-facebook-antitrust-lawsuits-big-tech, The Guardian, December 19, 2020. (Paul, 2020)
[94] Michael Luca, Timothy Wu, Sebastian Couvidat, Daniel Frank, William Seltzer, Is Google degrading search? Consumer harm from universal search, https://www.slideshare.net/lutherlowe/wu-l, June 28, 2015. (Luca, Wu, Couvidat, Frank, & Seltzer, 2015)

Thanks to the significant impact on our everyday lives that Google was able to apply, the company has been able to become so dominant in almost all the online market sectors such that the term "Google" has now become a verb used as a synonym for searching the Internet[95].

[95] "Google (somebody/something) to type words into the search engine Google in order to find information about somebody/something." Oxford Learners' Dictionaries.

6. A comparison between the lawsuits.

The basis of a global system of competition policy is derived from the European Union and the United States. Today, this duopoly is being overpowered by the emerging of other national and multinational systems, but, still, those directly derive from the EU and US ones.

Indeed, William E. Kovacic, commissioner of the US Federal Trade Commission from 2006 to 2011, affirmed that: "*the past three decades have featured remarkable growth in the number of jurisdictions with competition laws – from roughly thirty in 1989 to over 130 today. Amid this period of stunning change, there is an important constant: the relationship between the competition systems of the European Union and the United States is the most important ingredient of the global competition law framework. The EU/US relationship is not only significant for transatlantic commerce but also for the development of global competition law substantive standards and procedures."* [96]

So, such influential position makes them the two most important international partners that allowed the development and improvement of economic performances worldwide.

EU and US competition Agencies worked and are still working together to discuss about matters of common concern, including mergers and acquisitions of big firms, such as the case of Facebook and its acquisition of Instagram[97]. The main concern regards not the cooperation between international Agencies, but rather internal frictions, especially in the US between the Department of Justice and the Federal Trade Commission or between the Department of Justice and the Attorneys General of the US states.

The core concept that allows for this cooperation between EU and US relies on the fact that competition Authorities have to invest in always better resources that allow to maintain effective relationships among countries, even if this means not generating immediate effective outcomes for the antitrust cases.

The reference digital market is continuously developing since it is based on the innovations of the participants. This peculiarity brings to a continuous change of active dominant firms, hence it is easy to think that in the next years Google could be overpowered, not only by new search engines, but eventually by social networks, such as Facebook, since they are capable of an even more precise data collection.

In addition, the antitrust laws regarding digital markets are something new and they still need to be properly developed and, as some economists pointed out, new technological business forms tend to be considered anticompetitive because they still have not been properly identified[98].

[96] William E. Kovacic, Competition policy in the European Union and the United States: focal points for future trans-Atlantic cooperation, Antitrust and public policies AGCM, http://a-p-p-review.com/article/view/12897/11662, (Kovacic, Competition policy in the European Union and the United States: focal points for future trans-Atlantic cooperation, 2019)

[97] See chapter 3 of this thesis.

[98] Manne, G. A. and Wright, J. D., Google and the Limits of Antitrust: The Case Against the Case against Google, Harvard Journal of Law & Public Policy, volume 34, 2011, pages 178-189. (Manne & Wright, 2011)

On the other hand, a considerable part of economists agrees with the assertion pointed out by Renda, a professor at LUISS University who has offered advice to many community institutions and has been a coordinator of many antitrust projects. Starting from the study of the boom succession of companies that seemed invincible and that, instead, have given way to stronger players, he analysed the markets in which Google operates, concluding that the company is actually very far from being replaced by possible competitors and, therefore, has significant market power. According to Renda, Google appears as dominant not only for the high market share it detains, but also for the fact that this high market share is obtained in several markets, including the algorithm-based search services, display advertising and search engine advertising. Through this concatenation of market shares, Google is found to collect information on end-users, to use them to allow a better profiling strategy of advertising messages on its own site and on that of others, and to sell advertising spaces characterised by a significant click-through-rate thanks to their ability to reflect users' preferences and geographical locations. This business model is impossible to imitate and Google's competitors, including Bing and DuckDuckGo, are forced to remain on the side-lines. However, Google did not get to its actual position very easily: indeed, the company had to acquire DoubleClick, which opened the doors for online advertising for Google, and, most importantly, the acquisition of YouTube, considered the largest search engine of queries second only to Google[99].

The fact that a firm holds a dominant position by itself does not distort the market and this is valid both for EU and US. On the contrary, it is considered as fair for a company to have some market power that has been obtained thanks to investments in innovation, better marketing campaigns and offering better products or at lower prices.

Pursuant to Art. 102 TFEU, what is prohibited is the abuse of such positions by the companies. Indeed, this Article's aim is not to eliminate monopolistic and oligopolistic situations, but rather to refrain dominant firms from engaging in illicit actions considered dangerous for the market as a whole, including conducts that might cancel the degree of competition on the market, acting in such a way to exclude a competitor from the market, or strengthen its position to the detriment of competitors to whom equal conditions are not applied.

According to the American antitrust laws, abuse of monopoly power is defined by the case law as the capacity to control prices or exclude competition. It can be proven either through direct or indirect evidence of price increases, exclusion of competitors, high market shares and barriers to entry. Other factors to be taken into consideration include the size and the strength of competitors, potential future competition and price trends. As previously stated in chapter 5 of this thesis, Google owns and controls almost 80% of all the general search queries, nearly 90% of all general-search-engine queries and 95% of queries on mobile devices in the US, a clear demonstration of abuse of dominant position if we think that a share of just above 50% is needed to support the inference of monopoly power.

[99] Renda A., Google il conquistatore. Note sull'istruttoria della Commissione europea, in "Mercato concorrenza regole", a. XIV, n. 2, pages 237-295, 2012. (Renda, 2012)

The American and Italian antitrust laws are similar since they concern the same behaviours. The American federal ones, made up by the Sherman Act (1890), the Clayton Act (1914) and the Federal Trade Commission Act (1914), precede the Italian ones, which had a first formulation in the Treaty of Rome in 1957, which drew inspiration from the US measures.

Both in Europe and US, cartels and mergers are prohibited since they reduce competition. However, while in Europe, and consequently in Italy, reserved information exchanges that reduce markets' certainty are prohibited, in the US it is necessary to demonstrate that such exchanges have been conducted through agreements in order to show that an illicit conduct has been undertaken[100].

The lawsuits are still not arrived at a conclusion and no new official documents or Google's declarations have been released, hence we still do not know how the proceedings will go.

For what regards Italy, with the Directive 2014/104/EU[101] it is possible to make effective the compensation for damages due to the victims of violations of the prohibitions set by the Articles 101 and 102 TFEU. While these legal rules contribute to the public enforcement[102] at European level, the Italian national directive tends to strengthen the private enforcement[103]. Italy, together with all the other European member states, is obliged to ensure the right to full compensation for damages, i.e., to put the injured individual or company in the condition in which they would have been if the violation had not been committed. Therefore, the compensation must cover the resulting damage, without, obviously leading to an overcompensation for it towards the injured part[104].

In the US measures are more restrictive: indeed, the Sherman Act condemns anticompetitive conducts as crimes with sanctions up to $350,000 for individuals and $10 million for a corporate entity. In addition, for different illicit actions, the American laws provide imprisonments up to three years or even both the fine and

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[100] See chapter 2 of this thesis.

[101] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

[102] Antitrust rules are enforced by state authorities, they are vested with special powers and use special procedures to investigate an infringement, Kai Hüschelrath, Sebastian Peyer, Public and Private Enforcement of Competition Law – A Differentiated Approach, discussion paper No. 13-029, https://poseidon01.ssrn.com/delivery.php?ID=959114027008108117100109091069079023001092026034079086085025024118067080006117096096020058018036060032020102020000064127088099024048022093036092122082067127013108053087041112110089069004096082078029126068091074066123120120023114109105082113098013064&EXT=pdf&INDEX=TRUE, pages 2-5. (Hüschelrath & Peyer, Public and Private Enforcement of Competition Law - A Differentiated Approach, Discussion Paper No. 13-029)

[103] It refers to individually initiated litigations before a court to remedy an infringement of antitrust law, Kai Hüschelrath, Sebastian Peyer, Public and Private Enforcement of Competition Law – A Differentiated Approach, discussion paper No. 13-029, https://poseidon01.ssrn.com/delivery.php?ID=959114027008108117100109091069079023001092026034079086085025024118067080006117096096020058018036060032020102020000064127088099024048022093036092122082067127013108053087041112110089069004096082078029126068091074066123120120023114109105082113098013064&EXT=pdf&INDEX=TRUE, pages 5-7. (Hüschelrath & Peyer, Public and Private Enforcement of Competition Law - A Differentiated Approach, Discussion paper No. 13-029)

[104] Erik Longo, Direttiva 2014/104/UE – Regole comuni in materia di azioni, basate sul diritto nazionale, per il risarcimento dei danni da violazioni del diritto antitrust nazionale ed europeo (1/2015), https://www.osservatoriosullefonti.it/archivio-rubriche-2015/fonti-dellunione-europea-e-internazionali/1209-direttiva-2014104ue-regole-comuni-in-materia-di-azioni-basate-sul-diritto-nazionale-per-il-risarcimento-dei-danni-da-violazioni-del-diritto-antitrust-nazionale-ed-europeo, January 2015. (Longo, 2015)

the imprisonment if the Court establishes it as a fair punishment. Instead, in Italy, only fines are provided by the Italian antitrust authority, the AGCM[105].

The Italian antitrust Authority will be hardly able to shift the balance of power at stake, which will lead to a self-limitation to imposing sanctions and censoring the behaviours that will be reproposed by Google under different spoils in the future.
More specifically, the AGCM will find great difficulty in coordinating its actions with the privacy legislation, which, inevitably, is connected with the issues examined by the Authority.
While the US antitrust Authorities, in particular the Department of Justice and the Attorneys General of the States involved in the lawsuits, have focused on the censorship of Google's pricing policies, the Italian Authority has chosen to investigate the territory of personal data, thus risking imposing solutions that might appear effective to restore competition, but that might harm the protection of users' data.

Any sanction that could be imposed on Google should be accompanied by an order for the firm to share the decryption keys of the Google ID and include third-party tracking pixels. However, it appears clear that even if Google decides, by free choice or by the order of the AGCM, to share data with advertisers, it should ask for consent to do so, therefore, the company would still be able to profile a portion of users' data.

The US cases against Google represent the biggest antitrust proceedings of the last two decades. However, Google will probably prevail for the fact that these lawsuits are based on a 20th-century legal framework and are going against a 21st-century firm.
The company has been accused of maintaining such high market shares that clearly represent an abuse of dominant position in a way that leads to harming both consumers and competitors.
That unlawful obtained market share was possible to reach thanks to: exclusivity agreements and reinvestment of monopoly profits for the creation of a self-fulfilling cycle of monopolisation according to the lawsuit started by the Department of Justice; arrangements between its ad products so that publishers were forced to use Google's tools and agreements with Facebook to obtain advantages in actions for mobile apps according to the proceedings led by the Attorney General of Texas; and, finally exclusionary contracts that aimed at depriving competitors from their potential ability to be part of the distribution channel and the use of the SA360 tool that denied interoperability with competing advertising tools as stated by the Colorado Attorney General.
The lawsuits seem to identify as victims all the competing browser makers and advertising suppliers, while consumers are cast as secondary injured parts as a consequence of the illicit actions acted against competition.

[105] Corporate Finance Institute, https://corporatefinanceinstitute.com/resources/knowledge/finance/sherman-antitrust-act/ (Corporate Finance Institute, s.d.)

Moreover, what is difficult to show, as stated also by a reply made by Google against the DOJ lawsuit of October 20, 2020, is the fact that consumers are not being stuck with Google as search engine, since, in reality, they are not, and the following concern that the company is depriving consumers of choice since Google appears as the default search engine on many devices as a result of agreements between the company and other firms, including Apple. These accusations, indeed, seem not to hold for the fact that users don't hate Google's search engine and have not complained about it, differently from the case against Microsoft from more than 20 years ago, in which consumers felt harmed after the company tried tying Microsoft's Explorer to Windows and cutting off Netscape. The cases against Google are rather driven by a growing distrust of Big Tech firms and by the fear of those giants to gain always increasing political power in international decisions[106].

The future of targeted advertising, therefore, hinges on this delicate balance between competition and privacy. However, in Europe, some regulations, specifically the Digital Services Package, are waiting to be approved regarding the limitations of targeted advertising, unfortunately without taking into consideration the fact that such types of advertisements bring advantages as well, and not only disadvantages.
The Digital Services Package, made up by the Digital Services Act and the Digital Markets Act, will be discussed in the next chapter of this thesis.

[106] Mark Sullivan, How Google will fight off the DOJ's claims of monopoly in search, https://www.fastcompany.com/90566355/google-antitrust-doj, Fast Company, October 21, 2020. (Sullivan, 2020)

7. Digital Services Act (DSA) and Digital Markets Act (DMA): two legislative initiatives proposed by the European Commission to upgrade the rules governing digital services in EU.

The Digital Services Act (DSA) and the Digital Markets Act (DMA) have been mentioned in chapter 3 of this thesis when talking about the accusations towards Amazon for its reservation of preferential treatments with its fidelity programme "Prime" for its own products and to the ones of the vendors present on the market who use Amazon's logistic services. They have been proposed by the European Commission on December 15, 2020. If adopted, these rules will be directly applied to all EU territories.

The Digital Services Act package is one of the key building blocks of the digital strategy proposed by the European Commission President Ursula von der Leyen.
Those two legislative initiatives comprise new rules that will be applicable in the European Union with the aim of creating a safer digital space.
They have two main goals: first of all, *to create a safer digital space in which the fundamental rights of all users of digital services are protected;* secondly, *to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally*.
The rules present in the DSA concern online intermediaries and platforms, including online marketplaces, social networks and app stores, while rules in the DMA regard the governing of gatekeeper online platforms, such as Google.
The need of new European legislations comes from the fact that, nowadays, digital services have developed rapidly with consequences, both positive and negative, on our lives. Indeed, on the one hand, these services allowed a wave of innovation for European consumers and producers, facilitating, at the same time, cross-border trading within and outside the European Union, opening for new opportunities and allowing for the development of new and old businesses to expand their market share in existing markets and to access to new ones. On the other hand, however, many illicit actions have been conducted in the digital world, such as the trade of illegal goods, manipulation of algorithms to spread disinformation and, as in the case of Google, abuse of dominant position in the online advertising sector.
The world's digitalisation, in fact, allowed few large firms to gain almost total control of digital markets, becoming gatekeepers capable of imposing unfair conditions for businesses, advertisers, customers and consumers[107].

What emerges from these new legislations is the need to enable platforms to become transparent and accountable, by putting users and businesses at the core of the digital space. Indeed, it is necessary to put an end to entry barriers and to enhance innovation and growth of all the online markets and, most importantly, to

[107] The Digital Services Act package, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package, European Commission, last update April 26, 2021. (Commission, The Digital Services Act package, 2021)

protect fundamental rights and freedom of expression of all users. These new acts could be able, also, to establish fair conditions for all businesses on online platforms, especially taking into consideration the impressive amount of power gained by international companies such as Google, Apple, Facebook and Amazon.

The Digital Services Act comprises a series of rules that aim at better protection of consumers, enable transparency for online businesses, and, most importantly, foster innovation and competition within markets, especially for smaller platforms, SMEs and start-ups.
This means more and better choice and protection for consumers, legal certainties for providers of digital services and, more generally, greater democratic control and lower systemic risks for the whole society.
The DSA includes rules for all types of providers, matching all on them based on their role, size and impact. All these new rules will have to be respected not only by online intermediaries established in the EU, but also outside it, such as Google. These rules include a series of obligations that will have to be respected and include transparency reporting activities, cooperation with national authorities in case of need, the absolutely needed presence of a legal representative, measures against abusive and illicit actions, risk management obligations and codes of conduct.
The DSA would lead to significant improvements for the users' safeguard and rights, and would also allow more European citizens to reach online platforms[108].

The Digital Markets Act's aim is to ensure that large online platforms that act as gatekeepers behave fairly within the online market.
A company is considered a gatekeeper if *has a strong economic position, significant impact on the internal market and is active in multiple EU countries; has a strong intermediation position, meaning that it links a large user base to a large number of businesses; has (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time*.
Positive outcomes are expected to arise: indeed, businesses dependent on gatekeepers will have a better and fairer business environment, with more possibilities of innovation, consumers will have more and better choice of services so that they are freer to switch providers, even at better prices, and, finally, gatekeepers will be still allowed to maintain such position, but it will be prohibited to maintain unlawful conducts that might harm competitors and consumers.
To confirm that those new rules will always be updated as digital markets develop, the European Commission will carry out inquests that enable it to identify the gatekeepers, update their obligations and design remedies if infringements occur.

[108] The Digital Services Act: ensuring a safe and accountable online environment, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en, European Commission. (Commission, The Digital Services Act: ensuring a safe and accountable online environment, s.d.)

If breaches are found, companies could be fined up to 10% of their total worldwide annual output and could even incur in periodic sanctions accounting up to 5% of their daily turnover. In addition, in case of systematic infringements, the European Commission might impose additional remedies, which will be proportionate to the breach committed, and even non-financial remedies, such as the disinvestment of a business[109].

These legislative initiatives arrived in a particular period of time of our lives: the Covid-19 pandemic has made it clear how much people need digital services and platforms since they allowed and still are allowing us to work, study, conduct businesses and to do many other activities.

The package, composed of the DSA and the DMA, represents an innovation in the outdated legal framework, which has been remained unchanged since the introduction of the e-Commerce Directive in 2000[110].

The European Commission felt the need to act after having identified several problems in the digital services which might hamper citizens and businesses' online lives.

First of all, the European Commission identified three issues when referring to the deepening of the internal markets and to the clarification of responsibilities for digital services. The problems include market fragmentation and lack of cooperation across countries due to different opposite laws, risk to citizens for their data protection since digital services have no clear responsibilities, and information asymmetries between users and services. To respond to these complications, the European Commission envisaged three policy options contained in the DSA. They include the creation of legal instruments capable of regulating online platforms, modernise the e-Commerce Directive of 2000 and, finally, put a regulatory oversight system which allows the cooperation across member states and reinforces the two previous suggestions.

Secondly, some problems regard the sphere of ex ante regulatory instruments of online companies that act as gatekeepers. Indeed, large online platforms that have been able to gain significant market power, if left uncontrolled, can harm traditional businesses by making them necessarily dependent on gatekeepers and start-ups can find it difficult to develop new innovative solutions, which might lead to unfair trading practices and a reduction of social benefits since innovation starts lacking. The remedies have been proposed in the DMA and they include the revision of the Platform-to-Business Regulation 2019/1150[111], the adoption of a horizonal framework with a regulatory body that can limit gatekeepers' powers and the adoption of a new flexible ex-ante regulatory framework.

Hence, following the remedies proposed by the package, it appears clear that these policies aim to improve and incentivise fair competition[112].

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[109] The Digital Markets Act: ensuring fair and open digital markets, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en, European Commission. (Commission, The Digital Markets Act: ensuring fair and open digital markets, s.d.)

[110] The e-Commerce Directive 2000/31/EC establishes a legal framework withing which electronic trading activities can take place. It applies to natural or legal persons that provide an information society service and who are established within the EEA.

[111] The Platform-to-Business Regulation 2019/1150 ensures the transparency of commercial relationships between platforms and business users, i.e., terms and conditions of platform services are plain and easily available for users.

[112] Aída Ponce Del Castillo, The Digital Services Act package: reflections on the EU Commission's policy options, ETUI Policy Brief, European Economic, Employment and Social Policy,

The Commission's proposal of the DSA and DMA represent the most ambitious projects regarding digital services regulation worldwide and have been critically discussed since they represent hybrid approaches to specific regulations made up by old laws.

However, for the fact that these legislative initiatives have as core concern data protection, regulation and limitation of gatekeepers' powers, they seem not to take into consideration the fact that many forms of targeted advertisements based on data collection, most of which are made by large companies that have high market shares, bring many advantages and not only disadvantages.

https://poseidon01.ssrn.com/delivery.php?ID=875082005085005099073009028111099092018052053087053016092065097124082065025114111026038106063111031098097098023106012109074075029018023080043024097087066120122099006028040056088088067088121121127081108122118124001027006112096064097085072085080092093103&EXT=pdf&INDEX=TRUE, No. 12/2020. (Ponce del Castillo, No. 12/2020)

Conclusions

Born as a search engine from the innovative idea of two Stanford's students who wanted to make the web more accessible, and then landed in the advertising world for auto-financing operations, Google has commercialised complementary services to offer to its users and has extended its action field through acquisitions and partnerships with the most important technology companies in various sectors, so much that it was listed on the stock exchange in 2004.

Today Google is a company characterised by an open culture, typical of start-ups, but we must not forget that it cannot be defined only as a search engine: in fact, in addition to cataloguing and indexing the resources of the World Wide Web, it is employed also in photos, newsgroups, maps, mails, shopping, translations, videos and programs creation.

Defined by Larry Page, Google's co-founder, as the "perfect search engine" because it understands exactly what people mean and return exactly what they want, it is the most visited site in the world, so popular that the term "google" became a verb which means searching the Internet. This has made it possible to obtain very high earnings, starting to worry rival companies, including Microsoft.

In this thesis the Italian and American proceeding of 2020 were addressed, through which Google was accused of abusing its dominant position due both to the high market shares it holds in the worlds of search and online advertising, and to the significant entry barriers that make it difficult for competition to emerge and survive.

The antitrust laws find their pillars in the economic analysis explained in the first chapter of this thesis. Indeed, the antitrust laws aim at maximising consumer welfare by controlling private economic powers so that they do not destroy competition. As stated by Thomas J. Miceli in The Economic Approach to Law, *"the economic rationale for antitrust laws is to promote competitive markets by making efforts to exercise monopoly power illegal."*[113]

The economic analysis of antitrust laws has been applied by Europe through Articles 101 and 102 of the TFEU, consequently by Italy with Law No. 287/90, and by the US with the Sherman Act (1890), which was then reinforced by the Clayton Act and Federal Trade Commission Act in 1914.

In the last few years, characterised by continuous innovations, both in Italy and in the US, the main four Big Tech firms, Amazon, Apple, Facebook and Google, have been sued by the antitrust authorities due to their excessive monopolistic power: indeed, they have been able to transform themselves into gatekeepers of the markets in which they operate and to gain such dominant positions that they have been compared to States.

The core elements of this thesis regard the accusations made towards Google by the Italian antitrust Authority and by the American Department of Justice and Attorneys General of the various States involved in the lawsuits.

[113] Thomas J. Miceli, *The Economic Approach to Law*, second edition, Stanford University Press, 2009, page 320. (Miceli, The Economic Approach to Law, 2009)

As explained in this thesis, the Italian antitrust Authority, the AGCM, has sued Google for an alleged abuse of dominant position in the display advertising market in violation of Art. 3 Law No. 287/90 and Article 102 TFEU. If Google is found guilty of such actions, the Authority will impose administrative pecuniary sanctions of a value comprised between 1% and 10% of the turnover of the company.

Overseas, the US started three different lawsuits in a very short period of time all against Google for alleged unlawful monopoly position in different markets. The first prosecution has been made by the Department of Justice in conjunction with 11 Attorneys General with the accusations towards Google of having entered exclusivity agreements that preclude competitors to operate in the markets of general search services and of having used the monopoly profits for the creation of a self-reinforcing cycle of monopolisation. The second complaint was conducted by the Attorney General of Texas, in which the company has been accused of having acquired and maintained a monopoly in the online ad market and having established agreements with Facebook to obtain advantages in auctions it runs for mobile apps. Finally, the last lawsuit was filed by 38 Attorneys General with the allegation that Google has entered exclusionary agreements that aimed at depriving competitors from their effective capacity of operating in the search engine market, has denied interoperability with competing advertising tools thanks to its SA360 instrument and has created entry barriers to competitors regarding the users' data collection.

In addition, on December 15, 2020, the European Union, after Italy's lawsuit, introduced two legislative initiatives, the Digital Services Act (DSA) and the Digital Markets Act (DMA), to allow for the creation of a safer digital space for users and online competitors in the European Union, which still to be approved. The DSA concerns online intermediaries and platforms, while the DMA regards the governing of gatekeeper online platforms. They have been proposed because the European Commission felt the need to act as a result of problems in digital services that damaged users' online lives.

It is a fact that technological and digital evolution contributes, overwhelmingly, to highlighting the limits and the urgencies of the current antitrust rules. Above all, the multifaceted power assumed by large companies clearly emphasises the gap with respect to the reach and the ability of governments to regulate them in a meaningful way and to manage the negative consequences that derive from them.

The American and Italian antitrust authorities are considered different, although they are related to same matters. Their difference is actually in the way they operate: on one hand the enforcement actions are both civil and criminal, while, on the other hand, sanctions are only pecuniary.

Unlike many hi-tech firms, Google has been able to maintain and reinforce its power in several markets since the beginning of its history, a goal that only few companies have been able to achieve in the past at the dawn of Internet, and this has definitely changed industry dynamics. It is for these reasons that Google made it possible for itself to create a certain future full of improvements and innovations that will allow it to remain the leading firm online.

All that remains is to wait for the outcomes of the lawsuits, which could end with some fines or with the acceptance of more appropriate remedies.

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