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Competition law in digital markets: from an ex-post to an ex-ante approach

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Table of Contents

Introduction

When performing our everyday activities, we all "automatically" use a few services or platforms. Indeed, when there is the need to do an online search, we all use Google, when we need to buy something, we first look for it on Amazon, when we buy a laptop, we ensure that it has the latest version of Microsoft and that the Office package is working.

These are just examples of activities that we perform every day and that we directly link to a particular company (for instance when doing an online search it is common to say, "search on Google" and no longer search on the Internet).

On the other hand, how did it happen that these companies became so powerful? There are five companies, identified as GAFAM (the acronym for "Google, Apple, Facebook, Amazon, Microsoft) which are now not only simply dominant, but they are the owner of services that are essential for our everyday average life. These companies are not simple owner, but they are gatekeepers since they decide who use their services and who cannot.

The presence of companies with such power is not in itself a problem. It becomes a problem when these companies systematically perform conducts that harm consumers and competition. The harm to consumer may take the form of reduced innovation or the absence of choice from different platforms for a service. Regarding competition, these companies are now too powerful, and competitors cannot keep the pace. At the same time, these companies take advantage of the situation of dependence that their competitors have on them.

What emerges from the assessments carried out by various National Competition Authorities and the European Commission is that a few companies systematically do not respect laws since they are too powerful. In addition, the advantage obtained through this lack of respect for the law is higher than the potential fine.

Consequently, it appears crystal clear that the major companies operating in the market are taking advantage of the grey zones of worldwide legislation to pursue their interest and consolidate their dominance.

The above-mentioned grey zones are strongly linked with an approach to competition law and antitrust that appears to be no longer appropriate to prohibit most of the

conducts that these companies systematically perform in order to consolidate their dominance.

Thus, it is possible to affirm that, nowadays, these companies can be considered more powerful than single countries and not only from the economic point of view.

Indeed, their power allows them to influence many sectors of our everyday life and interfere in areas of fundamental importance, e.g. free speech or political preferences, creating massive issues also from a social point of view, not only from the perspective of competition.

Moreover, although there are numerous antitrust investigations, fines, European Commission decisions, etc., these companies continue to engage in conducts that are considered anticompetitive.

Therefore, it is possible to state that these companies are gaining more through exploitative anticompetitive conducts than by "respecting the rules". Thus, the monetization of the gain is way higher than the potential fine that Competition Authorities can impose on them.

In addition, the most significant part of the gain cannot be monetised since the real profit comes from the consolidation of their dominant position.

When discussing how to face GAFAM, we should bear in mind that these companies are running services that are of prime importance for our everyday lives. Hence, it is not possible to simply block the functionalities of these platforms since end-users or business users will suffer the negative countereffect.

The services offered by GAFAM are essential not only for end-users who, in their everyday life, perform some activities more efficiently, but also for business users who must use gatekeeper's platform and services to run their activities. For example, only a few companies may not use Google and Facebook advertising services, just as many sellers must sell through Amazon to reach more customers.

Furthermore, when assessing GAFAM's anticompetitive attitude it should be remarked that they are the most significant competitors for the companies that use them to run their activity.

Therefore, in the light of all the considerations above, it is possible to affirm that these companies are distorting the market to increase their power and that their power is

already too high for it to be possible to break them up. Consequently, we can state that the traditional antitrust model is no longer adequate for digital markets.

This is due to many factors, one of them is that antitrust investigations are way too long with many passages that require a lot of time. Specifically, the identification of anticompetitive conducts and the definition of the relevant market are very time-consuming.

The existing antitrust system is considered too slow, bulky, and unpredictable for the digital sector. Consequently, there is the need for a new approach, or a new system of norms based on the problems identified by various Competition Authorities.

Therefore, when analysing the change of approach in the antitrust field the new Digital Markets Act proposed by the European Commission must be considered. The DMA is an extremely important piece of legislation through which it is clear that the passage from the ex-post antitrust approach, which is the core of the traditional antitrust approach, to an ex-ante approach is necessary.

This ex-ante approach is based on the primary antitrust investigation conducted by Antitrust Authorities at the European level; thus, identification of the main prohibited conducts comes directly from all the antitrust investigations conducted by National Competition Authorities concerning the Tech Giants.

The passage from ex-post to ex-ante regulation is one of the most important revolutions in antitrust history. In effect, traditionally, Antitrust Authorities are not regulators. This revolution, however, appears justified by a situation in which there is the need to avoid the situation in which companies that are already too powerful damage competition in a way that makes it no longer possible to talk about competition in the market, but instead we shall talk about the competition to the market since the main competition is now based on entering in the market.

It is also worthy of note that the European Commission is not the only institution active in implementing its internal competition provisions. The Digital Markets Act is one of the only examples of legislation that provides an ex-ante discipline to tackle abusive conduct in electronic communications services. However, it is worth remarking that all Member States of the European Union are enforcing their internal norms.

There is a reason behind the choice of not approving norms that simply copy the prohibition identified by the DMA. Each country has different issues concerning

competition law and they have different provisions regarding antitrust enforcement as well. This will lead to countries that will prohibit some conducts or that will investigate in some cases and other countries which will have a completely different attitude.

It is worth emphasising that the DMA proposal was born around the need to protect competition at the European level from the companies that are distorting competition and that are also harming consumers by violating one of their fundamental rights i.e. the right to privacy recognized, among other international and European provisions, by the Charter of Nice.

In this sense, the DMA is the European answer to the harm caused by Tech Giants, and therefore it will apply to a few companies by prohibiting them from performing the conducts identified by the proposed Regulation.

Hence, according to what is stated above, the DMA is not enforcing all the aspects of competition law, but only those in which the European Union believes that there is a need for a more central approach with a careful eye on the sectors dominated by the gatekeepers.

Member States are enforcing different aspects through their internal norms. There is no need to implement legislation in the same area as the DMA. Indeed, countries like Germany, Greece, and Austria have approved internal norms concerning competition law in digital markets.

National Competition Authorities and internal competition norms are a fundamental part of the overall competition law system. Hence, even if the DMA is aiming to create a more central approach through the reduction of the powers for Competition Authorities, the expertise provided by single Member States and their National Competition Authorities is still an important element in the challenge to establish and maintain a fair and competitive market and to protect individuals' privacy.

Apart from the European enforcement, it is helpful to analyse also how the United States is adapting its legal framework to restore competition and fairness in the digital markets.

American enforcement is crucial since the US competition law has been interpreted according to the ideas put forth by the Chicago School. For Chicagoans, the market self regulates and thus there is no need to impose restrictions on allowed conduct or limit the possibility of the creation of monopolies. Therefore, the idea that US

institutions are working to identify conducts that shall be prohibited is of absolute relevance for this paper.

This work first aims, first of all, to analyse the contemporary issues related to digital markets, from a competition law point of view. This will be done through the analysis of the conducts considered to be more harmful for users and competition.

The analysis of the harm created by Tech Giants will be based on the study of the most significant antitrust cases concerning Tech Giants to understand whether the existing legal framework is good enough to face gatekeepers.

Continuing from the consideration of the first chapter, in the second chapter, there will be a deep analysis of the proposed Digital Markets Act and the other legislation proposed or approved in various Member States (i.e. Germany, Greece, and Austria) as well as in the US.

In the conclusion, whether the proposed norms or those which are already in force are good enough to restore fairness in the market will be highlighted.

Chapter 1

Is competition fair in the digital era?

1 What are the so-called “Tech Giants”?

Although the term Tech Giant or also Big Tech is commonly used in the media and in everyday life, Tech Giants or Big Tech still lack universally accepted legal definitions.

However, the common feature that companies often identified as Tech Giants possess is the power to act as monopolists in their respective relevant markets.

The European Commission, for instance, in order to facilitate the categorisation of such companies, in its own communication created a new category of companies i.e. "online intermediaries" or "online platforms"[1]. The Commission has used these two terms interchangeably, inserting: ‘*Internet search engines, social media, knowledge and video sharing websites, news aggregators, app stores and payment systems*’[2] in the abovementioned two categories.

In the interest of this analysis, we can refer to Tech Giants or Big Tech companies, as the largest information technology industry companies based on market capitalization.

Frequently, and this phenomenon became most common in the past few years, Big Tech is used synonymously with the terms Big Four or Big Five describing the four or five largest, most dominant, and most prestigious American companies in the industry—namely Alphabet (Google), Amazon, Apple, Facebook (or Meta), and Microsoft.[3]

Tech Giants are the dominant players in their respective areas of technology, namely: e-commerce, online advertising, consumer electronics, cloud computing, computer software, media streaming, artificial intelligence, smart home, self-driving cars, and

[1] Martin Moore ‘Tech Giants and Civic Power’ (2016) CMCP Policy Institute King's College London, 6 < https://doi.org/10.18742/pub01-027 > accessed 3 November 2021

[2] European Commission ‘Have your say on geo-blocking and the role of platforms in the online economy’ (2015) press release <http://europa.eu/rapid/press-release_IP-15-5704_en.htm >

[3] Alex Gautier, Joe Lamesch, ‘Mergers in the Digital Economy’ (2020) CESifo Working Paper No. 8056, 2 <http://dx.doi.org/10.2139/ssrn.3529012 > accessed 3 November 2021

social networking. They have been among the most valuable public companies globally,[4] each with a maximum market capitalisation ranging from around $1 trillion to around $2 trillion. Big Tech companies typically offer services to millions of users and can sway user behaviour as well control user data.[5]

There are also powerful international technology companies that in many ways rival those of the United States. For instance, two of the most valued companies in China Tencent, a social networking company, and Alibaba, an eCommerce and cloud computing company, are Tech Giants comparable to US companies with high market values exceeding $770 billion and $650 billion, respectively.

Other counterparts in China and abroad are also large and compete internationally. For example, while Apple has a value of $2.252 billion, its direct Chinese competitor, Xiaomi, has a value of $ 84 billion. The five American companies have the lead over their direct competitors in terms of market value. Although technology companies have not always had a significant presence in the global economy, the size of these American technology companies has grown over the last decade along with their competitors abroad. The bid by policymakers to reform the competition policy will affect how US technology companies interact with foreign ones in the global economy[6].

Because of their enormous power in the market, many concerns have been raised about their monopolistic practices that have led to antitrust investigations by the Department of Justice of the United States, the Federal Trade Commission in the United States[7],

[4] Abel Mateus, 'Is There a Consensus on Antitrust for the Big Tech?' (2019) SSRN, 3-4 <http://dx.doi.org/10.2139/ssrn.3508055> accessed 3 November 2021

[5] Geoffrey Parker, Georgios Petropoulos, Marshall W. Van Alstyne, 'Digital Platform and Antitrust' (2020) Concurrences, 11 < https://awards.concurrences.com/IMG/pdf/digital_platforms_and_antitrust.pdf?68676/8a50d36eaee17f6a10818aad947248ee1abc7dc2 > accessed 4 November 2021

[6] Christophe Carugati, 'Regulation in the Digital Economy. Is Ex-Ante Regulation of 'Gatekeepers' An Efficient and Fair Solution?' (2020) SSRN, 4-6 <http://dx.doi.org/10.2139/ssrn.3705928> accessed 4 November 2021

[7] Thibault Schrepel, 'Platforms or Aggregators: Implications for Digital Antitrust Law' (2021) 12(1) Oxford Journal of European Competition Law & Practice, 3 < https://ssrn.com/abstract=3772697 > accessed 7 November 2021

and the European authorities.[8] These investigations will be in depth analysed later in all this work.

1.1 How did the Tech Giants become so powerful?

With every new product, service, and innovation, the Big Five cement their digital imprint and expand their influence on the global economy and dominate the digital universe.[9]

Therefore, one of the things that these five companies have done rather masterfully is create platforms that start-ups have to use to get to customers.[10]

In order to better understand how Tech Giants accumulated power, it is helpful to focus on the main aspects that all these companies have in common.

Google began its activity as a search engine and its core business remains its search engine. Today, Google boasts many ancillary services from ads to Google maps. [11]

Facebook is a social network born in 2003 and is now the most used social media platform in the world counting around 3 billion users worldwide. Facebook's main activity is providing a system of connection between users and increasingly, opportunities for businesses to advertise their products.

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[8] Stavros Aravantinos, 'Competition law and the digital economy: the framework of remedies in the digital era in the EU' (2021) 17(1) European Competition Journal, 135-136 < https://doi.org/10.1080/17441056.2020.1860565 > accessed 8 November 2021

[9] Alex Gautier, Joe Lamesch, 'Mergers in the Digital Economy' (n 3), 4

[10] Eleanor M. Fox, 'Platforms, Power and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.–Europe Divide' (2019) 98 (2) Nebraska Law Review, 118-119 < https://ssrn.com/abstract=3476675 > accessed 10 November 2021

[11] Google, like the other Tech Giants, runs many services which move from the simple search engines to navigation systems or advertising services. National Competition Authorities as well as a large part of scholars are studying how the complex web of conducts implemented by Google can be rationalized as a profit-maximizing, exclusionary strategy. On this point see: Olivier Latham, Mikael Hervé, Romain Bizet, 'Antitrust concerns in Ad-Tech: formalizing the combined effect of multiple conducts and behaviours' (2021) 17(2) European Competition Journal, 354 < https://doi.org/10.1080/17441056.2021.1893960 > accessed 11 November 2021

Apple began its activity as a computer seller. However, its computer business is now only one of many components ranging from phones, music, streaming and its ever-powerful app store.

Microsoft generates revenue by developing, licensing, and supporting a wide range of software products and services. In addition, Microsoft designs and sells hardware devices, most notably its Xbox video game console, and by delivering relevant online advertising to a global customer audience. Microsoft has also successfully created a robust Cloud platform.

Amazon's key activities are as follows: i) merchandising of its digital and physical goods, ii) development, design, and optimization of its platform (website or apps), iii) management of supply chain and logistics, iv) securing and building a partnership with its supplier and sellers, v) support for the production of movies or show on its prime video platform.

Amazon is now the greatest e-commerce company globally but started its activity as a bookstore in 1994. How did Amazon grow up? As reported by Lina Khan, a Columbia University scholar, just appointed head of the Federal Trade Commission,

> *"Amazon has established dominance as an online platform thanks to two elements of its business strategy: a willingness to sustain losses and invest aggressively at the expense of profits, and integration across multiple business lines".*[12]

These aspects of its strategy are closely interlinked, in fact the main element that helped Amazon's expansion was the renunciation to short-term returns. Indeed, this strategy aims to pursue market share rather than short-term income. This strategy challenges the main theories of the Chicago School of rational market actors and of the research of profits. [13]

[12] Lina M. Khan, 'Amazon's Antitrust Paradox' (2016) 126 (3) The Yale Law Journal, 746-747 <https://www.yalelawjournal.org/note/amazons-antitrust-paradox > accessed 6 November 2021

[13] The Chicago school of economics is a neoclassical school of economics though associated with the work of the faculty at the University of Chicago, some of whom have constructed and popularized its principles. Milton Friedman and George Stigler are considered the leading scholars of the Chicago school. The reference concerning the legal idea of the school was Richard Posner while the reference for the economic aspects was Carl Shapiro

Moreover, Amazon's strategy of struggling with heavy losses while spreading its activity within various sectors tells us that it should be seen as an integrated entity in order to fully understand Amazon's structural power. By looking at one isolated line of its business we fail to grasp the true shape of the company's power and dominance in the market and the way Amazon is able to capture the benefit of one business line to invest them in another sector.[14]

Incidentally Amazon, is not an isolated case. The five biggest companies worldwide have in common the feature of running a service that is crucial for both users and businesses. Indeed, nowadays it is not possible to provide office work without the tools of Microsoft's Office package, also communications are much easier thanks to tools like Facebook Messenger or WhatsApp. Furthermore, companies will not be capable of running their activities without advertisement provided by Facebook or other social media. In fact, we could continue this endless list of services provided by Tech Giants which are fundamental to our everyday life.

Of course, the secret behind these Tech Giants is not just the idea of innovative platforms, otherwise, it would be difficult to justify their power. This stems from the fact that these companies have developed important strategies to achieve power in the market and consolidate it. They have spread their businesses into various markets and have taken advantage of the massive amount of available data to have constant and instant feedback on their platform and make them more user-friendly[15]. In addition, they strongly invest in research and development to update their services. Thus, through these simple features, they establish the high-quality service we use every day.

[14] Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 748-749

[15] Yogesh K. Dwivedi, Elvira Ismagilova, Laurie Hughes, Jamie Carlson, Raffaele Filieri, Jenna Jacobson, Varsha Jain, Heikki Karjaluoto, Hajer Kefi, Anjala S. Krishen, Vikram Kumar, Mohammad M. Rahman, Ramakrishnan Raman, Philipp A. Rauschnabel, Jennifer Rowley, Jari Salo, Gina A. Tran, Yichuan Wang, 'Setting the future of digital and social media marketing research: Perspectives and research propositions' (2021) 59 International Journal of Information Management, 3 < https://doi.org/10.1016/j.ijinfomgt.2020.102168 > accessed 10 November 2021

1.2 Main anticompetitive actions by Tech Giants to acquire or consolidate their power

The abovementioned features are not the only elements that have helped Tech Giants achieve and consolidate their dominance. Although it is undeniable that the Tech Giants have developed strong and user-friendly platforms, political authorities and potential competitors have increasingly alleged that the Tech Giants are engaging in anticompetitive behaviour to maintain and increase their market share[16].

This paragraph will provide just a small overview of these anticompetitive conducts. Then they will be analysed more in detail in the various sections of this chapter.

Tech Giants are accused of many anticompetitive conducts performed to consolidate their power and block the birth of new competitors[17]. They are, indeed, blamed for unfairly preferring their products over those of their competitors: a clear example of this is given us by Google since all the Android digital devices which are using the operational system software (whose intellectual property rights belong to Google) will also have all Google basic features, like Google Chrome for online search or Google maps, pre-installed.

In addition, another relevant conduct from an antitrust point of view is the wild acquisition of young competitors and start-ups as well as the horizontal integration with other companies to consolidate dominance instead of competing with each other[18].

Furthermore, the massive exploitation of user data gives these companies enormous power. Indeed, they are accused of anticompetitive conduct concerning massive data collection as well as unjustified denial of access to collected data.[19]

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[16] Jole Seminara, 'Market dominance of GAFA companies and challenges posed to competition policy' (master's degree thesis, Politecnico di Torino 2019), 23 < https://webthesis.biblio.polito.it/10587/1/tesi.pdf > accessed 10 November 2021

[17] Thibault Schrepel, 'Platforms or Aggregators: Implications for Digital Antitrust Law' (n 7), 2

[18] Pauline Affeldt, Reinhold Kesler, 'Big Tech Acquisitions — Towards Empirical Evidence' (2021) 12 (6) Journal of European Competition Law & Practice, 471-472 < https://doi.org/10.1093/jeclap/lpab025 > accessed 10 November 2021

[19] Vikas Kathuria, Jure Globocnik, 'Exclusionary conduct in data-driven markets: limitations of data sharing remedy' (2020) 8(3) Journal of Antitrust Enforcement, 511–514 < https://doi.org/10.1093/jaenfo/jnz036 > accessed 11 November 2021

Moreover, these Tech Giants are blamed for imposing strong terms and conditions for the use of their services and, since they have market dominance, it is impossible to run businesses without using their services, thus users are forced to accept them[20].

In addition, Tech Giants are the main competitors that businesses face. In effect, they use strong terms and conditions to reinforce their power through businesses and users and then they use this economic power to improve their service and annihilate the competition composed of many of the users of the platform itself.

1.3 The strategy of predatory pricing to consolidate dominance

The first abusive strategy to be analysed is the predatory pricing strategy. Before analysing which companies have achieved dominance in a specific market thanks to the predatory pricing strategy and how they did so, it is important to provide a brief definition of what this strategy consists of.

In this strategy, the predator, an already dominant firm, sets its prices so low for a sufficient period of time that its competitors leave the market and others are deterred from entering. Assuming that the predator and its victims are equally efficient firms implies that both the predator and its victims have suffered losses and that these losses are significant. For predation to be rational, there must be some expectation that these current losses (or lost profits), as with any investment, will be offset by future gains. This in turn implies that the dominant company has some reasonable expectation that it will gain exploitable market power after the predatory episode, and that the profits in this later period will be large enough to justify incurring losses or foregoing profits at first. The theory also entails that there is some method for the predator to outlive its victims, be it through increased cash reserves, better financing or cross-subsidisation from other markets or other products[21].

[20] Thierry Kirat, Frédéric Marty, 'Affectation with a public interest between antitrust laws and regulation: lessons from the U.S. experience of the first decades of the 20th century for online ecosystems' (2022) Sciences Po Office Working Paper N° 01, 16 < https://www.ofce.sciences-po.fr/pdf/dtravail/OFCEWP2022-01.pdf > accessed 26 January 2022

[21] Organisation for Economic Co-operation and Development, 'Predatory pricing' (1989), 7-11< https://www.oecd.org/competition/abuse/2375661.pdf > accessed 13 November 2021

Predatory pricing is one of the main instruments in the hands of a firm allowing it to achieve dominance, act as a monopolist in a market or consolidate dominance in the relevant market. In addition, predatory pricing causes harm to users,[22] contrary to what people may believe, but let us proceed step by step. In competition law, it is still unclear whether predatory pricing should always be considered an anticompetitive conduct or not[23], because in predatory pricing cases there is the recoupment phase, i.e. re-obtaining the money wasted to pursue the strategy[24].

On the other hand, scholars, argue that whether a monopolist recoups the loss it suffered to acquire its monopoly power does not determine whether the anticompetitive conduct harmed the consumer or not[25]. Identify the harm to the consumers raised by predatory pricing is not an easy task. Indeed, courts usually interpret the first phase of a predatory pricing strategy as a gift to consumers who obtain something below cost[26].

Incidentally, considering predatory pricing as a benefit to the consumer fails to consider that there are two categories of consumers affected by predatory pricing: the first group which is paying less during the predatory phase and the second which is buying the product in the second stage in which the monopolist is trying to recover the losses incurred in the pursuit of its strategy[27]. Thus, the second category of consumers is harmed simply because the monopolist increases its pricing so that it can recover all its losses. Furthermore, it does not matter whether the surviving company recovers its losses or not, predatory pricing still has an anticompetitive[28] effect and still creates

[22] Christopher Leslie, 'Predatory Pricing and Recoupment' (2013) 113(7) Columbia Law Review, 1741-1743 <https://ssrn.com/abstract=2363725 > accessed 14 November 2021

[23] Christopher Leslie, 'Revisiting the Revisionist History of Standard Oil' (2014) 85(3) Southern California Law Review Research Paper No. 2014-33, 575-576 < https://ssrn.com/abstract=2443473 > accessed 13 November 2021

[24] Christopher Leslie, 'Predatory Pricing and Recoupment', (n 22), 1761

[25] Ibid, 1762

[26] ibidem

[27] Louis Kaplow, 'Recoupment and Predatory Pricing Analysis' (2018) 10 Journal of Legal Analysis, 50-52, < https://doi.org/10.1093/jla/lay003 > accessed 15 November 2021

[28] Miguel de la Mano, Benoît Durand 'A Three-Step Structured Rule of Reason to Assess Predation under Article 82' (2005) European Commission, 8-12 < https://ec.europa.eu/dgs/competition/economist/pred_art82.pdf > accessed 14 November 2021

harm to consumers who have less choice in the market as a result of this conduct and will be forced to pay the monopolist the price for the acquisition of its dominance[29].

Many authors state that prices in the second phase, known as the recoup phase, may be highly supracompetitive, meaning that prices will be not only higher than before, but consumers will also pay more than they would have paid in a competitive market[30]. Moreover, the harm suffered by consumers should be regarded as existing even if prices are not high enough to recover the losses. Indeed, the fact that prices were low in favour of few consumers does not remove the anticompetitive effect that second phase consumers face. Therefore, customers are victims of a monopolist which acquired its power not through a superior product but through the use of a strategy aimed at eliminating competitors and consolidating dominance. In fact, if second phase customers suffer damages and are harmed by a predator strategy, why should predatory pricing conduct not be considered an anticompetitive conduct[31]? The fact that first stage customers received an advantage does not eliminate the harm caused to new customers[32].

Furthermore, a predatory pricing strategy may also create inefficiency in the market regardless of whether the predator recoups its investment. Indeed, when the predator is in the first stage of the strategy, selling products below cost may cause overconsumption because consumers have their choice influenced by a price that the firm cannot sustain.

In a fair and properly functioning market, pricing of products derives from the products' social value or scarcity.[33] Creating an artificial demand for a product will attract more customers since also those who are not normally interested in buying these

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[29] Christopher Leslie, 'Predatory Pricing and Recoupment', (n 22), 1746-1751

[30] Ibid, 1741-1743

[31] United States Department of Justice 'Competition and monopoly: single-firm conduct under section 2 of the Sherman act : chapter 4' (2015), para 1, letters A,B,C < https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4 > accessed 11 November 2021

[32] Miguel de la Mano, Benoît Durand 'A Three-Step Structured Rule of Reason to Assess Predation under Article 82' (n 28), 3-6

[33] Paul L. Joskow, Alvin K. Klevorick 'A Framework for Analyzing Predatory Pricing Policy' (1979) 89(2) Yale Law Journal, 224 < https://digitalcommons.law.yale.edu/fss_papers/1305/ > accessed 15 November 2021

products will be interested because the products will seem more convenient to them. Moreover, a below-cost price gives customers the wrong feeling and thus resources shift away from valuable users.[34]

Scholars agree that consumers erroneously believe that a predator price will remain and endure, and according to this view consumers adapt their choices in the erroneous belief that prices will not go up. Accordingly, consumers may incur strong net losses. Indeed, the US Supreme Court stated that: *"unsuccessful predatory pricing may encourage some inefficient substitution toward the product being at less than its cost"*[35].

In addition, predatory pricing increases inefficiency by increasing the deadweight loss[36]. In fact, a deadweight loss may be due to the overconsumption of a product, which is boosted by new consumers who purchase this product whose cost is higher than the value buyers give it[37].

Furthermore, even a predatory pricing strategy that fails can hurt stronger and more efficient competitors than the predator. Thus, predatory pricing seriously harms competition since it reduces the competitors in the market and gives an undue benefit to the predator. Let us see then the main effect of predatory pricing strategy in practice through a few of Amazon's conducts.

It was given, in the previous section, a brief overview of the main strategies and conducts carried out by big companies in order to acquire or consolidate their dominance. In this section, instead, the results of the predatory pricing strategy are discussed specifically using Amazon's growth as an example, which is strongly linked to the use of predatory pricing[38].

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[34] Ibidem

[35] United States Court of Appeal, Case 509 U.S. 209, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., para 224 (1993)

[36] Frederic M. Scherer, 'Predatory Pricing and the Sherman Act: A Comment' (1976) 89(5) Harvard Law Review, 873-877 <https://www.jstor.org/stable/1340183> accessed 15 November 2021

[37] Christopher R. Leslie, 'Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal PriceFixing' (1993) 113(7) California Law Review, 1714-1716 <http://www.jstor.org/stable/23561380 > accessed 15 November 2021

[38] Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 722-731

Amazon is in fact now growing so fast that it is thought to be growing faster than the entire e-commerce overall[39]. Indeed, it controls half of all e-commerce in the US[40]. This is due to the fact that, as has already been mentioned, Amazon was capable of developing its activity and its retail presence in various sectors, from simple product shipping to the sale of clothes [41] and the e-book market, which has been one of the best investments for Amazon. The analysis of how Amazon entered the e-book market is fundamental in the interest of this work since Amazon entered the sector of the e-book market by *"pricing bestsellers below cost"*[42]. It all started in 2007 when Amazon priced bestsellers at $9.99[43], a price that was way lower than the average cost that was between $12 and $30. The price at which Amazon was buying books, on the other hand, did not drop. In effect Amazon was basically pursuing losses by pricing e-books below cost.[44]

Amazon's plan was to dominate the market in that particular sector and to increase the sales of its new e-book tool, the "kindle". The strategy paid off, and by the end of 2009 Amazon had sold about 90% of all e-books.

Another example of the predatory pricing attitude of Amazon is the history of the acquisition of Quidsi.

Quidsi was one of the most important e-commerce companies of the first decade of this century also thanks to its subsidiaries: Diapers.com, Soap.com and Beautybar.com.

Since Quidsi was so strong in e-commerce it became one of Amazon's main competitors. In response, Bezos' company first tried to buy Quidsi, which refused

[39] ibid, 753-755

[40] ibid, 755

[41] Worth mentioning that Amazon clothing sales is bigger than its five largest competitors combined, see more at Shelly Banjo, 'Amazon Eats the Department Store' (2016) Bloomberg: Gadfly, < http://www.bloomberg.com/gadfly/Articles/2016-09-20/amazon-clothing-sales-could-soon-top-macy-s > accessed 17 November 2021

[42] Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 755

[43] Ibidem

[44] It is important to underline that before 2009, thanks to a discount publishers recognised for selling e-books, Amazon was capable of meeting the price of many e-books. The real below price started in 2009 when publishers removed the discount and Amazon kept selling at $9.99 making it clear that it was selling e-books below cost. On this Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 757

Amazon's offer[45]. Then Amazon used the predatory pricing strategy again to put pressure on Quidsi and then acquire the rival company.

To this end, Amazon cut its prices on products for babies and other products sold also by Quidsi by 30%. Quidsi tried to match Amazon prices but whenever Quidsi changed its prices, Amazon's software adjusted its prices in order to keep Amazon's prices lower than Quidsi.[46] In addition, in 2010 Amazon launched the *"Amazon Mom"*[47] program which offered free Prime shipping and other bonus options to their new users like the "subscribe and save" service which grants users an additional 30% discount.[48]

The strategy paid off, Diapers.com was in fact unable to keep Amazon's price strategy so Quidsi started talking with WalMart to sell the business. However, this plan did not stop Amazon. It made Quidsi an offer (lower than WalMart's), thus putting a lot of pressure on Quidsi and WalMart, using the hidden threat of keeping the Amazon Mom program on. After buying Quidsi, Amazon raised its prices and broke down the Amazon Mom program[49].

Through these examples it is clear that there is harm for competition as well as for users as a result of Amazon's conduct. In fact, one of Amazon's main competitors went bankrupt since it was no longer capable of facing Amazon's price war. Moreover, users who started using Amazon Prime at the time of the Amazon Mom program faced the second phase in which Amazon removed the program to reassess the losses incurred in support of their predatory strategy. Indeed, readers also faced a reassessment of prices right after Amazon consolidated its dominance in the e-book sector. In addition, many users, attracted by the low prices of e-books compared to those of normal books, also bought the Amazon Kindle.

A conduct like predatory pricing in digital markets is susceptible to creating enormous harm in the market and among users. This derives from the fact that digital platforms like Amazon are rich enough to wage war basically against any competitor in the market. This increases the competition to the market instead of the competition in the

[45] Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 769

[46] ibidem

[47] Ibid, 773-774

[48] This program for Amazon had enormous costs, Quidsi's experts calculated that Amazon was losing about $100 million every three months to keep this predatory price.

[49] Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 773-774

market and also this, in turn, contributes to increasing the lock-in effect that users suffer when approaching big platforms like Amazon[50].

1.4 Wild acquisition of competitors and start-ups: how do Killer Acquisitions affect competition?

Moving away from Amazon's acquisition of Quidsi, now one of the most emblematic elements of Tech Giants' activity as well as one of the most discussed topics in competition law will be analysed. The intended topic is the wild acquisition of both competitors and start-ups (which may become competitors) and also the anticompetitive use of horizontal mergers between companies in the same market.

It is clear from our point of view that both these activities aim to allow Tech Giants to become monopolists in their respective sectors and also to invest in others in order to acquire power in other markets and increase their revenues.[51]

Before going further into the analysis of the competitive issues and the possible innovation issues created by this wild mergers and acquisition strategy (from now on referred to as "M&A"), let us provide some numbers to quantify how widespread this phenomenon is.

Therefore, it is helpful to move on to the most significant M&A operations by analysing both what the main mergers are and what the strategy behind these operations is for each company.

In the last section the acquisition of Quidsi by Amazon was described. Therefore, let us look at the other main extraordinary operations Bezos' company has performed.

1. In 2009, Amazon bought Zappos, which was one of the main competitors in the field of retail shoes - a service that Amazon was conducting through one of its subsidiaries, Endless.com. Thanks to the acquisition of Zappos, Amazon increased its power in online retail shoes and therefore closed Endless.com in 2012.

[50] John Yun, 'App Stores, Aftermarkets & Antitrust' (2021) George Mason Law & Economics Research Paper No. 21-21, 12-13 <https://ssrn.com/abstract=3942570> accessed 17 November 2021

[51] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne 'Platform mergers and antitrust' (2021) 30(5) Industrial and Corporate Change, 1307–1310 < https://doi.org/10.1093/icc/dtab048 > accessed 18 November 2021

2. The acquisition of Ring in 2018 not only made it easy for the e-commerce giant to get into home security services and devices, but it also provided a new outlet for its own voice assistant, Alexa. After purchasing Ring, Amazon integrated its Alexa voice assistant into the devices, allowing users to control their video doorbells via voice and expand the company's position as a titan of Internet-connected homes.[52]
3. Quidsi has already been discussed in the previous section.
4. With the acquisition of Zoox in 2020, Amazon entered the world of electric transport. Zoox provides Amazon with its first approach to electric transport with this self-driving, steering-wheel-less robot-taxi for four passengers which can instantly change direction.

Amazon's acquisition strategy could be described through the identification of the various stages of Amazon's activities and its main goals. Early acquisition for Amazon served to achieve geographical expansion, allowing Amazon to enter as an online retailer in China, the UK and Germany. Then Amazon acquired other online retailers to expand its activity and its dominance in various sectors by acquiring, in addition, the personal data of the customers of these companies. [53]

In the second stage, starting from 2006, Amazon started acquiring companies relevant to its web services and increased its interest in the field of entertainment and media by entering into the industry of film and television and improving its streaming service.

Let us move now to a different type of company, Google, which has a great tradition of acquisition of various companies and competitors.

Google's M&A activity in the beginning focused on establishing its role and presence in online research by making acquisition linked to the *"personalisation of search services customer relationship management and the efficiency of its online advertising*

[52] Regarding this acquisition, Bezos mentioned in an e-mail that: "*To be clear, my view here is that we're buying market position — not technology… And that market position and momentum is very valuable*." Makena Kelly, 'Amazon bought Ring for market position, not technology, emails suggest' (2020) The Verge < https://www.theverge.com/2020/7/30/21348483/amazon-jeff-bezos-alexa-ring-market-dominance-antitrust-hearing-congress > accessed 20 November 2021

[53] In this work we mentioned many times that Amazon (and not only Amazon) uses the personal data of users to improve its service and to provide customised prices for users. For more on this see Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 780-784

system"[54]. Two of the most important operations made by Google are the acquisition of Android[55] in 2005 and the acquisition of YouTube which gave Google the opportunity to exercise dominant power in the field of video sharing. In addition, Google improved YouTube's system by acquiring additional functionalities for desktop and mobile video sharing.[56]

Concerning the priciest acquisitions performed by Google, there is Motorola in 2011, Nest Labs in 2014 and Double Click in 2007[57]. Worth mentioning is also the acquisition of Waze that happened in 2013. Waze is a GPS navigator system that could have been considered the strongest competitor for Google Maps.

Nowadays Google's latest investments are more focused on the cloud computing market with acquisition in the field of artificial intelligence, image recognition, natural language processing and machine learning. The primary strategy for Google is, like Amazon, to expand its services into new sectors in order to consolidate its dominance in more markets.

Let us now talk about Microsoft, the oldest company of the group being analysed here. Microsoft in fact started its M&A strategy in 1987 by acquiring software applications for computers that target new tools that were developed further in order to provide equipment services for work and personal activities.

Then, starting in the 2000's, Microsoft began to expand into the gaming sector by purchasing Bungie studios in 2000. This allowed Microsoft to develop and launch its main gaming console, the "Xbox", with the game "Halo" developed by Bungie.

Later Microsoft's strategy focused on other sectors by targeting instruments capable of facilitating information sharing between online users as well as web services while increasing the protection and security of online activities. In addition, Microsoft

[54] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne 'Platform mergers and antitrust' (n 51), 1315

[55] Ibid, 1316

[56] Ibid, 1317

[57] *DoubleClick in 2007, which became a core unit in Google's advertising strategy and dominance. DoubleClick offers technology products intended to increase the purchasing efficiency of advertisers and to minimize unsold inventory for publishers".* Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne 'Platform mergers and antitrust' (n 51), 1315

moved into the mobile sector by making acquisitions in the fields of mobile apps and mobile smartphones with the acquisition of Nokia in 2013[58].

Apart from the above-mentioned acquisitions, Microsoft's major operations have been:

1. The acquisition of LinkedIn in 2016 which is the most expensive acquisition performed by any tech giant company (assuming the Tech Giants to be: Google, Apple, Facebook, Amazon, Microsoft). This acquisition allowed Microsoft to enter one of the most popular social networks in the market, giving Microsoft the opportunity to combine its software suite with LinkedIn's structure.
2. The acquisition of Skype in 2011 allowed Microsoft to integrate Skype users with Microsoft main communities and services since Skype supported Microsoft devices.
3. The acquisition of aQuantive that is an advertising network which provides digital marketing and technology solutions. With this acquisition Microsoft was able to integrate it into their online search engine, Bingo, in order to monetise users' research.

Another Tech Giant is Apple, that took its first steps in the field of personal computers. Nowadays when one thinks of Apple, their iPhone or iPod come to mind and not the company's origins.

Apple, in fact, began its M&A strategy through the acquisition of software and applications which could run on its Macintosh computer, or which were capable of updating the operating system.[59]

In a second phase, when the Internet was more widely developed, Apple moved its acquisition strategy towards information technologies which furnished important services for Apple's online network like the identification of suspicious websites

[58] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne 'Platform mergers and antitrust' (n 51), 1315

[59] In 1997, Apple tried to expand its position through various acquisitions to obtain cheaper hardware, but it was a total failure. On that Parker stated: "*Apple acquired Power Computing Corporation which developed clones that ran the Macintosh operating system. The objective of the acquisition was to replicate Microsoft's and Intel's success in fostering cheaper hardware in order to expand Apple's position in operating systems. However, Steve Jobs reversed the decision that same year because Power Computing was cannibalizing Apple hardware sales instead of expanding the market.* on this point see: Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne 'Platform mergers and antitrust' (n 51), 1313

linked with illegal activities or the development of content for teachers and students which is compatible with iPod and other web apps that are useful for office work.

In the last decade Apple has become the company we know today, developing its iPhone and the relevant Appstore for its devices. Apple's focus, in fact, has shifted to human-machine interaction through the improvement of its online apps linked to its mobile operating system. This involves improving a large set of services from maps to online search and vocal control assistance thanks to their personal assistant Siri[60], which was acquired in 2010. In addition to those that were previously mentioned, Apple has heavily invested in music, books, mobile photography database analytics, facial recognition and many other things. Most of these are instruments that now make up the main part of all new mobile devices presented every year.

In 2015, Apple started targeting companies operating in the field of artificial intelligence and its application, but it is impossible to make a proper analysis of Apple's targets and prices since Apple keeps this data secret.

Last, but of course not least, in our analysis is Facebook. Facebook's M&A activity was quite linear and had a precise goal: creating a user-friendly social network experience for users. Pursuing this goal, Facebook purchased tools which facilitate online conversation, photo sharing, the sharing of brief stories and live events as well as instant messaging tools. On the other hand, in order to improve the revenues deriving from these services, Facebook focused on a system which could improve the advertising market in a second phase of acquisition.[61]

The most relevant acquisitions made by Facebook are:

1. The acquisition of Instagram[62]. Instagram, especially in its early phase was used for its photo sharing features, which are also one of the main features of Facebook itself.

[60] For more on Apple's strategy to achieve and consolidate dominance also through the use of Siri see: Shili Shao, 'Antitrust in the Consumer Platform Economy: How Apple Has Abused its Mobile Platform Dominance' (2020) 36 Berkeley Tech. L.J., 54 - 70 < http://dx.doi.org/10.2139/ssrn.3603682 > accessed 20 November 2021

[61] Michele Giannino, 'The Appraisal of Mergers in High Technology Markets Under the EU Merger Control Regulation: From Microsoft/Skype to Facebook/WhatsApp' (2015) SSRN, 5 <http://dx.doi.org/10.2139/ssrn.2548560 > accessed 21 November 2021

[62] The acquisition of Instagram has been considered somehow abnormal by part of the doctrine. Many think that the only desire behind the idea of buying Instagram was Facebook's inability to develop a

Therefore, this operation can be considered not only the fulfilment of a desire to create a more user-friendly environment for the user, but also the means of elimination of a possible future competitor from the market[63].

2. The acquisition of WhatsApp happened in 2014. WhatsApp is a platform of instant messaging, photo sharing, and video calls and it was very likely to become one of Facebook's main competitors due to its competition with one of Facebook's most important additional services, Facebook Messenger.

3. The acquisition of Oculus occurred in 2014. Oculus was a producer of virtual reality headsets for gaming. This technology was fundamental to the improvement of the virtual reality use of Facebook's main platforms.

Now it is possible to map out what the main common features are of the M&A strategies of these five companies. These companies can, in fact: i) improve or add additional functions to make their main service or core business even more efficient; ii) extend their activity and services into new markets; iii) protect themselves from competitors or potential competitors through the consolidation of their power in a specific market; and iv) provide substitutable and competing services to expand their market also in other countries.

Indeed, there are many benefits for these companies in pursuing a M&A strategy, but how does the market react? There are two different ways of interpreting the consequences of the attitude of big companies towards M&A.

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strong user base also on mobile devices. Hence, he bought Instagram to annihilate a potential competitor and also "steal" its user base while exploiting Instagram's features on mobile devices. For more on this point see: Mark Glick, Catherine Ruetschlin, 'Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook' (2019) Institute for New Economic Thinking Working Paper NO. 104, 26-30 < https://www.researchgate.net/profile/Catherine-Ruetschlin/publication/336746903_Big_Tech_Acquisitions_and_the_Potential_Competition_Doctrine_The_Case_of_Facebook/links/5e0bb5a64585159aa4a8f6bc/Big-Tech-Acquisitions-and-the-Potential-Competition-Doctrine-The-Case-of-Facebook.pdf > accessed 2 February 2022

[63] *"Facebook M&A activity has been motivated to some extent by the platform's competitive concerns. Facebook Chief Executive Officer Mark Zuckerberg and Chief Financial Officer David Ebersman, in their email conversation over the acquisition of platforms like Instagram, revealed by The Verge, agreed that one of the objectives for such acquisitions is to neutralize competitors and to prevent them from growing and disrupting Facebook's market operation".* On this point see: Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne 'Platform mergers and antitrust' (n 51), 1315

Most of the scholars as well as most political authorities believe that big tech monopoly is creating "Kill Zones"[64], meaning that the monopoly power exercised by Tech Giants, including through their M&A strategy, is creating two major problems in particular. These problems are the stalling of innovation and the creation of competition not inside the market but to enter the market with the consequent drastic reduction of competition in the market while increasing the one "for" the market.

Instead, other authors, have a totally different view. For them the previous consideration is simply myth and, moreover, the assumption that large Internet companies are reducing competition by performing killer acquisition are enormously exaggerated in their view.[65] They state, in addition, that acquisitions serve useful purposes which can range from stimulating investments in new companies to the faster development of technology by putting major tech instruments in the hands of those which can develop it faster.

Let us focus on this view first. Part of the scholars do not see the activity of Tech Giants as an innovation deterrent, but instead think that Tech Giants are innovation enablers[66]. Accordingly, it is not useful to invest in companies which are trying to replicate elements or products that already exist in the market because larger companies that benefit from economies of scale and network effects have already provided them. The public much more appreciates it if new companies insert themselves into and concentrate on other markets they can enter into easier. As proof of the existence of stimulus to innovation, venture capital investments are increasing[67]

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[64] Heli Koski, Otto Kässi, Fabian Braesemann, 'Killers on the Road of Emerging Start-ups implications for market entry and venture capital financing' (2020) ETLA, 2-6 <https://www.etla.fi/wp-content/uploads/ETLA-Working-Papers-81.pdf> accessed 22 November 2021

[65] "*Critics accuse big tech companies of stifling innovation by buying start-ups just to kill them or by exerting such dominance that entrepreneurs don't want to enter their markets. Neither claim holds up to logic or evidence"* see: Joe Kennedy, 'Monopoly Myths: Is Big Tech Creating "Kill Zones"?' (2021) Information Technology and Innovation Foundation, 4 < https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones > accessed 22 November 2021

[66] ibidem

[67] Tim Zanni 'Investment in technology innovation' (2019 KPMG) <https://assets.kpmg/content/dam/kpmg/uk/pdf/2019/07/investment-in-technology-innovation.pdf> accessed 22 November 2021

and also areas of investment have changed through the years, reflecting the natural evolution of the digital platform.[68]

The main element that has been stressed in this work is the fear competitors feel when challenging Tech Giants in the market and that this fear could lead to the annihilation of competition in sectors fundamental for everyday life. Indeed, many authors believe that Tech Giants[69] deter investments since nobody wants to face their power and, in addition, competitors are worried by the "kill zones[70]" they create and by the "killer acquisitions" they perform. Kennedy argued that this concept is overstated. In his opinion, killer acquisition does not reflect the unique nature of Tech Giants for which innovation is the main feature. Tech Giants, in fact, have a lot to invest in research and development and this is something they are forced to do since their market is continuously innovating. Indeed, the dynamic nature of these markets ensures both high investments, overall high innovation[71] and more efficiency[72] even without new entrants in the market.

In addition, strong innovation in the platform market and other features make acquisition a more tempting form of technology shift[73]. The first feature that makes

[68] Joe Kennedy, 'Monopoly Myths: Is Big Tech Creating "Kill Zones"?' (n 65), 4-6

[69] *"Anything having to do with the consumer Internet is perceived as dangerous, because of the dominance of Amazon, Facebook and Google…. Venture capitalists are wary of backing startups in online search, social media, mobile and e-commerce. It has become harder for startups to secure a first financing round"* on this point see: 'American Tech Giants are Making Life Tough for Startups' (2018) The Economist <https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups> accessed 23 November 2021

[70] Joe Kennedy, 'Monopoly Myths: Is Big Tech Creating "Kill Zones"?' (n 65), 6- 10

[71] Carmelo Cennamo 'Competing in Digital Markets: A Platform-Based Perspective' (2021) 35(2) Academy of management perspectives, 3-5 < https://doi.org/10.5465/amp.2016.0048 > accessed 24 November 2021

[72] *"In the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them"* Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 'Competition Policy for the Digital Era: A Final Report' (2019) European Commission, 111 <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1. > accessed 24 November 2021

[73] Luis M.B. Cabral, 'Merger Policy in Digital Industries' (2020), CEPR Discussion Paper No. DP14785, 6-7 <https://ssrn.com/abstract=3612854 > accessed 25 November 2021

acquisition more attractive is the fact that the evolution of the market is not easy to predict but is instead very difficult. Indeed, preventive activities are challenging to judge because of the poor definition of the relevant market and the difficulty in identifying potential future rivals[74]. Second, technological products are strongly linked with intellectual property in the sense that tech products are much more difficult to protect than other types of products[75], and for this reason it is easier for competitors to simply copy technology already used by other companies for free[76].

Remaining on the topic of innovation concerns, Tech Giants are not using M&A strategies as a substitute for investment in research and development Apple, Facebook, Google and Microsoft are, instead, the top companies for investment in the research and development fields. This means that even if these companies perform wild acquisitions and mergers they do not avoid investing in ReD. It is possible to say that the larger and more powerful the companies are, the more they invest in the market. [77]

Indeed, it makes sense for smaller companies to invest in different sectors instead of those in which bigger and richer companies are investing. This situation, by the way, is not related only to modern times. Exploiting new markets may be a good idea if there is one dominant company but also if there are many[78].

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[74] Franck, Jens-Uwe and Monti, Giorgio and de Streel, Alexandre, 'Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law' (2021) TILEC Discussion Paper No. DP2021-16, 5-7 <https://ssrn.com/abstract=3966244 > accessed 27 November 2021

[75] ibid, 8

[76] "*Intellectual property is more difficult to protect than in markets such as pharmaceuticals. As a result, companies cannot be sure of what they are licensing. Nor can they be confident that a rival will not simply copy their technology for free".* Joe Kennedy, 'Monopoly Myths: Is Big Tech Creating "Kill Zones"?' (n 65), 5

[77] For more detail on this topic see: 'European Commission 'The 2019 EU Industrial R&D Investment Scoreboard' (2020) < https://iri.jrc.ec.europa.eu/scoreboard/2019-eu-industrial-rd-investment-scoreboard >

[78] "*Few complained after the 1930s automobile-sector start-ups declined precipitously. By the 1930s, it made little sense to invest in new automobile companies when it was clear the technology system (internal combustion engine) and major players (American Motors, Chrysler, Ford, and GM) had already been established. Investment to create new entrants would have represented a waste of societal resources. Instead, funding went to emerging industries such as radios, chemicals, and machine tools."* Joe Kennedy, 'Monopoly Myths: Is Big Tech Creating "Kill Zones"?' (n 65), 6

Nowadays the Internet sector is considered to be mature and accepted as "in the hands" of a few companies which provide essential services. Indeed, this fact is moving investors and capital into other areas. Kennedy considers this as a win because investors do not want to move their capital into markets that are already under dominant influence and they, instead, invest in more promising areas where there are no dominant firms at the moment.[79]

Let us move on then to another major point in Kennedy's work. Do acquisitions of competitors and start-ups increase innovation or not[80]? In Kennedy's view acquisition is a strong stimulus to innovation, especially in the case of the so-called *"acqui-hires",* which are basically those in which the acquiring company is interested in the technology the start-up or the competitor is developing and has no intention of breaking up that company but, instead, is interested in investing and helping the team to develop that idea[81]. Indeed, according to this view large companies are interested in innovation because they gain more in using the new technologies than in stopping them in the beginning. In this sense, many start-ups begin their activity with the goal of being bought by one of these Tech Giants. This may be seen as a form of financing in the development of their idea rather than an anticompetitive conduct. For these reasons, wild acquisition of competitors should not be treated as an enemy of innovation but as a stimulus.

[79] Organisation for Economic Co-operation and Development, 'Start-ups, Killer Acquisitions and Merger Control' (2020), 32 < https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf > accessed 27 November 2021

[80] According to Van Beers and Sadowski, in the manufacturing sector acquisition and innovation are linked in such a way that the more acquisition is performed on the market the better for the innovation on the market. On this see Cees van Beers and Bert M. Sadowski, 'On the Relationship Between Acquisitions, Divestitures and Innovations: An Explorative Study' (2003) 3 Journal of Industry, Competition and Trade, 131-133 < https://link.springer.com/Article/10.1023/A:1025486722201 > accessed 27 November 2021

[81] That is the case of Google's acquisition of Keyhole, in fact, when Google bought it, it gave no obligation to the team in developing their digital map system, and now we have Google maps which is an essential instrument in our everyday life that is also free for users.

1.5 The theories of harm and the reasons why wild acquisition is an anticompetitive attitude that hinders innovation

Opposite to Kennedy's view are the theories of harm. A killer acquisition could be seen as a case in which the acquiring firm's strategy is to discontinue the development of the targets' innovation projects and pre-empt future competition[82].

The first of these theories is the harm created by "killer" acquisition in the market.[83] By killer acquisition, this work intends those in which the buyer acquires targeted companies in order to stop the target's innovation process and project and to avoid any future competition. This creates harm since it reduces users' welfare by reducing the competition inside the market as consumers do not have alternative choices of new products and new services. Instead consumers will likely always use the same choice which has possibly been updated with the innovative tools acquired by the competitor[84].

The main issue in modern times is that it is not easy to identify potential competitors as well as the referring market in the digital market[85]. This is also heightened by the fact that modern market analytics techniques are in the hands of Tech Giants rather than in the hands of the authorities that should investigate those companies' activities[86].

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[82] Colleen Cunningham, Florian Ederer, Song Ma, 'Killer Acquisitions' (2021) 129(3) Journal of Political Economy, 670–673 <http://dx.doi.org/10.2139/ssrn.3241707 > accessed 30 November 2021

[83] Geoffrey Parker, Georgios Petropoulos, Marshall W. Van Alstyne, 'Digital Platform and Antitrust' (n 5), 1307-1310

[84] Mario Todino, Geoffroy van de Walle, Lucia Stoican 'EU Merger Control and Harm to Innovation—A Long Walk to Freedom (from the Chains of Causation)' (2018) 64(1) The Antitrust Bullettin, 15-17 < https://journals.sagepub.com/doi/pdf/10.1177/0003603X18816549 > accessed 30 November 2021

[85] In section 1.3 when it was mentioned Amazon's predatory pricing concerning E-Books it is important to underline that DOJ of the US did not properly identify the relevant market. In fact, they inserted Amazon conduct in the general market of Books, not specifically of E-books in which Amazon was trying to acquire a dominant influence. On this see Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 760-764

[86] *Facebook used Onavo to conduct global surveys of the usage of mobile apps by customers, and apparently without their knowledge. They used this data to assess not just how many people had downloaded apps, but how often they used them. This knowledge helped them to decide which companies to acquire, and which to treat as a threat.* Damian Collin 'Note by Damian Collins MP,

The first theory of harm originates from the consideration that the acquisition of competitors and start-ups does not enhance the welfare of the consumer since it reduces their ability to choose services and products and also reduces the power of new entrants into the market by increasing the competition to enter the market and not within the market. Also, the above-mentioned talent acquisition (acquihire) is linked to this theory. Tech Giants buy talent or innovative elements from their competitors to consolidate their position in the market and eliminate any threat.

The second theory of harm is focused on the impact of M&As on small firms operating in related markets. This theory is derived from the consideration that acquisition by Tech Giants can create a kill zone effect[87].

Indeed, Tech Giants' M&A strategies have constantly reduced market entry rates and, in addition, reduced the level of investment for start-ups operating in the same or similar market as that of Tech Giants. Thus, when a big company acquires a start-up in a specific sector, this negatively affects also other small companies operating in the market since for them it will be even harder to compete in the market with Tech Giants[88].

One of the main reasons for this harm could be found in the features of the digital market. In the big platform market, elements like network effects, economies of scale and data-driven economies of scope are significant. Indeed, when a Tech Giant enters, smaller firms, investors and venture capitalists are not interested in continuing to invest in those markets since they are afraid of the strong competition exercised by the tech giant, which is capable of acting as a monopolist, and they are aware that their investment will probably never pay off. In addition, small companies are now organizing their activity and their businesses with the goal of being acquired by a tech giant[89]. This has the only effect of increasing the power of those companies which already have dominant influence, strong investments, and high value. Also, when one

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Chair of the DCMS Committee Summary of key issues from the Six4Three files' UK Parliament (2018), 1 <https://www.parliament.uk/globalassets/documents/commons-committees/culture-media-and-sport/Note-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf > accessed 30 November 2021

[87] Geoffrey Parker, Georgios Petropoulos, Marshall W. Van Alstyne, 'Digital Platform and Antitrust' (n 5), 1320

[88] Ibid, 1321

[89] Ibidem

of the smaller companies is bought, those which are now entering the market will have even less possibility of being acquired. Parker [90] described it as "first mover advantage", meaning that the winner of the race between smaller companies is the one that is selected by the big company for the acquisition while the others will have even more problems staying in the market. This has the consequence of annihilating competitors.

With regard to mergers, for the interest of this analysis, we shall focus on also horizontal mergers between companies which provide their services for free to their users. Usually, when a service is free it means that the company running that service obtains profits from the side of the market that uses the platform to interact with consumers. In this sense the platform makes profit by the interaction they create between user of the platform and the advertiser. Indeed, the platform, thanks to a horizontal merger that increases the number of users, may charge even more to an advertiser. Therefore, the advertiser has to gain back the costs of the surplus required by the platform by imposing this cost on consumers[91].

The same concerns are created by vertical mergers. When a dominant company performs a merger with a service's supplier, the dominant company can grant it preferential access to many information, such as the user base or to the demand side in general, thereby reducing the options left to consumers[92]. In addition, a dominant firm may use all the data and information that it acquires from the subsidiaries and suppliers that are part of its group when selling its products. Thus, the market can be considered distorted since the dominant platform becomes more powerful and leverages that power by using its role as intermediary to obtain more power.[93]

[90] Ibid, 1322

[91] Andrea Minuto Rizzo, 'Digital Mergers: Evidence from the Venture Capital Industry Suggests That Antitrust Intervention Might Be Needed' (2021) 12(1) Journal of Competition Law & Practice, 5-8 < https://doi.org/10.1093/jeclap/lpaa051 > accessed 30 November 2021

[92] Ibid, 8

[93] Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne 'Platform mergers and antitrust' (n 5), 1319

The Financial Times[94] pointed out that major tech enterprises have spent at least $264 billion to acquire potential rivals worth less than $1 billion since the start of 2021. The glut of acquisitions comes amid much tougher scrutiny from the White House, regulators, and members of Congress who have accused Tech Giants of stifling competition and harming consumers.

The Federal Trade Commission released the results[95] of a study on Tech Giants' M&A activity from 2010 to 2019, putting a spotlight on a decade of frenetic activity in which companies bought up smaller rivals at a rapid pace. Lina Khan, the FTC chair, said the study *"underscores the need for us to closely examine reporting requirements... and to identify areas where the FTC may have created loopholes that are unjustifiably enabling deals to fly under the radar*"[96].

Thus, acquisitions of less than $92 million should not be reported to regulatory authorities.

On this topic, Barry Lynn, director of the Washington-based Open Markets Institute declared:

"*This dealmaking is bad because it makes these corporations that much more powerful. It increases their power over the people who work for them, over capital markets and investors, and it blocks off the kind of competition that can bring innovation*." [97]

Lina Khan said the study highlighted how big tech companies have systemically used acquisitions of start-ups to eliminate future competitors. "*[The study] captures the extent to which these firms have devoted tremendous resources to acquiring start-ups,*

[94] Kiran Stacey, James Fontanella-Khan, Stefania Palma, 'Big tech companies snap up smaller rivals at record pace' (2021) Financial Times <https://www.ft.com/content/e2e34de1-c21b-4963-91e3-12dff5c69ba4> accessed 1 December 2021

[95] Federal Trade Commission 'Report analyzes acquisitions by Alphabet/Google, Amazon, Apple, Facebook, and Microsoft' (2021), press release <https://www.ftc.gov/news-events/press-releases/2021/09/ftc-report-on-unreported-acquisitions-by-biggest-tech-companies >

[96] Federal Trade Commission 'Remarks of Chair Lina M. Khan Regarding Non-HSR Reported Acquisitions by Select Technology Platforms Commission' (2021), 1-2 < https://www.ftc.gov/public-statements/2021/09/remarks-chair-lina-m-khan-regarding-non-hsr-reported-acquisitions-select > accessed 3 December 2021

[97] Kiran Stacey, James Fontanella-Khan, Stefania Palma, 'Big tech companies snap up smaller rivals at record pace' (n 94)

patent portfolios and entire teams of technologists — and how they were able to do so largely outside of our purview"[98].

Moreover, Apple, Facebook, Amazon, Google and Microsoft have made a lot of acquisitions for more than $1 million, a very high percentage of which included non-compete clauses for acquired company founders and key employees according to the FTC report. A minimum of 40% of the deals involved companies whose assets were incredibly new, in fact they were not even five years old. Rebecca Kelly Slaughter, an FTC commissioner, said: "*I think of serial acquisitions as a Pac-Man strategy: Each individual merger, viewed independently, may not seem to have a significant impact, but the collective impact of hundreds of smaller acquisitions can lead to a monopolistic behemoth."*[99]

Consequently, it is easier to understand that wild acquisition of competitors and horizontal integration is harming competition.

Thus, to sum up, the main element of Tech Giants' activity aimed at consolidating their dominant power is to perform wild acquisition of competitors and start-ups as well as to engage in horizontal mergers with other enterprises constituting a part of the market in order to ensure their dominance. Scholars are divided on how to interpret this phenomenon. Many authors believe that there is no harm to consumers carried out by Tech Giants, instead consumers' welfare is granted and there are no relevant anticompetitive concerns. On the opposite side, there are those who think that the conduct of Tech Giants is intended only to ensure their power and increase their welfare, and not that of the consumers.

As mentioned before, the first issue is that the power and dominance of Tech Giants are making investment in this sector less attractive. This creates penalties for smaller firms and start-ups that are beginning to make their primary goal of being acquired by more prominent companies in order to develop their idea thanks to the tech giant acquiring them.[100] Heading in this direction will create only bigger companies while only one out of a thousand firms will be capable of testing out innovation or entering the market without being smashed by a dominant firm. This highlights that the modern

[98] Ibidem

[99] Ibidem

[100] Alex Gautier, Joe Lamesch, 'Mergers in the digital economy' (2021) 54 Information Economics and policy, 10-11 < https://doi.org/10.1016/j.infoecopol.2020.100890 > accessed 1 February 2022

age challenge is to place competition within the market and not in the entrance into the market since being acquired by a competitor should not be the best way to enter in the market.

The second main issue is that when companies acquire more users, thanks to the acquisition of a competitor platform or thanks to horizontal mergers, they can achieve higher profits from advertisers or other companies that use platforms or services furnished by Tech Giants to use or promote their services[101]. Thus, big companies are destined to become more and more powerful since minor competitors and firms operating in different sectors must use the platform and services provided by just a few companies in markets in which these platforms act as a monopolist. For these reasons, the theories of harm are preferable and better aligned to reality especially in this modern age. Innovation is at risk of becoming the exclusive element of only a few big companies that will become more dominant through the strategies described above.

The journalist Farhad Manjoo, in his interview for the Financial Times, declared: "*But now you're saying now that these companies that they dreamed of are so big, they're actually in some ways suppressing innovation - the innovations of other, you know, men and women in their dorm rooms or garages dreaming up ideas. So, in what ways do you think that these companies now sometimes suppress innovation? ... This, I think, is the huge change in how the tech industry works now versus how it worked back when some of these companies were starting up. It's still possible to come out to Silicon Valley and start, you know, some new app, some - create some new piece of hardware that lots of people like and that takes the world by storm. But there's now kind of a ceiling on how successful your idea can be, and the ceiling is kind of determined by these five companies.*"[102] These words give us a strong idea of why Tech Giants are annihilating competition.

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[101] Philip Marsden, Rupprecht Podszun, 'Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement' (2020) KAS, 58-70 < https://www.kas.de/documents/252038/7995358/Restoring+Balance+to+Digital+Competition+%E2%80%93+Sensible+Rules%2C+Effective+Enforcement.pdf/7cb5ab1a-a5c2-54f0-3dcd-db6ef7fd9c78?version=1.0&t=1601365173489 > accessed 30 November 2021

[102] Kiran Stacey, James Fontanella-Khan, Stefania Palma, 'Big tech companies snap up smaller rivals at record pace' (n 94)

As we have pointed out in this section, the issue of killer acquisitions and company mergers has become a significant problem.

This stems from the fact that such conducts create harm mainly to users by limiting their choice as potential competitors are removed from the market at an early stage. This type of conduct, as we have pointed out in this paragraph, has become even more frequent with the advent of digital markets.

This comes from two main elements: i) when one buys a competitor one also buys the personal data related to its users/customers; therefore, platforms that through their activity acquire a large amount of data become very desirable in the market; ii) digital markets are strongly connected to technology and therefore to maintain a solid user-base it is necessary to exploit the most modern technologies. Start-ups can bring important innovations and thus be able to steal users away from the tech giants, which is why the biggest companies buy start-ups even before they have fully developed their 'idea'; in doing so, for a small outlay, they eliminate a potential competitor.

Killer acquisitions, as well as all the other conducts that we have analysed and will analyse in this paper, fit into the grey areas of laws and regulations, thus highlighting how the current legislative instruments are not adequate to deal with the issues raised by digital markets.

Therefore, it is important to highlight the European Commission's March 2021 initiative.

On 26 March 2021, the European Commission published new Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation[103] to certain categories of cases. Article 22 of the European Union's Merger Regulation (EC/139/2004) (EUMR) provides a mechanism for Member States to request the Commission to examine a concentration that does not meet the EU turnover threshold for merger control. The mechanism of Article 22 EUMR was introduced in the EUMR in 1989 to address the absence of national merger control regimes in certain Member

[103] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, the "EC Merger Regulation"

States[104]. Nowadays, almost all EU Member states adopted national merger control laws. Therefore, the importance of Article 22 EUMR in European merger control diminished over time and the Commission even considered limiting its scope in 2014.

Seven years later, the Commission changed its idea by expanding Article 22 EUMR's relevance in its recent Guidance. Over the last years, there appeared to be an enforcement gap in merger control legislation with respect to innovative markets and the digital economy. Acquisitions of inter alia start-ups, highly innovative companies or platforms are often not caught by the traditional turnover-based merger control thresholds. Larger competitors could acquire such companies before it generates sufficient turnover to meet the thresholds. By doing so, larger companies can avoid merger control scrutiny.

In its new Guidance on Article 22 EUMR, the Commission encourages Member States to refer merger cases to the Commission where the Member State itself does not have jurisdiction over the transaction and where the criteria of Article 22 EUMR are met, *i.e.* the concentration must (i) affect trade between Member States and (ii) threaten to significantly affect competition within the territory of the Member State(s) making the request.[105]

Categories of cases that might be appropriate for referral under the Guidance concern concentrations involving at least one undertaking whose turnover does not reflect its actual or future competitive potential (e.g. start-ups, important innovators or companies with access to competitively significant assets such as data). In this sense, the new Guidance could be considered an important step in the fight against Killer Acquisition, hence we will see if this new instrument will be good enough to limit that kind of conducts.[106]

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[104] Pablo Ibáñez Colomo, 'EU Merger Control between Law and Discretion: When Is an Impediment to Effective Competition Significant?' (2021) 44 World Competition, 6-11 < http://dx.doi.org/10.2139/ssrn.3874304 > accessed 31 January 2022

[105] Siyou Zhou, 'Merger Control in Digital Era' (2021), SSRN, 6-10 <http://dx.doi.org/10.2139/ssrn.3976594 > accessed 31 January 2022

[106] It should be remarked that this new guidance was already applied in the case of the proposed combination between Illumina and GRAIL. The new guidance on Article 22 is important since, at the European level, the operation does not reach the control thresholds. At the national level, the merger was notified in any Member State. That is why France, followed by Belgium, Greece, Island, Netherlands, and Norway submitted a referral request to the Commission under Article 22 of the EU

Scope of this work is indeed to point out that the actual legal framework does not fit for digital markets. The rationale behind the analysis of killer acquisition is to highlight that also in this field the existing legal framework needs to be further developed.

In the next section we will move to the analysis of the data monopolies.

1.6 Anticompetitive use of data and the formation of data-opolies: the Facebook-Germany case

Nowadays, Tech Giants and major companies in general make massive use of data in their everyday activities. Data may be used to monitor the preferences of users and give them personalised services to get the most out of using the platform.[107]

In addition, data are used also to monitor the trend of the market, which helps Tech Giants or those platforms that massively use and treat data to develop and make their strategies adequate to increase their profit. The use of data in the market is not illegal in itself as it does not integrate any anticompetitive conduct nor is it against the law in general[108].

Merger Regulation. Indeed, this provision is related to a mechanism of upward referral which consists of a Member State to refer a suspected merger to the European Commission. Before this new conception, such a merger had to validate a condition: to reach national thresholds instituted by the referring country. Now, this condition is no more required: it means that all mergers, regardless of the size, can be referred to, controlled, and potentially prohibited by the European Commission. Hence, the Commission opened an investigation in July 2021 and, in October 2021 it adopted binding interim measures. The interim measures prohibit the concentration of the two companies, at least until the outcome of the Commission's merger investigation is published.

[107] By data-opolies we refer to those companies which use and base their activity on the acquisition and treatment of personal data and that operates as monopolist in their respective sector.

[108] From privacy point of view, it is different. It is linked with the laws, and they may differ from country to country. For example, US and Europe have a totally different attitude to the topic. In Europe in fact, privacy is a fundamental right recognised by the art. 8 of the Charter of Fundamental Rights, in US, instead, privacy is not protected that much. While Europe has a strict norm regarding the treatment of personal data, which is the General Data Protection Regulation, nothing like that could be seen in the US that considers norms like GDPR to be too strict and potentially capable of creating damages to companies which use data or simply store them for their activities. Main differences between the two legal systems were pointed out in the Court Decision C-311/18 - Facebook Ireland and Schrems in which CJEU declared that US legal system is not granting an adequate level of protection to personal data.

Nowadays, data are extremely easy to capture since all devices and all platforms used by consumers store personal data for many purposes. However, can data be used for anticompetitive conducts? Answering this question is not easy for many reasons. It may be said that users think that in a data-driven economy there should be less risk of monopolisation[109] since data-driven markets may be believed to have low entry barriers. Indeed, data are cheap, ubiquitous and widely available. Furthermore, it is difficult to monopolise markets in which the service is furnished for free.[110] Examples of this are that modern Tech Giants have all overtaken previously dominant companies in their sector. Indeed, it should be possible to say that data-driven markets are in perfect competition and that since they offer free products and services there is no possibility of harming users with increasing prices and there is no possibility of annihilating competition since the barrier at the entrance may be considered very low[111]. Furthermore, there are no technical or economic constraints which prevent

For an overview of Schrems II decision see: Michele Nino, 'La sentenza Schrems II della Corte di giustizia UE: trasmissione dei dati personali dall'Unione europea agli Stati terzi e tutela dei diritti dell'uomo' in *Diritti umani e diritto internazionale, Rivista quadrimestrale",* 3/2020,733-759< http://doi:10.12829/99542 > accessed 2 December 2021. For a more detailed analysis of the issue raised by the transfer of personal data from UE to the US see: Asunción Estevè, 'The business of personal data: Google, Facebook, and privacy issues in the EU and the USA' (2017) 7(1) International Data Privacy Law, 36-47 <https://doi.org/10.1093/idpl/ipw026 > accessed 2 December 2021. For the analysis of the US surveillance programs which are not respectful of Europeans' right to privacy see: Bowden C, Bigo D, 'The US surveillance programmes and their impact on EU citizens' fundamental rights' (2013) Study for the LIBE Committee, PE 474.405, 1-40 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/briefingnote_/briefingnote_en.pdf > accessed 2 December 2021. In the end, for an analysis from the US point of view of the main differences between US privacy system and UE privacy system see: Lothar Determann "Adequacy of data protection in the USA: myths and facts' (2016) 6(3) International Data Privacy Law, 244-250 < https://doi.org/10.1093/idpl/ipw011 > accessed 2 December 2021

[109] Maurice Stucke, 'Should We Be Concerned About Data-opolies?' (2018) 275(2) Georgetown Law Technology Review, 275 < https://dx.doi.org/10.2139/ssrn.3144045 > accessed 3 December 2021

[110] Maurice Stucke, Allen Grunes, 'Data-opolies' (2017) University of Tennessee Legal Studies, 2 <http://dx.doi.org/10.2139/ssrn.2927018 > accessed 3 December 2021

[111] Eric Schmidt, Executive Chairman of Google, stated that *"the barriers to entry are negligible, because competition is just one click away"*. See 'Why Google Works' (2015) Huffington Post < http://www.huffingtonpost.com/eric-schmidt/why-Googleworks_b_6502132.html.> accessed 5 December 2021

users from changing providers; basically, users can easily switch from one platform to another.

Assuming this concept is true and there are no entry barriers or any other element obligating users to switch platforms, there would be no reason for search engines and Tech Giants to intentionally degrade the quality of their services, but this is not the case. The main entry barriers are data-driven network effects.[112]

According to Stucke, there are 4 main network effects that are strongly influenced by data: "*first classic network effects, second network effects arising from the scale of data, third network effects from the scope of data and finally how network effects on one side of a multisided platform can spill over to the other side"*[113]. When analysing digital markets, it is important to bear network effects in mind since, even if digital markets are affected by these effects, this will not always lead to market dominance. Therefore, network effects shall be analysed on a case-by-case basis[114]. Thus, network effects must be taken into account in addition to classical entry barriers because data-driven network effects may create market concentration and dominance. For these reasons even if someone creates a better platform or service (e.g. a search engine or a social network), with data-driven network effects the new product will not be immediately used by many[115].

Data-driven network effects should be considered one of the reasons for the creation of the so-called "*data-opolies*". Indeed, network effects may provide leeway in the engagement in anticompetitive behaviour as a way to maintain a monopoly. Thus, data network effects can influence the behaviour of dominant companies whose goal is obtaining users; the loss of users can reduce the quality of the service offered and the attractiveness of the platform for investors and advertisers which constitute the core business of the platform[116]. In the case that a platform acquires the users of its competitors, a quality gap may be created through the additional surplus generated by

[112] Maurice Stucke, 'Should We Be Concerned About Data-opolies?' (n 109), 280

[113] Ibid, 5

[114] *Facebook/WhatsApp* (Case Comp/M.7217) Commission Decision C7239 (2014) para 130.

[115] Maurice Stucke, Allen Grunes, 'Big data and competition policy' (2016), Oxford University Press, 1-3 < https://www.researchgate.net/publication/308970973_Big_Data_and_Competition_Policy > accessed 4 December 2021

[116] Maurice Stucke, 'Should We Be Concerned About Data-opolies?' (n 109), 6

having more users. When users notice a quality gap, the network effect can hasten the loss of users as they may move to competitors' platforms.

One of the most relevant elements of digital platform markets is that they are winner-take-all markets[117]. This fact derives from the network effect and the control over data. Indeed, both may make early advantages become self-reinforcing. Thus, Tech Giants and platform markets, in general, are destined to be dominated by only a few firms[118].

Companies operating in platform markets, like Amazon, obtain strong benefits from network effects. This happens when users' utility in using a product increase when other users use the same product. When popularity increases and gets stronger, network-driven markets are likely to tend towards oligopoly or monopoly[119]. Remaining on Amazon, its user review system is a good example of how powerful a network effect could be. Indeed, the more users buy and review a particular product, the more information new users have about that product. Thus, network effects help Amazon to reinforce its dominant position in e-commerce and, when companies become dominant, threats come from a different market[120]. Therefore, network effects have a strong role when companies acquire a dominant position and when this happens other companies avoid any conflict with dominant companies. Therefore, it is possible to affirm that network effects work as an entry barrier. Indeed, a platform's control over data is also capable of enforcing and consolidating its position[121]. Having access to consumer data gives a platform the opportunity to furnish its users with a service that is more adapted to their needs and also to develop its services with an eye to user

[117] Lisa M. Khan, 'Amazon's Antitrust paradox' (n 12), 785

[118] For example, Walmart purchased Jet.com, which is a start-up that had sought to challenge Amazon in online retail.

[119] Lisa M. Khan, 'Amazon's Antitrust paradox' (n 12), 785-786

[120] *"[O]nce dominance is achieved, threats come largely from outside the dominated market, because the degree of dominance of such a market tends to become so extreme."* on this see United States Court of Appeal, Case 505 F.3d 302, Novell Inc. v. Microsoft Corp., para. 308 (2007)

[121] Frédéric Marty, Julien Pillot, 'Cooperation, dependence, and eviction: how platform-to-business coopetition relationships should be addressed in mobile telephony ecosystems.' Challenges to Assumptions in Competition Law, 9 < https://www.elgaronline.com/downloadpdf/edcoll/9781839109065/9781839109065.00007.pdf > accessed 31 January 2022

preferences [122] . In addition, spreading platform activity across markets allows platforms to deploy data obtained from one market to benefit another part of the business[123]. Moreover, control over data makes it even easier for companies to enter into new markets.

Hence, since online platforms are operating in markets in which network effects and control over data are strong and part of their strategy is to achieve and consolidate dominance, new companies trying to enter must find a way to capture data as well[124]. The best way to do this is to chase market shares and drive away the main competitors even if this costs part of the revenues[125]. In this sense, network effects enforce the market strategy of facing losses in order to consolidate dominance.

This is just a small part of the market strategy of Tech Giants using data.

In addition, thanks to the massive amount of data available in the market, companies can "nowcast" [126] through digital platforms. Nowcasting gives a great benefit to companies since it could help in the monitoring of competitors and emerging trends; for instance, Google and Apple have control of the Google play Store (Android devices) and of the App store (Apple devices) respectively and can monitor when

[122] In addition, the massive presence of data in the market creates many other uncertainties. Hence, other uncertainties raised by the use of Big Data are represented by the polarisation of information in the hands of a few digital intermediaries, which reveals the full extent of the asymmetry between the provider of the information service and its user, aggravated by the non-transparent and selective criteria which underline the operation of the algorithm, which is a problem that reflects on the full exercise of rights to freedom and the future of democracy. There is thus an urgent need for an effective regulation of Big Data and, more generally, of personal information circulating online, inspired by constitutionally guaranteed values and aimed at protecting the individual from the improper use of information technologies, with a view to an innovative delineation of models of active digital citizenship, as the basis for effective freedom of personal construction. For more on this topic: Gustavo Ghidini, Gustavo Olivieri, Valeria Falce '*Informazione e Big Data tra Innovazione e Concorrenza'* (Giuffrè 2017)

[123] Amazon for example spread its activity across many different markets, no doubt that the data obtained through one side of its e-commerce are also used and are useful on the others. On this point see: Lina M. Khan, 'Amazon's Antitrust paradox' (n 12), 785-786

[124] Ibid, 780-784

[125] As we mentioned many times, Amazon pursued in many case the idea of losing money in order to consolidate its dominance, it happened with the E-books in 2009 and also when he bought Quidsi

[126] "*Nowcast, i.e., 'predict the present' by using search inquiries, social network postings, tweets, etc."* Maurice Stucke, 'Should We Be Concerned About Data-opolies?' (n 110), 282

various apps are downloaded, including those of their competitors [127]. Thus, nowcasting is a data-based weapon for monitoring competitors in real time. Indeed, nowcasting could be used by a data-opolist to quickly identify competitive threats, allowing the dominant firm to acquire emerging competitors before they become strong,[128] or even block their development by making it more difficult to find an app on the relative store or by manipulating search engines[129].

As a result, it is not possible to say that data-driven markets cannot be monopolised, instead data-driven network effects are an effective instrument in consolidating the dominance[130] of a company, increasing its power on both the advertising market and the multitasked market by using nowcasting to monitor any threats.

Indeed, a dominant data-driven company has the opportunity to use exclusionary tactics simply as a means of preventing its competitors from obtaining a minimum efficient scale[131] which is important in data-driven companies like search engines and advertising. Furthermore, dominant companies have the power to prevent rivals and competitors from accessing crucial data for their development. Through this unfair activity dominant firms may extend the quality gap between their platform and those of their competitors and attract new investors, new users and increase their revenues[132].

[127] For example, Google acquired in 2013 Waze, but before that date Google would have been much interested in knowing the number of downloads of Waze which was the main competitor of Google maps

[128] Facebook for example, alert its investors that platform partners may use information shared by our users through the Facebook Platform in order to develop products or features that compete with them.

[129] Maurice Stucke, 'Should We Be Concerned About Data-opolies?' (n 109), 279

[130] *"The reality is that monopolies are not only possible in data-driven markets, but in some industries, given the network effects, are very likely"* Maurice Stucke, Allen Grunes, 'Data-opolies' (n 110), 8

[131] Victoria Fast, Daniel Schnurr, Michael Wohlfarth, 'Regulation of Data-driven Market Power in the Digital Economy: Business Value Creation and Competitive Advantages from Big Data' (2021) SSRN, 6 < https://ssrn.com/abstract=3759664 > accessed 5 December 2021

[132] The link between data and the market itself is very strong. Colangelo, indeed, stated that the development of digital markets shows the birth of business models based around the collection and commercial use of big data: an increasing number of companies are dedicated to collecting, storing, analysing and using information, often of a personal nature. For these reasons, for many years it has been discussed the fact that owning such a massive amount of data could raise strong anticompetitive concerns. Thus, there is a growing demand for antitrust intervention to neutralise the risks associated with the collection and use of big data relating to personal information, to the point of hypothesising a

About anticompetitive use of data, it is paramount to analyse the Facebook case of 2019[133]. In 2019, the German Federal Cartel Office (from here on referred to as the FCO) issued an infringement decision against Facebook for exploiting consumers through excessive data collection and prohibited Facebook from continuing its data collection policy, considering it an abuse of dominance. The FCO's decision was based on the belief that Facebook's policy was violating users' right to privacy[134]. This decision is very important[135] since it underlines the strong link that actually exists between competition law in digital markets and privacy norms.

The decision was the first European case in which a digital platform was considered guilty of an exploitative[136] abuse rather than an exclusionary[137] abuse.

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combination of competition and consumer protection rules to ensure that any breaches of privacy are also analysed from an antitrust perspective and with antitrust instruments. This concept will be remarked in chapter two trough the analysis of the proposed norm to contrast the Tech Giants; indeed, the European Digital Markets Act takes into account the worries expressed by Colangelo. On this see: Giuseppe Colangelo 'Big data, piattaforme digitali e antitrust' (2016) Mercato Concorrenza Regole, 425-433 < https://www.rivisteweb.it/doi/10.1434/85666 > accessed 10 December 2021

[133] Case B6-22/16 *German Federal Cartel Office v Facebook* (2019)

[134] Anne Witt, 'Excessive Data Collection as a Form of Anticompetitive Conduct – The German Facebook Case' (2021) 66(2) Antitrust Bulletin 278–285 <http://dx.doi.org/10.2139/ssrn.3671445> accessed 12 December 2021

[135] The decision of German FCO was so important that was in almost all headlines worldwide

[136] Exploitative abuses have no detrimental impact on competitors. Instead, they involve the dominating corporation actively harming consumers (which uses its market power to extract rents from its customers beyond what would normally be achievable). The most common example of exploitative behavior is when a dominant company charges its customers exorbitant prices—prices that are far in excess of both the dominant company's costs and comparable products, or, as the leading case on the issue stated, charging a price that is exorbitant because it bears no reasonable relationship to the economic value of the product supplied. While the worry about excessive pricing is apparent, it is rarely implemented by authorities in reality since it requires a definition of the proper competitive price and hence essentially implies price control. Basically, according to competition law, exploitative conducts are practices that harm business users and/or end-users directly, whereas exclusionary conducts are practices that remove or weaken actual and potential competition, while directly or indirectly harming business users and/or end-users. On this see point: Miriam Caroline Buiten, 'Exploitative abuses in digital markets: between competition law and data protection law' (2021) 9(2) Journal of Antitrust Enforcement, 270-273 < https://doi.org/10.1093/jaenfo/jnaa041 > accessed 5 December 2021

[137] Exclusionary abuse is defined as behaviour by a dominating business that is capable of prohibiting competitors, in whole or in part, from profitably entering or remaining active in a particular market (and

The decision originates from an innovative theory of harm since the FCO, justified its infringement decision by stating that Facebook violated the main norms governing privacy in Europe, that is the GDPR[138].

First, let us focus now on the key background information regarding this decision. Facebook, as is widely known, is a provider of worldwide digital social network services and has been available in Europe since 2008. The platform, as was previously mentioned, is free of charge and gets its revenue thanks to online advertising. The only step needed to use Facebook's services is to set up a profile and register on the platform by accepting a large number of terms and conditions. In addition, and most importantly, Facebook asks users to authorise the treatment of personal data as described in its data and cookie policies. Basically, users, by accepting these terms and conditions, allow Facebook to collect, combine and analyse the data of the user and data generated by the user from a variety of online sources. These sources are Facebook itself, Facebook-owned services and third-party websites that use Facebook Business Tools[139].

For users it was difficult to discover which third-party services were using Facebook Business Tools because the tools and products were provided for free to third-party website operators, advertising developers or any other businesses for the purpose of integrating business apps and online services into their own business. The main issue is that, by the time of the FCO decision, millions of businesses were using Facebook Business Tools[140] and, even more problematic, they were not listed in Facebook's terms and conditions. Therefore, users did not know whether a website had access to

which, as an indirect result, will ultimately have a detrimental impact on consumers). Exclusionary behaviors are often regarded as the most dangerous sort of maltreatment. This is because they have the potential to undermine the competitive process in the long run by preventing small or new rivals from becoming viable challenges to a dominant business, depriving customers the chance to benefit from more choice and competition. Björn A. Kuchinke, Miguel Vidal, 'Exclusionary strategies and the rise of winner-takes-it-all markets on the Internet' (2016) 40 (6) Telecommunication Policy, 592-594 < https://doi.org/10.1016/j.telpol.2016.02.009 > accessed 5 December 2021

[138] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[139] Anne Witt, 'Excessive Data Collection as a Form of Anticompetitive Conduct – The German Facebook Case' (n 134), 274

[140] Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 905.

their data, and this was the case even for websites the user had never accessed. Through this system, Facebook was capable of acquiring an enormous amount of data, starting with more detailed data from Facebook users themselves to data from people who were not registered on Facebook but who had visited third-party websites. Thus, Facebook was able to develop highly detailed user profiles with different types of data[141], giving Facebook the opportunity to sell more targeted advertisement online and thereby increasing its revenues.

It is interesting, for the purpose of this analysis, to understand Facebook's dominant position as described by the FCO. The interest here is due to the fact that dominance is normally associated to companies which provide paid services and not free services. In order to assess Facebook's dominant position, the FCO referred to its own merger guidelines according to which dominant position refers to the capability of a single enterprise to take commercial decisions that are not limited or that are not sufficiently limited by the reactions of competitors, customers and suppliers; in particular, the FCO's guidelines intend those decisions referring to price, production quality of service or any other market parameter[142]. Indeed, with price as only one of the main factors, the FCO was able to consider Facebook dominant although its service is free of charge. For the FCO, Facebook's dominant position referred to its ability to force contractual conditions upon consumers who have no bargaining power; indeed, users were forced to accept Facebook's data collection terms.[143]

This concept was not easy to highlight since users are more sensitive to price increases rather than privacy infringement. Incidentally, this is due to the fact that users have issues knowing the full extent of the data collection they agreed to. In addition, if users

[141] "*It thus established a vast database of highly-detailed user profiles, including information such as names, age, gender, photos, friends, locations, shopping behaviour, interests, political views, and sexual orientation, amongst many others*" see: Brian X. Chen, 'I Downloaded the Information That Facebook Has on Me. Yikes.' (2018) New York Times < https://www.nytimes.com/2018/04/11/technology/personaltech/i-downloaded-the-information-that-facebook-has-on-me-yikes.html > accessed 11 December 2021

[142] Bundeskartellamt, 'Guidelines on Market Dominance in Merger Control' (2012), para 9 <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitfaden/Leitfaden%20-%20Marktbeherrschung%20in%20der%20Fusionskontrolle.pdf > accessed 11 December 2021

[143] Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 378

did not accept the terms and conditions of the platform, they were not able to use the service[144].

One of the main issues in assessing Facebook's dominant position was understanding Facebook's market share and the position of its competitors - this is due again to the fact that Facebook's service is free. Another important part of the FCO decision, that is strongly linked with what has been said in this section, is the recognition that the social media market is strongly influenced by direct and indirect network effect which has increased market concentration, creating stronger entry barriers and also barriers to the growth of already existing competitors, and therefore giving Facebook a strong unassailable market position[145]. The FCO, in addition, highlighted that Facebook has access to competition law relevant data. This fact is sure to be considered highly relevant when assessing the dominant position in the social network market. More data equals more suitable advertisements for users. Therefore, advertisers will pay Facebook more for advertising thereby increasing its revenues[146].

Facebook appealed the FCO decision to the Dusseldorf Higher Regional Court (*Landesgerichthof)*. The Higher Court went against the decision of the FCO.[147] First, the Higher Court stated that the FCO failed to show that prices were higher or

[144] Maurice Stucke, 'Should We Be Concerned About Data-opolies?' (n 110), 287

[145] The three hundred and more pages of the order issued by the Bundeskartellamt is an exemplary model of how deep should be the reconnaissance of the facts underlying the evaluation, from an anti-monopolistic point of view, of the activities of the protagonists of the digital economy; and they endeavour to verify how far the intervention of the antitrust authority can be pushed, in the name of the imperative to preserve the saving capacity of the market, by leveraging other regulatory frameworks, which produce effects in any case destined to fall on that market. Hence, the decision of the German Competition Authority is important not only since it's the first case in which it is discussed privacy violation as anticompetitive conduct, but also because being highly detailed represents a fundamental benchmark for other Competition Authorities; hence Facebook-Germany represents one of the most important antitrust cases of European history. For more on this see Cristoforo Osti, Roberto Pardolesi, 'Antitrust in the Time of Facebook' (2019) (2) Mercato Concorrenza Regole, 195-202 <https://ideas.repec.org/a/mul/jhpfyn/doi10.1434-95577y2019i2p195-218.html > accessed 5 December 2021

[146] Viktoria H. S. E. Robertson, 'Antitrust market definition for digital ecosystems' (2021) 2 Concurrences, 3 < https://ssrn.com/abstract=3844551 > accessed 5 December 2021

[147] OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), available at www.olgduesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VIKart-1-19-_V_.pdf

contractual terms were less good than in a competitive market. In addition, the High Court stated that the FCO did not furnish enough evidence to prove that Facebook's data acquisition deprives the digital market of competition. Moreover, the Dusseldorf Court stated that the FCO did not demonstrate that Facebook has engaged an anticompetitive conduct since its users did not face any economic loss from the transfer of data also because data are duplicable and easy to transfer and share with many other undertakings[148]. In the end, the Dusseldorf Court did not analyse whether Facebook's conduct infringed upon the GDPR or not as it was considered irrelevant. The Court stated that an exploitative conduct could be considered anticompetitive only if it harms competition.

More interesting for this analysis is the further appeal made by the FCO to the German Federal Court of Justice (*Bundesgerichtshof*"). The Federal Court totally disagreed with the statements made by the Dusseldorf court. Indeed, for the Federal Court[149] there was no doubt that Facebook abused its dominant position. The Federal Court's approach was not essentially focused on the possible infringement of the GDPR, instead its main focus was on users' lack of choice between a more personalised experience on Facebook, which needs data collected through the three sources previously mentioned, or a less personalised experience based on the data that the user themselves choose to disclose to Facebook[150]. Thus, as stated by the federal court, Facebook's data acquisition and data collection policy can affect competition. Indeed, the restrictive effect was on the social network market since acquisition of data increases the lock-in effect of the platform, increasing the profits of Facebook and creating restrictive effects on online market advertising.

On 23 June 2020, the German Federal Court of Justice merely annulled the Dusseldorf Court decision while the proceedings continued in Dusseldorf. In April 2021, the Higher Regional Court of Düsseldorf filed a request for a preliminary ruling by the European Court of Justice (the CJEU) which handles central questions of data

[148] Dusseldorf Court Order, point B.1.b).bb) (1), p. 8.

[149] Maren Steiert, 'German Federal Cartel Office against Facebook: now the European Court of Justice will decide' (Bird & Bird 2021) < https://www.twobirds.com/en/news/Articles/2021/germany/german-federal-cartel-office-against-facebook-now-the-european-Court-of-justice-will-decide > accessed 13 December 2021

[150] Anne Witt, 'Excessive Data Collection as a Form of Anticompetitive Conduct – The German Facebook Case' (n 134), 23

protection law and the relationship between Competition Authorities and data protection authorities[151].

The analysis of this proceeding against Facebook was helpful since it pointed out many elements that were discussed in this section: the direct and indirect effect of the network, the ability to enforce dominant power through the acquisition of data, how data create entry barriers[152] and, in the end, the existing bond between privacy concerns and competition law in digital markets.

1.7 Self-preferencing: the business of App-stores and mobile devices

One of the most significant issues raised by modern platform markets is that companies which want to be competitive in the market must use these platforms while the owners of the platform are their strongest competitors. This issue is due to vertical integration across Internet businesses which gives Tech Giants the opportunity to foreclose on rivals and consolidate their dominance[153].

A good example of this anticompetitive behaviour is the Amazon Marketplace, where third-party shops sell their products. Of course, since Amazon, as has been mentioned,

[151] The request for preliminary ruling includes seven questions, two relating to the application of the GDPR and five to its content. For more on this see: Björn Herbers, ' CJEU to issue preliminary ruling on German FCO-Facebook case' (CMS Law-Now 2021), 2 <https://www.cms-lawnow.com/ealerts/2021/04/CJEU-to-issue-preliminary-ruling-on-german-fco-facebook-case> accessed 9 December 2021

[152] Even if in this section it was pointed out that due to the presence of massive amount of data there are more related anticompetitive conducts, it is important to highlight that data are a crucial instrument also for the development of public policies. Indeed, worldwide authorities are developing system based on data driven decisions which will be the most important assets for future policies. Also, from the political point of view there is uncertainty concerning the use of data since compliance with the data protection and privacy norms is by no means an easy task. An example of that issue can be seen in the 'Digital Urban European Twins' (DUET) project which aims in creating digital twins of European cities to implement data driven decisions. In one of the main deliverables, it was discussed whether it should be implemented an ethics code of conduct that should guide the activities of politicians in the development of data management tools; hence when managing data, it is mandatory to keep an eye not only on legal compliance but also on ethical concerns. On this see Tomas Pavelka, Kletia Noti, 'Ethical Principles for using Data-Driven Decision in the Cloud' (2021) DUET

[153] Lina M. Khan 'Amazon's Antitrust Paradox' (n 17), 792-797

commands an enormous part of the e-commerce market, a lot of smaller sellers must use its platform to find buyers for their products[154].

Basically, sellers list their products on Amazon. From all products sold on the platform, Amazon gains a fee that is around 5%. Imaging that there are millions of third-party sellers operating on Amazon and that the number of sellers operating through Amazon has dramatically increased in the past few years, it can be deduced that Amazon's income has increased in a vertiginous way.

Third-party sellers themselves recognise that they are not protected when selling on Amazon[155]. Indeed, Amazon uses its Marketplace as a laboratory which is useful for obtaining data from other merchants in order to improve its price strategy, cut out potential competitors, spot new products to sell, and, more importantly, give its own items featured placement under a given search.[156]

Amazon has the power and the data to fight against any independent merchant on price by undercutting it if necessary on products that were originally brought to the market by the competitor and by going direct to the manufacturer, Amazon is able to cut out independent sellers[157]. Even more problematic are the so-called Amazon Basics products. In essence, Amazon has started responding to most sold products in the market by producing and selling them itself.

Amazon has been developing its Amazon Basics products since 2009. It started with the production of generic goods and then moved on to the acquisition of the data of other sellers through its Marketplace.

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[154] *"If you say no to Amazon, you're closing the door on tons of sales."* Angus Loten, Adam Janofsky, 'Sellers Need Amazon, but at What Cost?' (2015) Wall Street. Journal <http://www.wsj.com/Articles/sellers-need-amazon-but-at-what-cost-1421278220 > accessed 10 December 2021

[155] *"You can't really be a highvolume seller online without being on Amazon, but sellers are very aware of the fact that Amazon is also their primary competitor"* ibidem

[156] Josh Hammer, 'How Do You Solve a Problem Like Amazon?' (2021) American Affairs Journal, 2-5 <https://ssrn.com/abstract=3908764 > accessed 6 December 2021

[157] An example of that is given us by the "Pillow Pets" which are peluche sold by a third-party seller through Amazon, selling about one hundred Pillows per day. Ahead of holiday season, merchant realised that Amazon was selling its own "peluche" giving it featured placement on the site. See Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 781

Now Amazon is selling its "basic" products in the market with a total margin of profit as it is not acting as an intermediary in this case, but as a seller. Indeed, Soper declared in Bloomberg News that: "*As it now rolls out more AmazonBasics products, it is clear that the company has used insights gleaned from its vast Web store to build a private-label juggernaut that now includes more than 3,000 products*[158]".

In addition, it was found that Amazon *"began selling 25% of the top items first sold through marketplace vendors"* as far as woman's clothes are concerned [159].

This strategy of Amazon's is a product of its time. Indeed, it is true that retailers use private labels and competitors or other brand sales numbers to organise their internal production. Here it is different since also the scale and level of sophistication of the data collected and used is different[160]. Thus, Amazon is able to do something that other retailers are not, which is to get information not only on actual sales (like every other retailer can do) but also data regarding products that users have been searching for but did not find. In addition, Amazon can access to data concerning products customers repeatedly return to or even data concerning what users keep in their basket and items over which they move their mouse on the screen.

This is set to harm competition since, in this way, Amazon does not suffer any risks, while its competitors, that use its Marketplace platform and provide Amazon with fees on the sales, are suffering all the risks. This is basically a winner-take-all strategy for Amazon. Through this strategy Amazon is certainly able to assert whether a product will be sold or not, while the seller suffers the economic risks.

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[158] Spencer Soper, 'Got a Hot Seller on Amazon? Prepare for E-Tailer To Make One Too' (2016) Bloomberg < http://www.bloomberg.com/news/Articles/2016-04-20/got-a-hot-seller-on-amazon-prepare-for-e-tailer-to-make-one-too > accessed 6 December 2021

[159] George Anderson, 'Is Amazon Undercutting Third-Party Sellers Using Their Own Data?' (2014) Forbes <http://www.forbes.com/sites/retailwire/2014/10/30/is-amazon-undercutting-third-party-sellers-using-their-own-data> accessed 8 December 2021

[160] Lina M. Khan, 'Amazon's Antitrust Paradox' (n 12), 772

This Amazon strategy has been fined multiple times especially by European or National institutions. For example, in December 2021, Amazon was fined over 1 billion dollars by the Italian Antitrust Authority[161].

Let us briefly discuss the reason for this decision by the Italian Authority. Amazon holds a position of absolute dominance in the Italian market of all intermediation services on marketplaces, which has enabled it to favour its own logistics service called Fulfillment by Amazon (FBA), with sellers active on the Amazon.it platform to the detriment of competitors in that market and to the strengthening of its own dominant position.[162]

According to the Italian Authority, the companies have linked the use of Amazon's Logistics service to access to a set of benefits that are essential for gaining visibility and better sales prospects on Amazon.co.uk. Among these exclusive benefits is the Prime label, which makes it easier to sell to the most loyal and high-end consumers who are members of Amazon's loyalty programme of the same name.[163]

The Prime label also makes it possible to participate in Amazon's popular special events such as Black Friday, Cyber Monday, Prime Day and increases the likelihood that the seller's offer will be selected as a Featured Offer and displayed in the so-called Buy Box. Amazon has thus prevented third-party sellers from attaching the Prime label to offers not managed by FBA[164].

The investigation found that these features of Amazon's platform are crucial to the success of sellers and to increase their sales. Moreover, third-party sellers, using FBA,

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[161] Autorità Garante della Concorrenza e del Mercato, 'A528 - Sanzione di oltre 1 miliardo e 128 milioni di euro ad Amazon per abuso di posizione dominante' (2021) < https://www.agcm.it/dotcmsdoc/allegati-news/A528_chiusura%20istruttoria.pdf >

[162] Umberto Monarca, Cesare Pozzi, Ernesto Cassetta ,'The Italian Competition Authority Imposes a record fine of over €1 billion as well as behavioral remedies on an E-Commerce company for abusing its dominant position through engaging In discriminatory practices and denying third-party sellers access to certain sales prospects crucial to increasing their visibility on its website (Amazon)' (2021) Concurrences, 2 < https://www.concurrences.com/en/bulletin/news-issues/december-2021/the-italian-competition-authority-imposes-a-record-fine-of-over-eur1-billion-as > accessed 15 December 2021

[163] Rocco Panetta, 'Antitrust, super sanzione ad Amazon e nuove regole: gli impatti' (Agenda Digitale 2021) < https://www.agendadigitale.eu/mercati-digitali/antitrust-super-sanzione-ad-amazon-e-nuove-regole-gli-impatti/ > accessed 8 December 2021

[164] Umberto Monarca, Cesare Pozzi, Ernesto Cassetta (n 162), 3

are not subjected to the stringent performance measurement system that Amazon imposes on non-FBA sellers and whose failure can lead to the suspension of the seller's account. In this way, Amazon has harmed competing e-commerce logistics providers by preventing them from presenting themselves to online sellers as service providers of comparable quality to Amazon's Logistics.

Such conduct has thus increased the gap between Amazon's power and that of its competitors also in the e-commerce order delivery business. Moreover, as a result of the abuse, competing marketplaces have also been harmed: due to the cost of duplicating warehouses, sellers using Amazon's logistics are discouraged from offering their products on other online platforms, at least with the same breadth of range.

In addition, in order to immediately restore competitive conditions in the relevant markets, the Authority has imposed behavioural measures on the Jeff Bezos-led group that will be reviewed by a monitoring trustee.[165]

Amazon will have to grant sales privileges and visibility on its platform to third-party sellers who meet fair and non-discriminatory order fulfilment standards in line with Amazon's service level to Prime consumers. Amazon will have to define and publish such standards and, as of one year after the decision is made, refrain from negotiating with carriers or competing logistics operators - on behalf of sellers – on rates and other contractual conditions applied for the logistics of their orders on Amazon[166], outside of its logistics platform[167].

Of course, Amazon is not the only platform which is pursuing this strategy of aiming to increase the benefit for the platform's own product rather than those of their competitors. For example, Apple has been accused for years by Spotify of not allowing

[165] Autorità Garante della Concorrenza e del Mercato, 'A528 - Sanzione di oltre 1 miliardo e 128 milioni di euro ad Amazon per abuso di posizione dominante' (n 161), paras. 889-890

[166] *"We are faced with an example of successful coordination between the European Commission and the Italian Authority, which was ideally placed to conduct a separate investigation into Amazon's conduct in Italy,"* on this see Valentina Iorio 'Brussels praises Italy for fining Amazon €1.1 billion in antritrust case' (2021) EURACTIV < https://www.euractiv.com/section/digital/news/brussels-praises-italy-for-fining-amazon-e1-1-billion-in-antritrust-case/ > accessed 13 December 2021

[167] Umberto Monarca, Cesare Pozzi, Ernesto Cassetta (n 162), 4

Spotify to upgrade its app on the Apple App Store[168]. Spotify's claim was based on the belief that Apple was trying to remove the competition in the field of music on mobile devices. When Spotify started a promotional campaign offering new subscribers the chance to get three months of the service for $0.99 if they signed up via Spotify's own site, Apple reacted, according to Spotify General Counsel, by removing the Spotify app from its Apple App Store, or at least making it more difficult to find. This is just an example of the kind of conduct digital platforms may use to annihilate competitors and consolidate their dominant position on a vast scale.

One of the major examples of abuse of a dominant position concerning the abusive privilege given to a company's own products over those of competitors can be found in the case of Google Shopping[169].

In a decision made in 2017, the European Commission found that Google has abused its dominant position in the field of online search services. Google was found guilty of favouring its own comparison-shopping services over those of its competitors[170]. The commission found that *"the results of product searches made using Google's general search engine were positioned and displayed in a more eye-catching manner when the results came from Google's own comparison-shopping service than when they came from competing comparison shopping services"*[171]. Moreover, the results from competing comparison shopping services appeared as simply generic results and as a consequence they were prone to be demoted by Google's adjustment algorithms in

[168] Shili Shao, 'Antitrust in the Consumer Platform Economy: How Apple Has Abused its Mobile Platform Dominance', (n 60), 3-7

[169] *Google Search (Shopping)* (Case AT.39740) Commission Decision C4444 (2017). Full decision available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

[170] The decision was confirmed by the General Court by the end of 2021 with the: Judgment of the General Court of 10 November 2021 Google Shopping, Google Inc. and Alphabet, Inc. v European Commission, Case T-612/17 ECLI:EU:T:2021:763. Full decision< https://curia.europa.eu/juris/document/document.jsf?text=&docid=250881&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7323555 >

[171] General Court of the European Union Press Release No 197/21 (2021), 1 < https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf >

Google's general result pages[172].Hence, the European Commission fined Google and Alphabet more than 2 billion dollars.

Google and Alphabet brought an action against the Commission decision before the General Court of the European Union. The General Court recognised the anticompetitive nature of Google's actions and upheld the fine imposed by the European Commission.

First, the General Court of the European Union considered that having a dominant position alone, even for a company as big as Google, is not grounds for criticism of the undertaking concerned, despite the fact that it is planning to expand into a neighbouring market[173]. The main finding of the General Court was: by *"favouring its own comparison-shopping service on its general results pages through more favourable display and positioning, while relegating the results from competing comparison services in those pages by means of ranking algorithms, Google departed from competition on the merits"*[174].

Three main circumstances were analysed: i) the importance of the traffic generated by Google's search engine in order to compare shopping services; ii) users' behaviour that focus on the first few results; and iii) the large proportion of 'diverted' traffic in the overall traffic of comparison shopping services and the fact that it cannot be effectively replaced. The practice at issue was liable to lead to a weakening of competition in the market[175].

Moreover, the General Court noted that, given the universal attitude of Google's search engine, which should index results from any possible source, the promotion of only a few specific results over others appears to be abnormal[176].

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[172] Thomas Höppner, 'The Eu General Court confirms a Commission's Decision finding a Big Tech Company guilty of Abuse of dominant position by Favouring its own comparison shopping service on its general results pages (Google Shopping)' (2021) Concurrences, 2-5 < https://www.concurrences.com/en/bulletin/news-issues/november-2021/the-eu-general-Court-confirms-a-commission-s-decision-finding-a-big-tech > accessed 15 December 2021

[173] Ibidem

[174] Judgment of the General Court of 10 November 2021 Google Shopping, Google Inc. and Alphabet, Inc. v European Commission, Case T-612/17 ECLI:EU:T:2021:763, paras. 168, 169, 180.

[175] Thomas Höppner, (n172), 6

[176] Commission Decision Case AT.39740, Google Shopping, (n 169), para. 169-170

The Court, by analysing that the case concerned the condition of supply for Google's services and underlining that it should provide access to general results pages for competing comparison-shopping services, stated that Google's service has the same characteristic as an essential facility since there is no available substitute for its services[177].

Furthermore, the General Court highlighted that Google's differentiated treatment of results is based on the origin of the results, i.e., whether they come from its own comparison-shopping service or from competing services[178]. The Court thus ruled that Google favours its own comparison-shopping service over competing services, rather than a better result over a lesser result[179].

As for what concerns the harm to competition highlighted by the Court, the Court first recapped that there is an abuse of a dominant position when the dominant enterprise uses methods diverging from those which regulate competition obstacles in the market. In this particular case there were no platforms capable of replacing services offered by Google and therefore the potential outcome of Google's behaviour would have been the disappearance of comparison-shopping services, the reduction of innovation in the market and harm to consumers derived from the reduction of available choices.

In this sense, the Court clarified the main risks of anticompetitive behaviour aimed at privileging one's own products and damaging competitors.

If a platform is providing a service like Google's, which is a fundamental feature that no other platform could provide because they do not have the same user base or infrastructure, then self-preferencing its own service creates high risk of harm to users. In this regard, conducts like Google's in this case seriously harm competition since first, they serve to help consolidate a company's own power and second, they drastically reduce the power of competitors by helping Tech Giants to consolidate their dominant position. Thus, the main effects of this conduct will be the reduction of innovation in the sector, fewer options available to users in the market as well as the creation of stronger entry barriers in the market.

[177] Ibid, paras. 171-172

[178] Ibid, paras. 199-203

[179] Ibid, para. 451

1.8 Modern Gatekeepers in digital markets

How powerful a few companies are becoming day after day has been stressed many times in this chapter. The fact that their power is increasing due to some factors that, if properly exploited, help them to consolidate their power has also been highlighted. Indeed, some online platforms are actually driving the economy and nearly all social activity nowadays. They are vectors of innovation and an essential instrument for gaining customers, especially across borders[180].

Scholars and policymakers have developed the idea that online platforms are beginning to act as *"gatekeepers"*[181] between companies and citizens[182]. Although there is no definition of what a gatekeeper is, the European Parliament has stated that: *"this term commonly refers to platforms providing online services (e.g. online marketplaces) or controlling and influencing access to online services (e.g. operating systems, app stores and voice assistants) and thereby exercising control over entire ecosystems, with a strong impact on competition and innovation in the digital field*[183].

The terms gatekeeper, as well as "gateway", are discussed in policy matters, especially when it comes to discussing whether big techs need to be regulated and how antitrust norms should be updated to face the issue.

[180] European Commission, 'Inception impact assessment on the Ex ante regulatory instrument' (2020), 4 < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers > accessed 15 December 2021

[181] European Parliament 'Regulating digital gatekeepers' (2020), paras. 1-5 < https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659397/EPRS_BRI(2020)659397_EN.pdf > accessed 15 December 2021

[182] Peter Alexiadis, Alexandre de Streel 'Designing an EU intervention standard for digital platforms'(2020) 14 EUI Working Paper RSCAS, 13 <https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020_14.pdf?sequence=1&isAllowed=y> accessed 15 December 2021

[183] European Parliament 'Regulating digital gatekeepers Background on the future digital markets act' (n 181), 2

First, we should define what gatekeepers are and then why their existence is a possible harm to competition law. A gatekeeper, to be considered so, must control something[184]. To summarise the main requirements of a gatekeeper, first it should control the access to something valuable, yet that access is two-sided. Gatekeepers control access to their platform to consumers from the perspective of producers and control access to various producers from the perspective of consumers. A gatekeeper is an intermediary, both as a platform or as a collector of products from other resellers. Basically, gatekeepers control what enters from sellers and what goes out to consumers.[185] If the gatekeeper itself produces everything, there is no need to control what is coming from third parties. Furthermore, a gatekeeper must have strong market power, otherwise there would be no difference between gatekeepers and an average intermediary.[186] Additionally, gatekeepers must control the access to a service or platform of high value, meaning services that are difficult or impossible to replace (like Google, as mentioned in the previous paragraph).

The issue is that companies like Amazon, Google and Facebook control access to the market. This means that other platforms and competitors must go through gatekeepers' platforms to obtain users and customers[187] while gatekeepers maintain information that can impact a public policy discussion and provide a strong influence on political outcomes.[188]

Thus, moving on from these considerations, the European Commission developed this definition of gatekeepers: "*An online gatekeeper is an intermediary, not necessarily a platform, that controls access to certain groups (e.g., users, websites, developers, merchants), where alternative access points and pathways are sufficiently distant*

[184] John M. Yun, 'Online Gatekeepers to Commerce and Culture' (2021) George Mason Law & Economics Research Paper No. 21-06, 4-5 <http://dx.doi.org/10.2139/ssrn.3791526 > accessed 12 December 2021

[185] Hamish van der Ven, 'Gatekeeper power: understanding the influence of lead firms over transnational sustainability standards' (2018) 25(5) Review of International Political Economy, 626-631 < https://doi.org/10.1080/09692290.2018.1490329 > 10 December 2021

[186] Peter Alexiadis, Alexandre de Streel 'Designing an EU intervention standard for digital platforms' (n 182), 14-17

[187] European Commission, 'Europe Fit for the Digital Age: Commission Proposes New Rules for Digital Platforms' (2020) Press Release, < https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347 >

[188] John M. Yun, 'Online Gatekeepers to Commerce and Culture' (n 184), 6

substitutes that this gives the intermediary substantial market power commercially and/or over information, including data, relevant to public policy debates."[189]

One of the principal problems concerning Tech Giants is that few large firms have become online gatekeepers capable of controlling essential facilities and infrastructures of everyday life thanks to many factors including strong network effect in the digital environment, their role as intermediary and moreover their ability to access and accumulate an enormous amount of data[190]. These characteristics may provide online gatekeepers with a dominant position and market power that is detrimental to fair competition[191].

Furthermore, traditional businesses are basically dependent on gatekeepers, meaning that smaller firms need services provided by bigger ones. This may lead to competition imbalance and imbalance in bargaining power between companies. Furthermore, gatekeepers have total control over online ecosystem start-ups and new firms have more issues in inserting their products into the market. Moreover, gatekeepers may use their power and dominance in the market to expand their dominant position into adjacent markets, a practice called "*leveraging*[192]".

Consequently, big enterprises have the power to control access to services and products online, to control fees and eventually to charge higher fees by manipulating rankings and influencing business reputations. Additionally, they may easily grow beyond a tipping point, after which they almost automatically gain more users and further strengthen their market power and dominant position.

Companies become gatekeepers through many factors. The first is linked to the service they provide, the second is connected to the data they may acquire through their activity and the last, from the possibility of the service being furnished by a competitor.

[189] Ibid, 7

[190] European Commission, 'Inception impact assessment on the Ex-ante regulatory instrument' (n 180), para. 117

[191] Anne Witt, 'Data, Privacy and Competition Law' (2021) Graz Law Working Paper No 24-2021, 6-7 <http://dx.doi.org/10.2139/ssrn.3989241> accessed 10 December 2021

[192] Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) SSRN, 6-8 < http://dx.doi.org/10.2139/ssrn.3790276 > accessed 2 February 2022

The European institutions, when analysing existing gatekeepers, have identified many exploitative and exclusionary conducts.[193] An example is the so-called self-preferencing defined as unfairly favouring its own products and services to the detriment of competing businesses by pre-installing default settings exclusively for the gatekeeper's own products/services[194]. Moreover, gatekeepers' anticompetitive conducts include unfairly favouring third-party products or services at the cost of other competing businesses.[195] There are many ways of doing this: discriminating between trade partners without reasonable cause; unjustifiably denying access to the platform or to the mandatory features necessary to run business, unjustifiably denying access to collected data, i.e. data that end-users allow the platforms to share; imposing strong terms and conditions for access, i.e. unfair blocking of important functionalities; unjustified tying and bundling practices, i.e. selling or offering distinct goods and or services together without proper justification; imposing unclear terms and conditions on users, i.e. excessively strong conditions for access to the platform for end-users; restriction on data portability, i.e. impeding individuals from obtaining and reusing their personal data for their own purposes across different services; effectively locking end-users into one platform; unduly restricting or refusing interoperability, i.e. the ability of a system, product or service to communicate and function with other systems, products or services, making it very difficult or impossible for businesses and end-users to switch platforms.[196]

[193] Vladya M. K. Reverdin, 'Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU?' (2021) 12(3) Journal of European Competition Law & Practice, 184-190 < https://doi.org/10.1093/jeclap/lpab016 > accessed 12 December 2021

[194] Christian Bergqvist, 'Google Android - Taking Stock before the Oral Hearing' (2021), SSRN 1-4 <http://dx.doi.org/10.2139/ssrn.3841342> accessed 30 January 2022

[195] Cristina Caffarra, 'Google Shopping: a shot in the arm for the EC's enforcement effort, but how much will it matter?' (2021) Concurrences, 6-7 < https://www.concurrences.com/fr/bulletin/special-issues/big-tech-dominance/google-shopping-a-shot-in-the-arm-for-the-ec-s-enforcement-effort-but-how-much > accessed 1 February 2022

[196] Miguel de la Mano, Valérie Meunier, Angelos Stenimachitis, Zsolt Hegyesi, 'The Digital Markets Act Back to the "Form-Based" Future?' (2021) Compass Lexecon, 15-22 < https://www.compasslexecon.com/wp-content/uploads/2021/06/The-DMA-Back-to-the-Form-Based-Future.pdf > accessed 28 January 2022

Indeed, the central issue is that these companies run services that are essential also for competitors that want to promote their services or activities. Thus, all app makers have to put their apps in the Apple App Store or the Google Play Store and when they sell in those apps, 30% of the earnings goes to Apple or Google. Most of the enterprises must advertise on Facebook or Google to get customers because that has become the way to advertise on digital platforms. Therefore, any new app must go through these five companies to get to their customers. What ends up happening is that although other companies succeed, these five benefit from that success[197]. In addition, if an app maker creates a new app or service that is quite similar to one of those already present on the Apple App Store or Google Play, both Apple and Google will advertise their own service or app more than their competitor's. In any case, since Apple or Google are successful in doing this, their competitor enriches them thanks to the mechanism described above.

1.9 Traditional competition law does not suit the digital markets: the need for a new competition law approach

This chapter aims to highlight the issue Tech Giants create in the market for their competitors and for end-users.

After discussing the main anticompetitive issues in this chapter, the last question remaining is: should we be afraid of the power Tech Giants have?

The answer must be affirmative as Tech Giants activity is strongly linked with anticompetitive behaviour; moreover, these Tech Giants keep increasing their economic power. Indeed, as long as their power increases, they will become more influential from an economic and a political point of view.

As demonstrated during a series of hearings held by Cicilline, head of the Subcommittee on Antitrust as well as Commercial and Administrative Law in the US, the online platforms' dominance causes massive harm. This dominance has diminished consumer choice, eroded innovation and entrepreneurship in the US economy, weakened the vibrancy of the free and diverse press, and undermined the privacy of

[197] See sections 1.1 and 1.2

Americans.[198] In addition, companies like Google and Facebook have developed an outsized influence concerning the distribution and monetisation of trustworthy sources of news online, harming the quality of journalism and journalists worldwide[199].

Moreover, it is not easy to stop the anticompetitive behaviour of these companies even when their conduct is recognised as being illicit. Indeed, it is important to mention the numerous cases of recidivism concerning dominant platforms[200]. For instance, in 2012, the Federal Trade Commission (the FTC) accused Facebook of fooling consumers by telling them they could keep their information on Facebook private and then repeatedly allowing it to be shared and made public[201]. Facebook settled this accusation by agreeing to abide by an administrative order requiring it not to misrepresent its privacy protections[202].

The FTC noted seven years later that Facebook immediately had begun to violate that order[203]. Google was sanctioned many times by the FTC for privacy violations too.

Another case happened in 2010, when Apple settled charges it received for joining a no-poach agreement[204] with other tech companies. In 2012, Apple was found guilty of managing a price-fixing conspiracy and it is important to highlight in that case that the

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[198] Jerrold Nadler, David N. Cicilinne 'Investigation of competition in digital markets' (2020), 7 <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 > accessed 17 December 2021

[199] Ibid, 17

[200] Ibid, 19

[201] Ibid, 74

[202] Ibid, 75-76

[203] *"The United States now alleges that Facebook violated the 2012 Order by "subvert[ing] users privacy choices to serve its own business interests in several ways, starting almost immediately after agreeing to comply with the 2012.".* District Court of Columbia, Case CV 19-2184 (TJK), United *States v. Facebook, Inc.*, para. 3 (2020), < https://www.Courtlistener.com/opinion/4748088/united-states-v-facebook-inc/ > accessed 17 December 2021

[204] No-poach agreement are "*agreement not to solicit another company's employees, or to fix wages or other terms of employment. In each case, the employees don't know about the agreements, which are "secret". The agreements potentially restrict competition by preventing companies from recruiting or competing for employees by offering more competitive remuneration or employment terms".* On this see: Douglas Tween, 'No poach agreements: What's the big deal?' (Linklaters 2018) < https://www.linklaters.com/it-it/insights/publications/2018/september/no-poach-agreements-whats-the-big-deal > accessed 18 December 2021

presiding judge declared that Apple demonstrated a blatant and aggressive disregard for the requirements of law.[205]

These examples allow us to say that Tech Giants are actually taking advantage of the power they have as well as of the fact that they are running essential facilities; therefore, being strong and harsh with them risks causing damage not only to users but also to companies which need them in order to run their activities.

This implies that Tech Giants feel themselves above the law. Indeed, their conducts often raise anticompetitive concerns which result in high fines, but, at the end of the day, Tech Giants are more than able to handle these high fines and still do not comply with Court decisions. Thus, it is always a win-win situation for Tech Giants as they acquire and consolidate their dominant position through their anticompetitive behaviour. Even if they are fined for it, the cost of the fine is lower than the income derived from the anticompetitive conduct.

Moreover, what has emerged in this chapter is that the current antitrust law cannot solve the problem. Indeed, many cases have been analysed in which national authorities as well as European authorities have imposed fines and sanctions on Tech Giants. Thus, this shows us that our legal framework is based on the ex-post condemnation of anticompetitive conducts rather than on ex-ante identification of key infringements.

Indeed, Article 102[206] of the TFUE alone is no longer good enough to fight the anticompetitive behaviour of Tech Giants. According to the above-mentioned norm, the abuse of a dominant position is forbidden while acquiring a dominant position through its own merits is allowed; on the other hand, even if a platform is allowed to acquire a dominant position by offering successful services, it must be careful not to

[205] United States Court of Appeals for the Second Circuit, Case 13-3741 *United States v. Apple Inc*., 952 (2015)

[206] Article 102 of the TFEU forbids abuse of a dominant position in a market. Against this backdrop, the Court of Justice of the European Union clarified that it is not prohibited for an undertaking to acquire a dominant position in a market on its own merits. Nevertheless, it is prohibited for such dominant position to result in a distortion of competition in the internal market. On this see point see: Marco Botta, Klaus Wiedemann 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) 10 (8) Journal of European Competition Law & Practice, 467-469 < https://doi.org/10.1093/jeclap/lpz064 > accessed 15 December 2021

distort competition. Clearly, in the field of digital markets and Tech Giants this is not the case. Indeed, throughout this chapter the main actions made by Tech Giants to consolidate their dominance have been stressed. Thus, anticompetitive activities such as self-preferencing one's own services over those of competitors shall be considered *a priori* anticompetitive since whether Tech Giants are fined or not, they acquire much more than the value of the fine in terms of consolidation of dominance and extirpation of competitors. According to this view, it is clear that there is the need for a new approach to antitrust law in digital markets which moves away from the sanctioning of an ex-post anticompetitive violation and towards an ex-ante consideration. Recently, there is movement being made at both the European and the single-member state levels.

Thus, in the next chapter the solutions identified at different levels to re- establish fairness in the market dominated by Tech Giants will be discussed.

To summarise the issue described in this chapter, let us state that the market nowadays is dominated by only a few companies running fundamental services for our everyday lives. Their dominance is established through many factors, but their competition is annihilated through anticompetitive conducts whose main objective is to reduce competition and competitors in the market.

Chapter 2

The various approaches to restoring fair competition in markets dominated by gatekeepers

The findings of the previous chapter highlighted that the competition is no longer fair in markets dominated by the gatekeepers. The unfair competition in digital markets comes from multiple factors, but one of them is the absence of adequate norms against platforms which are essential for both business-users and end-users. In the last few years, this topic has been largely discussed at a central level, by the European institutions, but also at Member States level by the National Competition Authorities. The chapter below will discuss the main innovations in the field of competition in digital markets with nan eye on the passage from ex-post to an ex-ante approach.

2.1 From the ex-post to an ex-ante approach to competition law in digital markets

In the previous chapter it was stressed that the conducts of Tech Giants in the market are harming both market fairness and consumers. Indeed, a few companies gained a dominant position in the digital markets that have often been used at the expenses of competitors and users that depend on the services of the few above-mentioned companies [207] . Hence, these platforms have triggered action by Competition Authorities many times in various countries, at both the Member State level as well as at European level. Antitrust Authorities accused these companies of using their gatekeeper position to act as gateways between business users and their customers, imposing unfair conditions of various types (e.g. the imposition of excessive intermediation fees, forcing businesses to use ancillary services and many others)[208].

[207] Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?' (2021) SSRN, 1-2 <http://dx.doi.org/10.2139/ssrn.3788152> accessed 17 December 2021

[208] Damien Geradin, Dimitrios Katsifis, 'The Antitrust Case Against the Apple App Store' (2020) TILEC Discussion Paper No. DP2020-039, 1-3 <https://ssrn.com/abstract=3583029> accessed 17 December 2021

In the previous chapter it was highlighted that Competition Authorities adopted many decisions against Tech Giants in order to prohibit these practices. However, it was also stressed that this kind of approach needs to be re-discussed in light of the conduct these companies are systematically adopting that harms the market. Accordingly, many policymakers and experts in competition law have come to agree that the current competition law cannot offer an effective and timely protection for business users affected by the anticompetitive conduct or unfair behaviour put in place by Tech Giants[209]. This is due to the fact that competition law proceedings take a very long time since there are many elements to ensure, each of which is not an easy task to define (e.g., the definition of the relevant market or whether there is dominance or not)[210]. Moreover, another issue is that the European Competition Authorities are not spreading their activity in the field of exploitative[211] anticompetitive conducts that give platforms much more power in the market through the exploitation of businesses depending on the platform[212].

The need for an ex-ante regulation depends on the fact that the actual competition law legislation does not offer adequate guarantees. Indeed, antitrust tools are planned to refer to anticompetitive agreements, concerted practices between companies[213], and abuse of dominant positions[214] existing in the digital market. However, according to what we stated above, there are limits to what EU competition law can achieve when addressing the role of the digital gatekeepers. The existing antitrust system is considered to be too slow, bulky, and unpredictable for the digital sector[215]. Antitrust

[209] Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Markets Act (n 207), 2

[210] European Commission 'Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009), para. 3

[211] For a definition of exploitative abuse see Björn A. Kuchinke, Miguel Vidal, 'Exclusionary strategies and the rise of winner-takes-it-all markets on the Internet' note 137

[212] Lyons, Bruce, 'The Paradox of the Exclusion of Exploitative Abuse' (2007) CCP Working Paper No. 08-1, 6 < http://dx.doi.org/10.2139/ssrn.1082723> accessed 17 December 2021

[213] Article 101 TFUE

[214] Article 102 TFUE

[215] European Parliament, 'Resolution on improving the functioning of the Single Market' (2020), paras. 72-80 and see also European Parliament, 'Resolution on adapting commercial and civil law rules for commercial entities operating online' (2020) paras. 1-4

systems of rules were born with an ex-post approach since they were made to stop or penalise behaviours that were considered to be anticompetitive when a competition issue is raised. Indeed, experts pointed out that investigations conducted under Articles 101 and 102 of the TFEU have usually been too long, sometimes taking more than five years, increasing the danger of irreparable harm to competition and consumers before the abusive conduct of the dominant platform is sanctioned[216]. Moreover, competition law is also having trouble as far as intervention is concerned in cases of structural competition problems in which the harm to competition is linked to an economic feature of the market more than to the conduct of the platforms in general[217].
Thus, following these issues, many governmental institutions, Competition Authorities and other relevant people of the sector have suggested a passage to an *ex-ante* regulatory regime [218] capable of preventing anticompetitive harm through the imposition of few prohibitions or obligations on Tech Giants[219] .

The shift from an *ex-post* approach to an *ex-ante* one is also influenced by cases where the harm to competition is linked to an economic feature of the market more than to platforms' conducts in general[220].

[216] European Parliament 'Regulating digital gatekeepers' (2020), 4

[217] European Commission, 'Inception impact assessment for the new competition tool' (2020) SWD 364, para. 53

[218] Philip Hanspach, Nicolas Petit, 'The European Union's Big Policy Bet Against the Tech Giants' (University of Oxford faculty of law 2021) <https://www.law.ox.ac.uk/business-law-blog/blog/2021/12/european-unions-big-policy-bet-against-tech-giants> accessed 17 December 2021

[219] Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Markets Act (n 207), 4

[220] Michal S. Gal, Nicolas Petit, 'Radical Restorative Remedies for Digital Markets' (2021) 37(1) Berkeley Technology Law Journal, 3 < https://ssrn.com/abstract=3687604 > accessed 30 January 2022

This approach was suggested, for example, by the Furman Report[221], but it was also stressed in the Digital Taskforce Advice[222] and in the US through the Stigler report[223]. Hence, after the critics moved to competition law, the European Commission agreed that the situation in competitive markets requires a regulatory intervention capable of effectively addressing all the challenges raised by the anticompetitive behaviour of Tech Giants. Indeed, the European Commission agreed that there is a need for a new type of protection for both businesses and users in order to face the upcoming risks raised by digital markets.

Concerning the above-mentioned risks, it is mandatory to remember that nowadays citizens and businesses must use digital platforms for their own personal interests, and thus, due to the massive and extremely valuable amount of data generated, this may lead to dangerous and abusive phenomena[224]. These events, due to the lack of defined rules adapted to the new technological developments and the peculiar elements of the digital environment, are challenging to prevent and manage.[225] Margrethe Vestager, the Commissioner for Competition, stated: *"Yet the risks are equally real… lost growth opportunities for small businesses due to giants who alone hold the keys to the Internet - the list is long. The message we are getting from citizens and companies is clear: the*

[221] Jason Furman 'Unlocking digital competition Report of the Digital Competition Expert Panel "Furman Report"' (2019), 14 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf > accessed 28 December 2021

[222] UK Competition and Markets Authority, 'A new pro-competition regime for digital markets. Advice of the Digital Markets Taskforce' ("Digital Market Taskforce Advice"), (2020), 26 < https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf > accessed 28 December 2021

[223] 'Stigler Committee on Digital Platforms: Final Report" ("Stigler Report")' (2019), 68 <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report > accessed 28 December 2021

[224] European Commission 'Communication on Online Platforms and the Digital Single Market Commission Staff Working Document' COM (2016) 288, para. 2.1

[225] Marina Rita Carbone 'Digital Markets Act, così l'Europa limita il potere delle big tech' (Agenda Digitale 2020) <https://www.agendadigitale.eu/mercati-digitali/digital-markets-act-come-si-sta-disegnando-il-futuro-delleconomia-digitale-europea/> accessed 17 December 2021

commercial or political interests of a handful of companies cannot dictate our future[226]*".*

In this context, the European Commission proposed the *Digital Markets Act* (DMA)[227]. Indeed, the DMA[228] is written on a background of important innovative benefits for users as well as new business opportunities as contributions to the market generated by digital services. Accordingly, the DMA, although it highlights all the benefits raised by the modern digital market, also notes that a few companies capture the greatest share of the overall value generated[229]. Thus, the DMA is built upon the concept that: *"few large platforms increasingly act as gateways or gatekeepers between business users and end-users and enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers"*[230].

The rationale behind the DMA is to establish a set of new harmonised rules at the European level to guarantee fairness in the market where gatekeepers are also present. Its goal, in addition, is to promote innovation, increase the quality of digital products

[226] European Commission, 'Communication on Online Platforms and the Digital Single Market Commission Staff Working Document' (n 224) paras. 2.3.1- 2.3.2

[227] European Commission 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' (2020)

[228] In addition to the DMA, it is worth remarking that the European Union proposed also the Digital Services Act (DSA) which is an important piece of legislation in the field of digital enforcement for the European Union. The European Commission's proposed DSA aims to inject transparency and fairness into the provision of digital services. The package goal is to ensure fair market practices, legal certainty and predictability of rules. DSA imposes an obligation on providers of online content brokerage services to take action against illegal content and when requested to provide information to competent authorities. The DSA falls outside the scope of this work, hence in here it is enough to highlight the main mechanism guiding the DSA which broadens the notion of illegal content, extending it to information, regardless of its form, that is illegal in itself. For more on this point see: Valeria Falce, Nicola Maria Francesco Faraone 'Digital Services Act, passi avanti e nodi da sciogliere' (Agenda Digitale 2021) <https://www.agendadigitale.eu/mercati-digitali/digital-services-act-dsa-tutela-dei-diritti-ue/ > accessed 17 December 2021

[229] Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2021) European Law Review, 4-5 <http://dx.doi.org/10.2139/ssrn.3978625 > accessed 19 December 2021

[230] European Commission, 'DMA Explanatory Memorandum (2020), 1

and services, encourage fair and competitive prices, and improve high-quality choices for users.[231]

On the 15th of December 2021 the text of the DMA was approved by the European Parliament[232] and aimed to address the negative consequences raised by platforms acting as digital gatekeepers to the internal market. In the DMA we have the new way of planning antitrust enforcement, thus we move from an ex-post intervention to an ex-ante prohibition of conducts.

The DMA is the European Union's answer to the main challenge against Tech Giants, but Europe is not the only country which is discussing antitrust enforcement. At the level of the Member State, for example, countries like Germany[233], Greece[234] and many others are trying to discover for themselves some internal norms capable of facing anticompetitive behaviour on the part of Tech Giants.

The scope of this chapter, and of this work in general, is to highlight this enormous change in the field of competition law since, as we mentioned in the previous chapter, the old approach to antitrust is no longer working as we acknowledge the current situation of the digital market and of users who are all bound to few platforms for their everyday life. In this light, the scope of the work will be to find out all the features of

[231] DMA proposal, recital 79

[232] European Parliament, 'Digital Markets Act: Parliament ready to start negotiations with Council' < https://www.europarl.europa.eu/news/en/press-room/20211210IPR19211/digital-markets-act-parliament-ready-to-start-negotiations-with-council >

[233] In January 2021, the latest reform of the German competition law ("ARC") entered into force, including significant new rules regarding digital platform markets. For more on this see: Christian Ritz, Hubertus Weber 'The German parliament enters into force its 10th amendment to the act against restraints of competition bringing significant adjustments regarding advancing digitalization, changes in merger control, as well as data access claims' (2021) Concurrences < https://www.concurrences.com/en/bulletin/news-issues/january-2021-en/the-german-parliament-enters-into-force-its-10th-amendment-to-the-act-against > accessed 20 December 2021

[234] The revised draft Greek Competition Bill modifies the Greek Competition Law (L.3959/2011) and intends to strengthen the Hellenic Competition Authority's enforcement capabilities while also modernizing the existing framework by establishing unique competition rules for digital marketplaces. For more on this see: Orestis Omran, Daniel Colgan, Andreas Politis, Ioannis Asimakopoulos, 'Special competition rules on digital ecosystems: Greece joins the club' (DLA Piper insights 2021) <https://www.dlapiper.com/it/italy/insights/publications/2021/09/special-competition-rules-on-digital-ecosystems-greece-joins-the-club/ > accessed 20 December 2021

these new norms in order to see if they provide the requested level of protection needed to re-establish fairness in the market.

Below, there will be an analysis of the DMA, starting from the identification of companies that will be subject to its provisions, i.e., the gatekeepers as individuated through the features classified in the norm. Then there will be a deep analysis of the main obligation for the gatekeepers imposed by the DMA itself.

2.2 Which platforms should be captured by the Digital Markets Act? Article 3 and the risk of "over inclusiveness"

The DMA is set to be applied to the so-called "Core Platform Services" by which the European Commission refers to: *online intermediation services, online search engines, social networking, video sharing platform services, number-independent interpersonal electronic communication services; operating systems; cloud computing services; and advertising services*[235].

The DMA refers to these platforms since, as was identified in many working documents, these are the services in which the issues are more evident and where the presence of few companies acting as gateways is damaging competition in the market[236]. Moreover, the DMA points out the main characteristics of these core platforms: *i)extreme scale economies, ii)very strong network effects, an ability to connect many business users with many end-users through the multi-sidedness of these services, iii) a significant degree of dependence of both business users and end-users, iv) lock-in effects, v) a lack of multi-homing for the same purpose by end-users, vi) vertical integration, vii) and data driven advantages*[237].

Thus, the DMA, in order to achieve its goal, i.e., guarantee the fair and proper functioning of the internal market, adopted a particular approach. Basically, the DMA provides a combination of quantitative and qualitative criteria to designate whether a

[235] DMA Article 2(2)

[236] Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (n 229), 7

[237] DMA recital 2

company shall be considered a gatekeeper[238]. These criteria must be seen in the light of Article 5, which lists the "*practices of gatekeepers that limit contestability or are unfair"*[239].

In this section the criteria set by Article 3 of the DMA to consider a core platform service as a gatekeeper will be analysed.

Hence, Article 3(1) of the DMA proposal lists the qualitative criteria that design a digital platform to be a gatekeeper[240]: "*i) it has a significant impact on the internal market; ii) it operates a core platform service which serves as an important gateway for business users to reach end-users; and iii) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future."*[241].

These qualitative criteria are presumed to be met when specific quantitative thresholds are exceeded. Herein we refer to those listed in Article 3(2).

First, the requirement that the Core Platform Service provider "*has a significant impact on the internal market*" is presumed to be met when "*the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States*."[242]

Second, the requirement that the Core Platform Service provider "*operates a core platform service which serves as an important gateway for business users to reach end-users*" is supposed to be exceeded when the Core Platform Service provider "*has*

[238] Pinar Akman Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (n 229), 8

[239] DMA proposal, Chapter 3

[240]Centre on Regulation in Europe 'The European Proposal for a Digital Markets Act' (2021), 12 <https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf > accessed 20 December 2021

[241] DMA Article 3(1)

[242] DMA Article 3 (2)

more than 45 million monthly active end-users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year."

Even more important is the provision of Article 3(6) of the DMA. Indeed, it was highlighted that when Core Platform Services respect the quantitative criteria it is presumed that the qualitative criteria are also met. Hence, this is not always right, as it may happen that companies meet the quantitative requirements and, in the meanwhile, do not meet the qualitative requirements. In the latter case, there is another procedure to assess whether a Core Platform Service shall be considered a gatekeeper or not, and it is identified by Article 15 of the DMA. Article 15 is linked with Article 3(6) since the latter states that: *The Commission may identify as a gatekeeper, in accordance with the procedure laid down in Article 15, any provider of core platform services that meets each of the requirements of paragraph 1, but does not satisfy each of the thresholds of paragraph 2, or has presented sufficiently substantiated arguments in accordance with paragraph 4.*[243] Article 15, indeed states that the Commission may conduct a market investigation aiming at examining whether a provider of Core Platform Services should be designated as a gatekeeper.

Moreover, Article 3(6) lays down the relevant aspects that must be taken into account by the European Commission in its investigation: i) the size, including turnover and market capitalisation, operations and position of the provider of core platform services; ii) the number of business users depending on the core platform service to reach end-users and the number of end-users; iii) entry barriers derived from network effects and data driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities; iv) scale and scope effects the provider benefits from, including with regard to data; v) business user or end-user lock-in; vi) other structural market characteristics.[244].

Thus, when the quantitative criteria are not met, or they are contested by the platform accused of being a gatekeeper, there is the possibility of triggering the procedure designed by Article 15. Hence the gatekeepers' designation will be conducted on an

[243] DMA art 3(6)

[244] DMA art 3(6) letters: a,b,c,d,e,f.

overall objective requirement that defines a gatekeeper in the light of the purpose of the DMA[245]. It is important to underline that the beginning of the investigation by the European Commission is facultative, this means that the Commission, when a platform does not meet the quantitative criteria of Article 3(2) is not forced to open an investigation[246].

On the other hand, when the Commission does open an investigation, it should strive to finish it within twelve months from the launch of the investigation by adopting a decision; instead, when the platform meets the thresholds listed in Article 3(2) but has submitted strong arguments, the Commission shall endeavour to end the investigation within a period of five months. [247]

However, many experts noted that there is one main risk concerning the criteria set out by the DMA concerning the identification of gatekeepers, i.e. the risk of over inclusion, meaning that more companies than should be may be subject to the obligations of the DMA. Obligations that of course have strong effects on that company's business activity[248].

The issue comes from the fact that the quantitative and qualitative criteria are not combined, indeed according to what we mentioned above, when the quantitative criteria are met, the qualitative criteria are presumed to be met as well[249]. Hence many

[245] Mario Mariniello, Catarina Martins 'Which platforms will be caught by the Digital Markets Act? The gatekeeper' dilemma' (Bruegel 2021) <https://www.bruegel.org/2021/12/which-platforms-will-be-caught-by-the-digital-markets-act-the-gatekeeper-dilemma/ > accessed 20 December 2021

[246] Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?' (n 207), 5

[247] DMA Article 3(4)

[248] Luis Cabral, Justus Haucap, Justus, Geoffrey Parker, Georgios Petropoulos, Tommaso M. Valletti, Marshall W. Van Alstyne, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts' (2021) Boston University Questrom School of Business research paper No. 3783436, 8-10 <https://ssrn.com/abstract=3783436 > accessed 20 December 2021

[249] According to what was said above, a quality assessment may take place in a second stage but only if the Core Platform Service provides strong arguments based on Article 3(4) of DMA. On this see: Alexandre de Streel, Richard Feasey, Jan Kramer, Giorgio Monti, 'Gatekeeper definition and designation' (2021) Centre on Regulation in Europe, 11 <https://cerre.eu/wp-content/uploads/2021/05/CERRE_-DMA_European-Parliament-Council-recommendations_FULL-PAPER_May-2021.pdf > accessed 20 December 2021

experts noted that few companies which are not gatekeepers in Core Platform Services would be subject to the obligation of the DMA. Thus, imposing such obligation on companies which shall be out of the scope of the DMA is not fair for both companies and their users[250].

Moreover, experts noted that there is a weak bond between the quantitative threshold and its corresponding qualitative criterion. For example, Article 3(1)(b) requires that a platform service provider operates a platform which is an important gateway for businesses users to reach end-users, this criterion is presumed to be met when, according to Article 3(2)(b), the platform has more than 45 million monthly active users in the Union or 10.000 yearly business users in the Union. The issue here is that the link may be abstract. Quantitative criteria are objective and give a good overview on the importance of a company in the market, but, on the other hand, it shall be duly noted that it's difficult to deduce that a company serves as an important gateway just because it has many end-users[251]. Indeed, being an important gateway has nothing to do with having many users. What is really important in defining whether a company is a gateway or not is the platforms' market[252].

The main solution to the risk of over-inclusiveness is provided by art. 3(4) of the proposed DMA, which states that a CPS which meets all the threshold set by Article 3(2) could be not designated as a gatekeeper if it presents sufficient substantiated arguments to demonstrate that it does not satisfy the requirements of paragraph 1. Moreover, when the platform presents a strong argument, the Commission shall,

[250] Fabiana Di Porto, Tatjana Grote, Gabriele Volpi, Riccardo Invernizzi, 'I See Something You Don't See'. A Computational Analysis of the Digital Services Act and the Digital Markets Act' (2021) 6 Stanford Computational Antitrust, 9-11 < https://ssrn.com/abstract=3780938 > accessed 30 January 2022

[251] Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?' (n 207), 6

[252] One of the main missing elements concerning the quantitative criteria is the imposition of an additional condition containing the reference to the dependency. Indeed, according to Colangelo it's impossible to have a company serving as fundamental gateway without assess if users or businesses users are dependent from the company. On this see Marco Cappai, Giuseppe Colangelo, 'Taming digital gatekeepers: the more regulatory approach to antitrust law' (2020) Stanford-Vienna TTLF Working Paper No. 55, 22 <http://dx.doi.org/10.2139/ssrn.3572629> accessed 21 December 2021

according to paragraph 6 of the same Article, start the procedure provided by Article 15 of the DMA that we described above.[253]

In the end, to sum up how gatekeepers are individuated according to the DMA, it should be remarked that the DMA's approach is different from that of competition law. The DMA indeed maintains a light test to allow for a practical system of early designation of gatekeeping positions. This allows the Commission to avoid the concept being based on a definition of the relevant market, on an assessment of the market power and on the position of the company in relation to rivals, all of which would take a long time to assess and would be contrary to the main scope of the DMA. The system is intended to allow a fast designation of undertakings without incurring the costs of proof of structure[254].

In addition, the DMA provides for a quantitative threshold, identified by Article 2 and qualitative criteria identified by Article 3(1), furthermore when the quantitative threshold is met, the qualitative criteria is presumed to be met. To be considered a gatekeeper, the platform must be a choke point for access by business users and end-users[255]. The platform must be a core platform service, as described in Article 2 of the DMA[256].

Another condition subject to the DMA is durability. Indeed, provisional market powers are excluded from the scope of the DMA. Thus, the DMA provides a presumption of durability, i.e. the platform must have reached 45 million active users monthly, or 10.000 yearly active business users in the last three years.[257]

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[253] 'Digital Markets Act position paper' (2021) DigitalEurope, 10-11 < https://www.digitaleurope.org/wp/wp-content/uploads/2021/05/FINAL-DIGITALEUROPE-DMA-position-paper.pdf> accessed 22 December

[254] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law & practice, 535 <https://doi.org/10.1093/jeclap/lpab062> accessed 22 December

[255] Ibidem

[256] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (n 254), 529

[257] German Monopolies Commission 'Recommendations for an effective and efficient Digital Markets Act' (2021), para. 44

Lastly, Article 3(6) introduces a different process to assess whether a company is a gatekeeper or not. Basically, when companies do not meet the quantitative threshold, the Commission may conduct a market investigation to establish whether the platform meets the condition stated in Article 3(1).

Having highlighted which platforms subject to the DMA are, we will start to analyse the main obligations listed by the DMA in the next section.

2.3 Gatekeeper obligations under the Digital Markets Act

The Digital Markets Act has many obligations for Core Platform Services designated as gatekeepers through the procedure identified in the previous section. The aforementioned obligations consist of many prohibitions and of a series of practices to be implemented in order to achieve the objectives set by the DMA itself.[258]

First of all, the obligations are divided into two main groups. First, the "obligations of the gatekeepers" are of a more specific nature and indiscriminate applicability to all gatekeepers covered by Article 5[259]. These are self-executing obligations, thus they are directly applicable even without a decision by the Commission. Second are obligations that may be subject to further specifications - i.e., rules to be adapted to specific cases - contemplated by Article 6. This second group of norms provides a set of rules that result from the possibility that the Commission establishes a direct regulatory dialogue with the interested gatekeeper.[260] These are also self-executing,

[258] Paolo Della Corte, 'Regolare i gatekeepers: un'analisi del digital markets act, la proposta europea per governare le attività delle grandi piattaforme digitali' (Master Degree in Digital business transformation, Luiss Guido Carli, 2021), 44-47 <http://tesi.luiss.it/30846/1/726361_DELLA%20CORTE_PAOLO.pdf > accessed 22 December 2021

[259] Alexandre De Streel, Pierre Larouche, 'The European Digital Markets Act proposal: how to improve a regulatory revolution' (2021) Concurrences, 4-6 <https://www.concurrences.com/en/review/issues/no-2-2021/Articles-en/the-european-digital-markets-act-proposal-how-to-improve-a-regulatory-100432-en> accessed 22 December 2021

[260] Pierre Larouche, Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions', (2021) 12(7) Journal of European Competition Law & Practice, 545 < https://doi.org/10.1093/jeclap/lpab066> accessed 22 December 2021

but they are subject to possible further elaboration through the adoption of specific Commission's decisions.

The above-mentioned dialogue with gatekeepers should be done to implement the measures adopted against gatekeepers in a more effective and proportionate way to achieve better results faster. Indeed, according to what we mentioned at the beginning of the chapter, fast decisions are paramount to achieve the DMA's goals. [261]

The analyses of the obligations established by the Commission in the DMA individually is useful, first and foremost, to indirectly understand which practices of gatekeepers do not guarantee a fair and contestable environment for competition, and thus lead to the detriment of consumers, businesses and innovation as we stressed many times in the first chapter.

Furthermore, as will become clear later, although the Commission remains very vague on the platforms to which these provisions are addressed - indeed there is no reference to the name of any company in the text of the DMA- it appears to be evident that the proposed regulation refers to GAFAM companies[262].

It will be noted that not all obligations are applicable indiscriminately to all gatekeepers, but it seems that some are addressed specifically to some platforms rather than others.

Indeed, this hypothesis is supported also by the fact that the European Commission, when drafting the DMA, focused mainly on a series of pending or past antitrust investigations [263]. Hence, this topic raises doubts as to whether this regulatory

[261] Body of European Regulators for Electronic Communications 'Draft BEREC Report on the ex-ante regulation of digital gatekeepers' (2021), 4 < https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9880-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers > accessed 22 December 2021

[262] David J. Teece, Henry J. Kahwaty 'Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment' (2021) BRG Institute, 20-25 <https://lisboncouncil.net/wp-content/uploads/2021/04/TEECE-AND-KAHWATY-Dynamic-Digital-Markets1.pdf > accessed 22 December 2021

[263] European Commission, 'Impact Assessment Report Accompanying the DMA' COM (2020) 842 final, paras. 42-43

instrument is built to address future scenarios since, even though the level of expertise provided by the national antitrust authorities is very high, it is still limited.

The differences between the obligations set by Article 5 of the DMA and those provided by Article 6 were highlighted through this brief introduction. In the next section each of these Articles will be analysed. Also a few major cases concerning Tech Giants will be used as reference to have a clearer picture of what kind of conducts the DMA is aiming to stop and what the anticompetitive advantages that Tech Giants acquire in the market every day compared to those of their competitors.

2.4 Gatekeeper obligations under Article 5 of the DMA

According to what was stated above, the first set of obligations for gatekeepers is provided by Article 5 of the DMA; these will be analysed one by one.

The first obligation that will be discussed is the obligation contained in letter a of Article 5 of the DMA, which states that a gatekeeper shall: "*refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end-users to other services of the gatekeeper in order to combine personal data, unless the end-user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679"*[264] except in cases where the user has expressly given his consent.

Accordingly, Article 5(a) requires gatekeepers to provide information to consumers as well as to obtain their consent when collecting user data for the purpose of combining personal data acquired from their platform with personal data acquired and collected through other services [265]

Indeed, the DMA shows a strong policy of hostility with regard to the combination of personal data, hence, the DMA states that gatekeepers should generally abstain from combining personal data.

[264] Digital Markets Actproposal, Article 5(a)

[265] Luis Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropulos, Tommaso Valletti, Marshall Van Alstyne, 'The EU digital markets act: a report from a panel of economic experts' (2021) European Commission Joint Research Centre, 12 <https://data.europa.eu/doi/10.2760/139337> accessed 24 December 2021

Article 5(a) of the DMA applies to all third-party services and not only to those which are under the control of a gatekeeper. Indeed, the main objective of Article 5 is to limit consumer exploitation and to give them real choices. Furthermore, the opt-in system of Article 5(a) aims to limit the scope and the scale where deep profiling happens, again providing an indirect limit on consumer exploitation for specific targeted advertising and personalised pricing.

Another major goal of Article 5(a) is to limit the economies of scope that may spawn on the supply side through conservation of personal data and improvement of contestability conditions for new entrants to both the main platform service and adjacent markets[266].

When describing the main conducts that will be prohibited under the DMA, apart from the description of the prohibited conduct and the goal behind the prohibition, it is useful for this analysis to provide examples of these conducts. This may be done by analysing antitrust investigation against Tech Giants performed by antitrust authorities in various Member States and at the European level.

Hence, in the first chapter the Facebook Germany case, one of the major cases concerning the exploitative use of data, was already analysed[267]. While chapter 1

[266] The European Data Protection Supervisor, in 2021, published its opinion concerning the proposed Digital Market Act. About Article 5(a) EDPS stated that: "*to specify in Article 5(a) of the Proposal that the gatekeeper shall provide end-users with a user-friendly solution (of easy and prompt accessibility) for consent management in line with Regulation 2016/679, and, in particular, the requirement of privacy by design and privacy by default laid down in Article 25 of Regulation 2016/679"* on this see: European Data Protection Supervisor 'Summary of the Opinion of the European Data Protection Supervisor on the Proposal for a Digital Markets Act' (2021)

[267] The emergence of multi-sided media platforms occurred in parallel with the success of business models that revolve around the collection and use of personal data, generating revenue from user-data-based profiling and advertising. In such a context, data protection rules are not effective, and thus the main privacy concerns relate to users' ability to control their digital identities. However, together with mere privacy issues, another concern lies at the heart of the debate about the data economy: that the collection and aggregation of data by dominant firms entrenches their dominant positions. Thus, it is important remarking the Facebook-Germany case, indeed there the Bundeskartellamt underlined that Facebook is abusing its dominant position by leveraging its social network to amass, without limitation massive range of data generated by its users when they visit third-party websites. In the first chapter we stressed that the US approach to privacy is slightly different from the European one; here there is no need to analyse both the two privacy systems, it is enough to highlight that the European approach grants a way stronger protection rather than US one; thus, the competition issues created in the market

should be referenced for major analysis of the decision, here the main objective is to emphasise why this type of conduct is prohibited by the DMA and what kind of harm users suffer as a result of this conduct.

Indeed, harm to users is strongly linked to digital markets' main features. Digital markets are in fact characterised by "market failures"[268]. Moreover, the absence of informed consent given by these platform users in addition to the so-called "privacy paradox"[269] are the main elements of the inability of online platforms to adequately protect their users' privacy.

Therefore, privacy rules are becoming stronger especially in Europe and they are enforcing the recognition of the privacy rights of users. Indeed, the GDPR itself is tackling many market failures concerning digital markets, especially those linked to data subject consent.

Market failures which are more concerned with data-driven economy are those which trigger data protection norms the most[270]. Hence, it is important to focus on the main privacy norms triggered by the conduct of Tech Giants. Indeed, the notion and role of consent given by platform users concerning their data is a paramount element to take into account in this analysis.

Starting with an analysis of the GDPR, Article 6 provides that data processing shall be prohibited unless the controller invokes a legal basis for it. Article 7 of the GDPR describes many legal bases for data processing but the most relied on is the consent provided by Article 6 of the regulation.

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by Tech Giants became even more difficult to face because of the lack of privacy enforcement in the US. For more on this see: Giuseppe Colangelo, Mariateresa Maggiolino, 'Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S'. (2018) 8(3) International Data Privacy Law, 7-11 <http://dx.doi.org/10.2139/ssrn.3125490> accessed 22 December 2021

[268] Marco Botta, Wiedemann Klaus 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) 64(3) The Antitrust Bulletin, 438–446 < https://doi.org/10.1177/0003603X19863590 > accessed 20 December 2021

[269] ibidem

[270] Alessandro Acquisti, 'Privacy and Market Failures: Three Reasons for Concern, and Three Reasons for Hope' (2012) 10 (227) Journal of Telecommunications and High Technology Law, 3 <https://ssrn.com/abstract=3305333> accessed 22 December 2022

The main goal of the consent of data users is to guarantee that a data subject decides autonomously whether their data can be processed and also to what extent[271]. Thus, it is clear that the goal of the GDPR is to give users full control over their personal data. This, by the way, is the main paradox of privacy in digital markets. Despite the GDPR granting users total control over the fate of their data, Tech Giants are acting in such a way that this right is never respected. Indeed, the so-called privacy paradox consists of the phenomenon where users demand protection of their data while in reality, they don't act according to their expressed preferences and desires[272].

This comes from the fact that users disclose personal data freely and also provide consent to data processing simply through agreement to terms and conditions as well as privacy policies that users do not understand at all[273].

Hence, the privacy paradox creates two main problems which may result in market failures. First, although most users care about their privacy and the treatment of their data, they are not acting in such a way as to really protect them. Instead, they are acting contrary to their best interests by not giving the adequate level of attention to privacy concerns. Users act below their standard out of laziness and "wilful data negligence"[274] and are not committed to protecting their own privacy.

The second element is that, since there is a lack of transparency in the data-related process as well as in the intelligibility of consent on data use, users are blind to what happens to their data. Indeed, the way data are processed is so difficult to understand that users, even those wanting to give more attention to the consent given regarding data treatment, simply do not have the instruments and the knowledge to do so.

The harm for users derives from the fact that users have clear privacy preferences for many online services, while platforms do not have as many privacy options as would be needed to ensure that user preferences are respected. This may put new users into

[271] Wolfgang Kerber, 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection' (2016) Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil, 639-641 <http://dx.doi.org/10.2139/ssrn.2770479 > accessed 22 December 2021

[272] ibidem

[273] German Monopolies Commission, 'Competition Policy: The Challenge of Digital Markets' (2015) Special Report No. 68, 74

[274] Wolfgang Kerber, 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection' (n 271), 642

the position of taking it or leaving it, i.e. giving consent to the condition imposed by the platform or not using the service at all[275].

In a competitive market we would not face this issue, indeed a competitive market would have the instruments to satisfy the different demands and offers of users in the market.

Basically, direct network effect leads to both market concentration and dominance of a few companies, thus users have limited choices concerning which platforms and services to use.

Market failures in the data and digital market help us understand the strong bond existing between data protection law, competition law and consumer law.

Competition law's scope is to safeguard the fairness of the market and that the market is undistorted. Data protection law, instead, protects the fundamental rights, in particular the protection of personal data as well the free movement of personal data.

Consumer law, in the end, aims to preserve the free choices[276] of customers and it indeed protects the welfare of individual consumers by sanctioning unfair contractual terms that are capable of misleading customers in their choices and not respecting their preferences.

Competition law, data protection and consumer law share common features that are particularly evident in data economy. Moreover, although these law sectors have the same aim, they have different objectives and scope of application Indeed, the CJEU stated that whether or not a conduct is legal under a legal regime does not prevent the enforcement of EU competition law. Hence, whereas the EU competition norm shall not pursue privacy goals, competition law experts should have the power to act when market failures happen in the data economy, even in the presence of crisscrossing data protection and consumer law applicability[277].

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[275] Ibid, 643

[276] Albertina Albors-Llorens, 'Competition and Consumer Law in the European Union: Evolution and Convergence' (2014) 33(1) Y.B. Eur. L., 170-175 <https://academic.oup.com/yel/Article-abstract/33/1/163/1683913 > accessed 22 December 2021

[277]Even if these three legal fields are interconnected, it should be remarked that they all respond to different logics between the different regulatory areas. Hence there are no bis in idem in relation to the various procedures. Investigations must be carried out for a specific purpose; elements acquired in the course of one investigation cannot be used for a different type of investigation, as this would otherwise incur violation of key principles of EU law, such as rights of defence and respect for the principle of adversarial and respect for the principle of the right to be heard. Thus, there is no overlap in the

Going back to the DMA's Article 5(a) obligation, the need to establish this obligation comes from a practice that has been one of the main focuses of the antitrust authorities' attention as detrimental to consumers and competition.

An example is the above-mentioned Facebook Germany case in which the German national Competition Authority, the Bundeskartellamt, prohibited Facebook from combining personal user data collected on other apps as well as from third-party sources with users' Facebook accounts.

This intervention was necessary since the business model of the social network in question is based on the activity of massively collecting, processing and combining data. Indeed, this was the main driving force behind Facebook's attainment of its dominant position. Strong network effects, in combination with a huge database from different sources, raise high barriers to market entry to the detriment of competitors[278].

application of sanctions. Hence when a dominant company which is, at the same time a dominant platform, infringes all three areas of law in a single act each authority may within the limits of their respective regulations conferring power, impose their own sanctions. Thus the absence of logical and regulatory overlaps therefore leads to the consequence that, in the rare event that the dominant platform has infringed all three areas of regulation through a single conduct, , the applicable antitrust sanctions can be added to the applicable to those applicable for a breach of the Data Protection Regulation, which in turn can be added to the additional obligations which, in turn, can be added to the additional obligations imposed on Tech Giants by the legislator. Thus, we could end up imposing on a given platform penalties of up to 24 per cent of the company's total turnover. Therefore, this could represent a powerful menace against Tech Giants. For more on this point see: GIANLUCA CONTALDI '*Il DMA (Digital Markets Act) tra tutela della concorrenza e protezione dei dati personali*', in *Ordine internazionale e diritti umani* (2021), 303-308 < http://www.rivistaoidu.net/sites/default/files/3_Contaldi_0.pdf > accessed 18 December 2021

[278] Pardolesi, on the other hand, underlined an important element concerning the Facebook-Germany case. Indeed, he questioned whether the prohibition of abuse of a dominant position in competition law is the most appropriate legal instrument to ensure the lawfulness of the collection and transmission of private data and to protect the privacy of consumers using social media. Hence, he stresses that even where actual market power can be found, there must be a causal link between the dominant position and the contested abuse. And if the protection of privacy is lacking even in competitive markets, the requirement of a causal link appears problematic to satisfy. Unless one accepts a weakening of it, with a sleight of hand that, however, triggers the legitimate concern of a subversion of competition law: a violation of the right to privacy should not be disguised under the guise of an anticompetitive tort. The main problem of decisions is that neither convincingly demonstrates the harm to competition caused by the breach of contractual privacy terms. The real cause of the deterioration in their quality is not the lack of competition, but the information asymmetry that afflicts users of digital services, who are

The Bundeskartellamt pointed out that, although end-users do not pay to use the services offered by the platform, for them the 'cost' of the service lies in the loss of control over the information they provide, which can be disseminated and used, for instance in profiling algorithms[279].

Another example is Google, which has changed its privacy policies many times in order to be able to combine data from the various services offered by the platform, and then started obtaining important information on users directly from the Chrome browser.[280] Google has stated many times that these conducts aim to make its services more efficient and to improve the offer to consumers. Indeed, such a use of data and information has allowed the platform to consolidate its position in the market[281].

Moving on to another example, also Italy fined Facebook for the same reasons as those in the Facebook Germany case. In fact, in 2018, the Italian Antitrust authority sanctioned Facebook for a breach in Italian consumer law[282].

Violations contested were of many types, such as:

- Facebook misled customers, making them believe that its service is free while the price for the enjoyment of the service is personal user data transferred to Facebook.

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unaware of the value of the information they transmit to enable the construction of super-profiles. Direct regulation of general terms and conditions requires much simpler assessments in terms of the imbalance of rights and obligations, prohibiting irrational clauses that an informed consumer would never have accepted. The use of competition law is an indirect way of achieving this. If remedial action really were to be taken through competition law, there would be a risk that the competition law enforcement authority, rather than repressing an abuse of a dominant position by some Internet giant, would itself abuse antitrust law. For more on this see: Roberto Pardolesi, Roger van den Bergh, Franziska. Weber, 'Facebook and the «Konditionenmissbrauch» Sins,' (2020) (3) Mercato Concorrenza Regole, Società editrice il Mulino, 507-511 <https://ideas.repec.org/a/mul/jhpfyn/doi10.1434-100120y2020i3p507-537.html > accessed 22 December 2021

[279] This case was deeply analysed in chapter one, in here it is provided just a small description of Facebook conduct as part of the obligation described by Article 5(a) of DMA

[280] Damien Geradin, Dimitrios Katsifis, 'Google as a de facto privacy regulator: analysing the Privacy Sandbox from an antitrust perspective' (2021) 17(3) European Competition Journal, 630 <https://doi.org/10.1080/17441056.2021.1930450 > accessed 22 December 2021

[281] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (n 254), 538

[282] Autorità Garante della Concorrenza e del Mercato, ' Uso dei dati degli utenti a fini commerciali: sanzioni per 10 milioni di euro a Facebook' (2018) <https://www.agcm.it/dotcmsdoc/allegati-news/PS11112_scorr_sanz.pdf >

- Facebook used a lot of practices in order to discourage users from blocking the transfer of their personal data to third-party websites. An example of this is Facebook's default option to allow the transfer of personal data and also through the warning that modifying that default option would affect user experience on Facebook. Hence, Facebook misled users into not acting according to their preferences.

In this decision the Italian authority first described the unfairness of the Facebook registration system, which was described as free while the real price was personal user data. Moreover, Facebook did not inform users about the flow rate of that counter performance and for these reasons the Italian authority easily concluded that Facebook was misleading users and thus its conduct was targeting users[283].

This decision is useful for our purposes here since it shows the link between consumer law, competition law and data protection. Indeed, the Facebook Germany case and the Italian decision are quite similar, but the conduct to achieve the goal is quite different in each case. In fact, the Italian authority sanctioned Facebook through the consumer code, avoiding the assessment related to the relevant market[284], while the German Competition Authority had no other choice then to follow the antitrust path since it has no competence on consumer protection.

In the end it is clear that the combination of data has negative outcomes for both consumers and competition, and this confirms that there is a need for new regulatory intervention in the sector.

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[283] Italian Competition Authority, 'The Italian Competition Authority Fines A Social Network €10 Million For Unfair Commercial Practices Using Its Subscribers' Data For Commercial Purposes (Facebook)' (2018) Concurrences < https://www.concurrences.com/en/bulletin/news-issues/november-2018-en/the-italian-competition-authority-fines-a-social-network-10-million-euros-for > accessed 31 December 2021

[284] It is important to underline that the definition of the relevant market in digital economy is one of the major issues. Indeed, many times antitrust authorities misidentify the relevant market thus leading to not adopt decision against Tech Giants which were not considered dominant in a relevant market just because the market was not adequately identified. For more on this topic see: Pierre Hausemer, Davide Fina, Roberto Sigismondo, Paula Ramada, Rhys Williams, Jule Hodok, Lorenz Nett, Niklas Fourberg & Michael Böheim, Kletia Noti, Francesco Sciaudone, Francesca Zambuco, Tomas Pavelka, Giovannella D'Andrea, Angelica Restori, 'Support Study Accompanying the Evaluation of the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law' (2021) WIFO Studies < https://ideas.repec.org/b/wfo/wstudy/67347.html > accessed 20 December 2021

Indeed, it appears to be evident that rules in the digital sector should be designed in such a way as to integrate purely economic concerns with respect for fundamental consumer rights, such as the right to privacy[285].

Let us move on to the second obligation for gatekeepers provided by Article 5 of the DMA. This obligation requires the gatekeeper to allow "commercial users to offer the same products or services to end-users through third-party online intermediary services at prices or conditions that differ from those offered through the gatekeeper's online intermediary services" (Article 5(b)).

Basically, Article 5(b) reduces the power gatekeepers may exercise to impose restrictions on business users, a power which prevents these users from obtaining both better prices and better terms or conditions through online intermediation channels.

The text of Article 5(b) does not precisely state whether the second obligation prevents gatekeepers from imposing strong distribution exclusivity, using both contractual and technical restrictions. Nonetheless, any sensible construction would imply that it does so.

Indeed, the text does not prevent gatekeepers from imposing better or the best prices or the best terms or restrictions on distribution channels apart from online intermediation services. The DMA, instead, allows a gatekeeper to reduce the power of a business user to propose better conditions through its own distribution channels. Indeed, the main goal of Article 5(b) is to make entry conditions for online intermediation services easier, especially for those which compete against gatekeeper distribution platforms, e.g., the Google Play Store or the Apple App Store. Hence, Article 5(b) is not intended to promote competition for distribution by the same commercial users.

An example may be Amazon, which, by imposing price parity or most-favoured-nation conditions, has repeatedly raised complaints, for example, in the e-book sector[286]. Amazon's dominant position allows it to establish clauses prohibiting suppliers from offering their products at better prices or with better terms through other channels[287].

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[285] European Commission, 'Commission staff working document impact assessment accompanying the proposal for a Regulation of the European Parliament and of the council on a single market for digital services (digital services act) and amending directive 2000/31/EC' SWD (2020) 348 final, para. 4.2.3

[286] On this see section 1.3 where it was described how Amazon in 2009 obtained a dominant position in the e-book field

[287] Jerrold Nadler, David N. Cicilinne 'Investigation of competition in digital markets' (n 198), 102

Such clauses mean a high degree of price control by Amazon and the power to strongly undermine competition. For example, a publishing house is not able to choose to sell a book on another platform at a price that is lower than the one on Amazon[288].

This also means that consumers will no longer be able to turn to platforms other than Amazon, thus discouraging multihoming as well as competition while improving a lock-in effect. Therefore, suppliers lose control over the freedom to choose which channels to use, and this becomes even more relevant if one considers that if suppliers do not respect the conditions imposed by Amazon, they face sanctions or penalties such as suspension of their account or the impossibility of accessing the buy-box - the white box which allows the product to be added immediately to the shopping cart in order to allow purchase[289].

According to what was said in the first chapter, these types of conducts are particularly dangerous for the fairness of the market since platforms like Amazon are not only retailers but also the first and strongest competitor of those who sell on Amazon. As stated in the same first chapter, Amazon may indeed adapt the prices of its products in order to always offer the best condition for users. Amazon may also use sales data to develop its own Amazon Basic products as well as to avoid producing products which are not successful in the market.

Similar issues can emerge also in the field of booking platforms, some of which obligate hotels not to charge lower prices than those provided by the platform[290]. On this subject it is worth mentioning that Booking.com is linked to many antitrust investigations [291]. For example, in August 2021 the Russian anti-monopoly agency

[288] Lisa M. Khan 'Amazon's Antitrust Paradox' (n 12), 758

[289] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (n 254), 533

[290]It is worth mentioning that many experts when analysing the criteria under Article 3 of DMA thought that one of the main risks was over inclusiveness. Indeed, DMA is not yet into force so we cannot know how many platforms will be subject to the obligation imposed by Articles 5 and 6. When underlining the risk of over inclusiveness, the authors highlighted that one of the main companies which would have been subject to the DMA is Booking.com and it should not since it does not have the same power as other gatekeepers. On the other hand, since Booking.com is also responsible for many antitrust cases concerning anticompetitive behaviour which are mining the fairness of the market, it appears reasonable that also booking fall under the scope of the DMA. On this point see: Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?' (2021), 2-3 <http://dx.doi.org/10.2139/ssrn.3788152 > accessed 22 December 2021

[291] Judgment of 24 November 2020, Case C-59/19, Wikingerhof v. Booking.com, EU:C:2020:950

(FAS) announced that it had sentenced the online accommodation-booking site Booking.com with a fine of 14.9 million euros for having abused its dominant position[292]. This decision was taken following a complaint filed by a Russian NGO. The Russian authority indeed stated that Booking.com had abused its dominant position in the Russian market for online accommodation booking sites, accusing it of having imposed "the obligation to respect price parity" on hotels and youth hostels.

This is not an isolated case. In fact, between 2015 and 2017 many important events occurred in the EU regarding the use of price parity clauses[293]. Following the complaints filed by trade groups representing hotel owners, National Competition Authorities opened many investigations into Booking.com and other dominant OTAs. Also the Czech Republic's antitrust authority imposed a fine on Booking.com. Indeed, the Czech Office for the Protection of Economic Competition discovered that Booking.com had included "most-favoured-nation clauses" (here now to be referred to as MFN clauses) in its agreements with hotels in the Czech Republic[294].

According to the above-mentioned office, these clauses distorted competition in the Czech online booking platform market for hotels and possibly also in other EU countries and therefore constituted a breach of Czech competition law. Booking.com forced hotels to offer the platform the same or better conditions as regards the price of accommodation, availability of rooms and other terms than those available on their own website or on any other online or offline distribution channel used by them.

The Czech Office for the Protection of Economic Competition stated that these MFN clauses first restricted competition among existing online booking platforms by

[292] Russian Competition Authority 'The Russian Competition Authority issues second warning to an online booking platform on termination of price parity clauses and restrictive conditions on hotels (booking.com)' (2021) Concurrences, 2 < https://www.concurrences.com/en/bulletin/news-issues/september-2020/the-russian-competition-authority-issues-second-warning-to-an-online-booking > accessed 22 December 2021

[293] Andrea Mantovani, Claudio A. Piga, Carlo Reggiani, 'Online platform price parity clauses: Evidence from the EU Booking.com case' (2021) 131 European Economic Review, 2-4 < https://doi.org/10.1016/j.euroecorev.2020.103625 > accessed 23 December 2021

[294] Vojtech Chloupek 'The Czech Competition Authority imposes a fine of €322.000 on an undertaking for infringing national competition law by concluding illegal vertical agreements with accommodation establishments (Booking.com)' (2018) Concurrence, 2-3 < https://www.concurrences.com/en/bulletin/news-issues/december-2018/the-czech-competition-authority-imposes-a-fine-of-eur322-000-on-an-undertaking > accessed 22 December 2021

dissuading them from offering lower prices or room availability and, secondly, they prevented new booking platforms from entering the market[295].

Basically, when there are gatekeepers in the market which have the power to impose such strong clauses, price competition between platforms offering the same service is ruled out. Moreover, since any innovations in terms of design or business model by new entrants in the sector are easily replicable, there is a very small room for contestability[296].

The third obligation in Article 5, 5(c), states that a gatekeeper must allow its commercial users to promote and conclude contracts with end-users acquired on the platform and even outside the platform.

Moreover, consumers should be free to use content, subscriptions, components on the platform and through its services or other elements that have been acquired outside the platform in question. Accordingly, Article 5(c) states that a gatekeeper shall *"allow business users to promote offers to end-users acquired via the core platform service, and to conclude contracts with these end-users regardless of whether for that purpose they use the core platform services of the gatekeeper or not, and allow end-users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end-users from the relevant business user without using the core platform services of the gatekeeper".*

Article 5(c) asks gatekeepers to allow out-of-platform distribution of services by any business users to end-users; this practice is also known as sideloading. Furthermore, the provision also states that gatekeepers should permit the in-platform use of services which were bought outside the platform[297]. The text indeed aims to allow business users to utilise different channels in order to sell their services, thus giving more choices to consumers when they are purchasing online[298].

The category of app stores is strongly affected by these provisions. To understand the rationale behind this obligation, it is useful to focus on the Google Play Store and the

[295] ibidem

[296] Filomena Chirico 'Digital Markets Act: A Regulatory Perspective' (2021) 12(7) Journal of European Competition Law & Practice, 495-497 < https://doi.org/10.1093/jeclap/lpab058 > accessed 22 December 2021

[297] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (n 254), 534

[298] Ibid, 535

Apple App Store which are the two main app stores in this category[299]. Indeed, the issue comes from the fact that both of these stores are gates allowing access to applications or content for devices. The Android system allows the download of apps and content even outside the Play Store although this practice is discouraged by the numerous steps a user has to take to install apps via the web or alternative stores[300].

The Apple iOS operating system, on the other hand, allows consumers to install apps exclusively through the Apple Store. It should be highlighted that when a consumer buys an app, the developer of the app pays a commission to the store owner - about 30% of the price.[301]

Both the Apple Store and the Google Play Store, moreover, use a system referred to as in-app purchase (IAP) which allows users to make purchases directly within the app or, in some cases, from the general store. The platform owner also receives a commission on these purchases.

In 2020, the European Commission launched a series of antitrust investigations in order to assess whether Apple's practices comply with competition criteria. Following several complaints, the Commission investigated two phenomena in particular: the mandatory use of the "IAP" system for the distribution of paid digital content and restrictions on the developers' ability to inform users of alternative purchase options outside the apps[302]. The possibility of imposing similar terms and conditions is due to multiple facts, above all their gate position, but also the fact that these companies are highly vertically integrated and have a massive user base[303].

The Commission will investigate two restrictions in particular imposed by Apple in its agreements with companies that wish to distribute apps to users of Apple devices:

- The mandatory use of Apple's own proprietary in-app purchase system for the distribution of paid digital content.

[299] European Commission 'Competition Policy for the digital era' (2019) Final report, 39-54

[300] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (n 254), 533

[301] Shili Shao 'Antitrust in the consumer platform economy: how Apple has abused its mobile platform dominance' (n 80), 47

[302] European Commission 'Antitrust: Commission opens investigations into Apple's App Store Rules' (2020) press release < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061 >

[303] Shili Shao 'Antitrust in the consumer platform economy: how Apple has abused its mobile platform dominance' (n 80), 20

- Restrictions on developers' ability to inform consumers of alternate purchase options outside of applications. While Apple enables users to enjoy content, company regulations prohibit developers from notifying consumers about cheaper purchasing options[304].

Google, since it owns the Android operating system, can easily impose the use of its app store on users. Apple instead does not only own the operating system but also the devices, which gives it total control over all content and applications on the devices.

It is clear that in such a context, the possibility of competing with established and well-established stores is almost absent. Furthermore, the introduction of commissions on purchases leads to developers increasing the prices of additional content and services, putting the burden of cost on the end consumer[305].

In addition, according to what was discussed in chapter one, app store fees discourage innovation by discouraging app developers from producing new apps[306]. Keeping this set of arguments in mind, it is also easy to observe how some platforms manage to impose market rules thanks to their dominant position, essentially replacing a healthy and balanced regulation that protects consumers and contestability in the sector.[307]

In Article 5(d) of the DMA it is stated that gatekeepers shall "*refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers".* Thus, the fourth obligation is of a general nature.

[304] The investigation started in March 2019, when music streaming provider, Spotify, filed a complaint about two rules in Apple's license agreements with developers and the associated App Store Review Guidelines, and their impact on competition for music streaming services. For what concern e-books on 5 March 2020**,** an e-book and audiobook distributor, also filed a complaint against Apple, which competes with the complainant through its Apple Books app. This complaint raises similar concerns to those under investigation in the Spotify case but about the distribution of e-books and audiobooks. These practices may hurt customers by preventing them from taking advantage of increased variety and reduced pricing. If confirmed, the activities under investigation may violate EU competition regulations against anticompetitive agreements between enterprises (Article 101 TFEU) and/or misuse of a dominant position (Articles 102 TFEU).

[305] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (n 254), 538

[306] See section 1.3 and 1.4 of chapter 1

[307] Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021) TILEC Discussion Paper No. 2021-04, 3 <http://dx.doi.org/10.2139/ssrn.3797730 > accessed 22 December 2021

This is a form of protection for commercial users who must be able to report unfair or harmful behaviour on the part of gatekeepers to the authorities without sustaining any negative repercussions[308]. Indeed, there are many contractual constraints imposed by gatekeepers which block commercial users from reporting unfair practices. Moreover, due to the strong dependency of commercial users on the platform, they therefore prefer to stick with the current conditions rather than risk being expelled from the platform or losing visibility on it.

The fifth obligation stated in Article 5 of the DMA prohibits gatekeepers from *requiring business users to use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper* (Article 5(e)).

Basically, this Article does not allow gatekeepers to impose the use of their own identification services on business users. Thus, this allows business users to choose other identification services and also to reduce the possibility of the core platform extracting important or key data from end-users and business users[309].

The provision covers the case, for example, of an app store owner who requires his app developers to use, within their applications, the identification system provided by the gatekeeper. It is important to remember that when an account is created with any digital platform, a digital identity of the individual is also generated which incorporates a set of data such as age, gender, address, preferences, e-mail address etc. Once the account is created, the user has to be identified by the gatekeeper[310].

Since users now create a digital identity for many services, it may be difficult to remember credentials for all of them so some digital platform providers, such as Facebook or Google, allow websites and applications to authenticate users through their own login service, e.g. 'Facebook Log-In' or 'Google Sign-In[311]'.

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[308] European Commission, 'DMA explanatory memorandum' (2020), para. 1

[309] Simonetta Vezzoso, 'The dawn of pro-competition data regulation for gatekeepers in the EU' (2021) 17(2) European Competition Journal, 394 < https://doi.org/10.1080/17441056.2021.1907080 > accessed 24 December 2021

[310] Organisation For Economic Co-Operation and Development 'Digital Identity management enabling innovation and trust in the Internet economy' (2011), 8-10 <https://www.oecd.org/sti/ieconomy/49338380.pdf > accessed 23 December 2021

[311] Many apps or services use Google's or Facebook's system of authentication. For example, Tinder (a popular dating app), Skyscanner (an app that helps to find discounts on plane tickets), and even apps like E-covid Sinfonia which is an app that registers individual's data concerning covid-19 test or

This means that a user can log in to a platform by identifying himself through his Google account, Facebook account or another provider offering this possibility.

Another example of this kind of service is Amazon Pay which works in quite a similar way, allowing users to make payments using the credentials and payment methods registered in their Amazon account[312].

The use of such identification systems has a significant impact from the perspective of both users and platforms. For users, having a single account to access different platforms means not having to store different credentials for each platform, which speeds up the log-in process. However, large platforms offering this service are able to collect a huge amount of data on the user, such as the type and pattern of usage of apps and websites, thus gaining a huge competitive advantage. In addition, consumers lose control over their own data and unwittingly provide new data[313].

It has been emphasised many times that the possession and control of data is a huge source of value. In fact there are many strategies to exploit both possession and data control. In general, data enable the improvement of the platform since it is the main resource which allows algorithms to work. The possession of large amounts of data gives platforms the possibility to profile their users and also to target their offerings according to data acquired about their users. It is clear, therefore, that the performance of the platform depends largely on the database on which it can rely[314]. Thus, it is easy to understand what the idea behind the introduction of the aforementioned obligation is. It aims to prevent the gatekeepers from imposing the use of a service which has the purpose of strengthening the gatekeeper's position, thus undermining competition.[315]

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vaccination status, use them. Hence, the two gatekeepers gain a lot of data of different types from an enormous variety of sources. This system is helped by the fact that it is considered to be a "gain-gain" situation for both parties, the user does not need to remember all his passwords while the gatekeeper acquires data useful for its activities.

[312] For more on this see General FAQs on Amazon Payment services, available at: https://paymentservices.amazon.com/support-center/faq

[313] Andrei Hagiu, Julian Wright 'When Data Creates Competitive Advantage and when it doesn't' (Harvard Business review 2020) < https://hbr.org/2020/01/when-data-creates-competitive-advantage > accessed 23 December 2021

[314] For more on this see European Data Protection Board, 'Guidelines 8/2020 on the targeting of social media users' (2021), paras. 50 e ss.

[315] Philipp Bongartz, Sarah Langenstein, Rupprecht Podszun, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' (2021) 10(2) Journal of European Consumer

This again points to the main objectives of the regulation, which is namely to protect consumers and to ensure a fair and contestable market.

The sixth obligation, Article 5(f), provides that the gatekeeper may not force end-users or commercial users to subscribe to or to sign up for a basic service of the platform as a condition of accessing, registering or subscribing to another basic service on the platform itself.

This obligation refers to a practice adopted by few digital platforms which abuse their dominant position in one area in order to impose conditions for access to a service[316]. This practice is highly detrimental to competition as it allows a gatekeeper with strong market power in a given segment to foster its own growth in another market segment[317]. A great example in which the exact practice prohibited by the regulation is involved can be found with Google's Android operating system.

In fact, Google was the subject of an antitrust investigation conducted by the European Commission started in 2015 and ended in 2018 with a decision against the search engine[318].

The Commission found many contractual terms and practices to be anticompetitive under Article 102 of the TFEU. [319] The Commission's investigation took place because it was alleged that Google was exploiting its dominant position by imposing the mandatory installation of some of its services together with the Android operating system. Specifically, Google required that the app 'Google Search' and the search

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and Market Law, 61-64 < https://kluwerlawonline.com/journalArticle/Journal+of+European+Consumer+and+Market+Law/10.1/EuCML2021017 > accessed 24 December 2021

[316] Ibid, 66

[317] Pierre Larouche, Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Journal of European Competition Law and Practice, 545-550 < https://doi.org/10.1093/jeclap/lpab066 > accessed 27 December 2021

[318] *Google Android (*case AT.40099) Commission Decision C (2018) 4761. Full decision available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf

[319] European Commission 'Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' (2018) press release <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 > accessed 26 December 2021

engine 'Chrome' be pre-installed, together with the Play Store, on all devices sold[320].By purchasing an Android-based device, consumers were forced to have pre-installed certain Google apps and therefore, providers of alternative applications were not put in a position to compete fairly with Google's services.

The Commission therefore found that Google enjoyed a significant competitive advantage over its competitors in the browser sector. Moreover, Google's practice did not stimulate innovation but instead discouraged competition, harmed consumers and strengthened its already dominant position[321]. In the situation described above the twofold harm to consumers and competition resulting from the strong integration of products and services offered by Google emerges[322]. These concepts were described in-depth in chapter one where I explained whether innovation and consumers benefit from conducts like those described in this section or not. It emerged that innovation could not be reserved to few companies only. In fact, a market in which the goal of smaller companies is simply being acquired by Tech Giants cannot be considered a fair market but instead a market dominated by only a few companies which are set to constantly increase their dominance. Hence, it is easy to understand what the rationale behind this obligation was.

The seventh obligation provided by Article 5(g) in the DMA concerns the sphere of advertising and is generally applicable to all gatekeepers as indeed they all should provide advertisers and publishers, upon request, with all information relating to the prices paid for gatekeeper services as well as the remuneration paid to the publisher.

The situation of online advertising is in the middle of numerous legal and economic issues. The increasing use of digital platforms as online advertising channels has allowed a few large platforms to become important channels for advertisers to reach their audience. The automation of advertising services and the use of technology and

[320] John Yun, 'The Legality of Legacy Business Practices in Antitrust' (2021) 24 University of Pennsylvania Journal of Business Law, 10-14 < http://dx.doi.org/10.2139/ssrn.3814974 > 27 December 2021

[321] Viktoria Robertson 'A new era for Antitrust market definition' (2021) 1 Concurrences, 4-5 < https://ssrn.com/abstract=3785986 > accessed 20 January 2022

[322] Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer 'Competition Policy for the digital era' (2019) European Commission Final Report, 31-34

algorithms to generate targeted offers is undoubtedly a very important resource for companies.[323]

However, it's common for digital platforms to take advantage of their dominant position in order to impose specific terms and conditions on advertisers and publishers and to keep information about costs, profits and ad placement hidden.

This situation also stems from the fact that advertising management technology services are by nature difficult to analyse, as they are based on complex algorithms that process very large amounts of data.

Therefore, controversy arises with concern to the lack of transparency in pricing by providers of such services. It is not always clear, for instance, how the fees retained by the platform are calculated[324]. Moreover, it should be noted that there is also a very high degree of concentration in the advertising sector. In fact, companies like Google and Facebook are strongly entrenched and are considered must-have partners by most advertisers[325], which in itself does not constitute a detrimental market practice.[326]

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[323] In general, an algorithm is a simple procedure that attempts to solve a given problem by applying a certain number of elementary steps. Similarly, in computer science, an algorithm is nothing more than a simple procedure that allows certain problems to be solved by applying a finite sequence of instructions which, in turn, must be interpreted and executed until their conclusion in a precise order. Algorithms play a primary role in gatekeepers' market strategies, indeed through algorithms, gatekeepers can provide more easily personalized services for users or also acquire more data. Hence algorithms will play an even more important role in gatekeepers' market strategies in the upcoming years. Indeed, Ariel Ezrachi and Maurice Stucke postulate the end of the competition as we know it and call for heightened regulatory intervention against the algorithmic system. it is hypothesized that the use of algorithms will bring newer forms of anticompetitive conduct which challenge traditional antitrust orthodoxy with new elements such as price discrimination, co-opetition, data extraction, and data capture. For more on this point see Suzanne Rub, 'Artificial intelligence, algorithms and antitrust' (2019) 18(4) Competition Law Journal, 141-143 < https://doi.org/10.4337/clj.2019.04.02 > accessed 28 December 2021

[324] Australian Competition and Consumer Commission (ACCC), 'Digital Platforms Inquiry' (2019) Final Report, 150- 164 < https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report > accessed 30 December 2021

[325] UK Competition and Market Authority 'Online platforms and digital advertising Market study final report' (2020), recital 33 < https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study > accessed 30 December 2021

[326] In chapter one it was stressed how the advertisement market is capable of harming both business and users, indeed it was said that when companies use platforms like Facebook or Google, which have millions of users' data to for advertisement, those platforms may ask for high prices since those have

2.5 Gatekeeper obligations under Article 6 of the DMA: the regulatory dialogue between gatekeepers and the Commission

Article 6 of the proposed DMA identifies the obligation for which there should be a normative dialogue between the gatekeepers and the European Commission. The DMA indeed establishes that gatekeepers must take every action needed in order to respect all obligations identified by the DMA[327].

Moreover, regarding the obligation under Article 6, the European Commission may identify, through specific decisions, the measures which gatekeepers shall adopt in the case that those already implemented do not ensure compliance with the obligations[328]. Thus, the Commission acquires a strong power of intervention in the field of gatekeeper's conducts and is therefore capable of directly influencing the activity of those companies.

With regard to the first obligation laid down in Article 6, the gatekeeper is prohibited from using non-publicly accessible data generated through the activity of business users on the platform or provided by the business users themselves or by their end-users (Article 6(1)(a))[329].

The data collected by a platform and over which it can exercise control do not only concern the user's personal sphere but also the number and type of transactions that take place within the platform itself.

The above-mentioned Article concerns cases in which gatekeepers compete with business users through vertical integration. Thus, Article 6(1)(a) prohibits gatekeepers from using any non-public data produced by business users. The rationale behind the norm is to ensure a level playing field between gatekeepers and businesses. This should

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an enormous amount of data concerning users' preferences. Thus, users have to pay the major prices for advertisement paid by the companies and only companies which may sustain that cost will be succeed on the market. Hence, market cannot be considered fair, and, in this context, we realise the need for the DMA

[327] Jan Kraemer, Daniel Schnurr, 'Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies' (2021) Journal of Competition Law & Economics, 34-40 <http://dx.doi.org/10.2139/ssrn.3789510 > accessed 31 December 2021

[328] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (n 254), 543

[329] ibidem

happen by guaranteeing no discrimination between gatekeeper services and that of independent third parties[330].

As far as practical examples of this conduct are concerned, Amazon, for instance, collects a huge amount of business data concerning the quantity and type of products sold, seller revenues, visits made by end-user to seller offerings etc. This same information can be translated into consumer preferences. In this way Amazon is fully informed about the development of the market underlying the platform. The problem arises because its dual role as e-marketplace and retailer of products in the same market allows it to exploit this data to its own advantage and to the detriment of third-party providers. In this respect, the European Commission has opened an antitrust investigation against Amazon on the grounds that the company allegedly uses non-public data of sellers to promote its product offerings and to define its commercial strategies. Particularly, the Commission's findings show that a vast amount of non-public seller data are available to employees of Amazon's retail business and flow directly into the automated systems of that business: these systems aggregate the accessible data and use them to adjust Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers. For example, it allows Amazon to focus its offers on the best-selling products across product categories and to calibrate its offers along with non-public data of competing sellers.

The Commission's view is that the use of sensitive sellers' data allows Amazon to avoid the normal risks of retail competition and to take advantage of its dominance in the market in providing its services.[331]

More dangerous is the fact that Amazon uses the information collected on sellers to produce and promote private label products[332] with the effect of undermining third-

[330] Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) SSRN, 14-20 < https://ssrn.com/abstract=3790276 > accessed 30 December 2021

[331] Jasmina Saric, 'The EU Commission vs. Amazon for an alleged abuse of dominant position as a marketplace service provider' (Centro di Ricerca sulle Organizzazioni Internazionali ed Europee 2021) < https://croie.luiss.it/2020/11/23/the-eu-commission-vs-amazon-for-an-alleged-abuse-of-dominant-position-as-a-marketplace-service-provider/ > accessed 2 February 2022

[332] It should be pointed out that Private labelling is when a supplier or manufacturer produces goods that are retailed, packaged, and sold exclusively by a third-party. Amazon is making massive use of that, indeed Amazon, in order to consolidate its dominance and reduce the number of competitors, has responded to popular third-party products by producing them itself. Now Amazon Basics products are an important part of the market and it is clear that the company has used insights gleaned from its vast

party suppliers on the e-marketplace[333]. Hence it appears evident that Amazon, as a retailer of products, is not competing fairly with third-party suppliers, exploiting its strong position and large amount of data to the detriment of the platform's internal competition[334]. The prohibition is therefore necessary. However, it is not clear how it should be applied to different cases where, for example, non-public data do not concern commercial users but concerns rather the information that the platform captures from different sources.[335]

The obligation under Article 6(1)(b) prescribes that the end-user should be free to uninstall any application pre-installed on the platform except for those which are indispensable for the functioning of the platform itself.

The nature of this obligation has already been discussed through both the first chapter and the previous section of this chapter. Here we refer to the concept of modularity and the strong integration of services offered by some digital platform companies. The pre-installation of proprietary applications or programs of the platform is a typical practice of many companies.

The case of Google, for instance, has already been reported. In that case the search engine "Google Search" was installed by default on devices equipped with the Android operating system.

Like Google, Microsoft has also been investigated in the past by the European Commission for its forced coupling of the Internet Explorer browser with the Windows operating system, both owned by the company[336]. Another example is Apple which,

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Web store to build a private-label juggernaut. Through this strategy Amazon can impose its price on items that it already knows are best-selling products. For more on this see: Lisa M. Khan 'Amazon's Antitrust Paradox' (n 12), 781-783

[333] Lisa M. Khan 'Amazon's Antitrust Paradox (n 12), 780-785

[334] Ibidem

[335] Facebook seems to have used non-public data, coming from tracking users' behaviour on its platform, to develop its strategy of mergers and acquisition on other platforms or competitors. On this see: Adelaida Afilipoaie, Karen Donders, Pieter Ballon, 'The European Commission's approach to mergers involving software-based platforms: Towards a better understanding of platform power' (2021) Telecommunications Policy, 5 <https://www.sciencedirect.com/science/Article/pii/S0308596121001920 > accessed 30 December 2021

[336] *Microsoft Tying* (Case AT.39530) Commission Decision C1210 (2013)

until the release of iOS 14 in 2020, did not allow users to use a search browser other than Safari[337].

The strategy of pre-installing a set of applications on a device is already detrimental to competition, as it seems that users are unlikely to uninstall an application they find already on the device for another one, unless this substitution represents a decisive advantage in terms of quality and cost[338]. This practice is related to the laziness of end-users for whom there is a strong preference for what is offered by default by a brand they trust[339]. Additionally, if one considers the impossibility for the user to uninstall applications or programmes, the damage to competition is even more evident and translates into less choice for the end-user. Hence, according to the main findings of chapter one, market and competition cannot be considered fair if few companies have the power to both strongly influence users to use only their platform as well as the power to reduce the available choices, amplifying the so-called lock-in effect, according to which users are locked into few platforms and have no alternatives[340].

The obligation under Article 6(1)(c) requires a gatekeeper to allow the effective use of third-party applications and app stores that use or are interoperable with the gatekeeper's own operating system. It must also guarantee access to these applications or app stores by means other than the gatekeeper's basic platform services[341].

Article 6(1)(c) includes tying practices in operating systems in which a gatekeeper only allows access to third-party software through another of its core platform services[342].

Above, the issue concerning app stores and the difficulty of using app stores that are different from those owned by gatekeepers was already discussed. In addition, the

[337] Shili Shao 'Antitrust in the consumer platform economy: how Apple has abused its mobile platform dominance' (n 80), 24

[338] This was already discussed in both chapter one and in the previous section of this work

[339]Damien Geradin, Dimitrios Katsifis, 'The Antitrust case against Apple App-store' (2021) 17(3) Journal of Competition Law & Economics, 517-522 < https://doi.org/10.1093/joclec/nhab003 > accessed 2 January 2021

[340] European Commission 'Commission Staff Working Document Impact Assessment Report Accompanying the Document Proposal for A Regulation OF The European Parliament and of the Council on contestable and fair Markets in the Digital Sector (Digital Markets Act)' (2020), para. 40

[341] Ibid, paras. 31-36

[342] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A legal and policy review' (n 254), 538

anticompetitive behaviour behind IAP systems was mentioned. Therefore, it appears even more clear the rationale behind Article 6(1)(c) of the DMA.

The following obligation under Article 6 (1)(d) is based on a practice that affects several digital platforms and has been repeatedly brought to the attention of the authorities by commercial users. Indeed, in this Article it is provided that the gatekeeper shall refrain from guaranteeing more favourable treatment in terms of placement to the services and products offered by the gatekeeper itself or by third parties belonging to the same company compared to similar services or products of third parties; moreover, the aforesaid placement must take place under fair and non-discriminatory conditions.

This obligation stems from the fact that most dominant platforms do not merely intermediate between supply and demand, but compete directly with one side of the platform, generally with business users. In addition, the nature of this provision is twofold. Hence, first, gatekeepers must not 'self-prefer' to third-party providers and, second, content, products and services must be offered on non-discriminatory but fair terms, i.e. there should be no preferential treatment of certain users to the detriment of others.

Although major platforms claim that the ranking of products is managed by algorithms that assess performance and compliance with a set of objective and pre-established criteria, several investigations question these justifications. The strategies covered by the obligation in question are found, for instance, in the case of app stores or e-marketplaces such as Amazon[343].

Furthermore, Google and Apple both play the dual role of owners of app stores and providers of apps and content; as they are also hardly or absolutely non-replaceable channels, they can exercise their gatekeeper role to promote or preferentially offer their own apps[344]. However, the self-preferencing strategy, is not limited to the category of app stores. The European Commission, for instance, declared in 2017 that Google had abused its dominant position by favouring its own comparative shopping services to the detriment of third parties through the exploitation of its strong position in the search engine market[345].

[343] Lisa M. Khan 'Amazon's Antitrust Paradox' (n 12), 788-790

[344] Damien Geradin, Dimitrios Katsifis, 'The Antitrust case against Apple App-store' (n 339), 525

[345] The analysis of Google Shopping case was already conducted in chapter one, in here it is just useful to remark that Google's conduct in that case is prohibited under DMA.

Adopting such practices not only harms competition and market contestability, but it also has negative repercussions on the consumer sphere. It is not necessarily the case that the content, products or services that a platform promotes because it owns them and/or benefits from them are better or more responsive to the needs of end-users than those offered by third parties.[346]

Moreover, self-preferencing raises high market entry barriers for new providers, who are unlikely to be able to make their offer prevail over that of the platform owner[347].

Article 6(1)(e) establishes that the gatekeeper shall refrain from technically limiting the possibility for end-users to change between different services and software applications to be accessed through the gatekeeper's operating system. In this Article the Commission's goal is to ensure multihoming, thus giving users the possibility and freedom to choose between different content and applications for the same service.[348]

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[346] Organisation for Economic Co-Operation and Development 'Ex ante regulation of digital markets', (2021) Discussion Paper, 27 < https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf > accessed 30 December 2021

[347] The prohibition of self-preferencing is even more important if we bear in mind that the definition of the prohibited conduct was difficult to assess. Indeed, if one reads the conduct through the lens of antitrust law, it is clear that preferential treatment is unlawful conduct since it excludes competitors from the market and, therefore, preventing effective competition between firms. Instead, from the point of view of digital companies, the duty not to favour oneself would constitute an obstacle to competition since it is based on the constant tension between companies' intent on outperforming the direct competitor. These two opposing, yet complementary forces have given rise to the debate on whether self-preferencing can be considered an antitrust offence and whether it can be attributed to one of the exclusionary practices listed in Article 102 TFEU. First it should be noted that the reference to the principle of treatment and the remedy proposed by the Commission make it possible to argue that preferential treatment does not constitute an unlawful act in itself, but rather that it is the manner in which it is implemented that makes it unlawful. Second there is no univocal orientation but seems, in EU antitrust enforcement, to be prevalent the idea that self-preferencing should be attributed to a discriminatory practice within the meaning of Article 102(2)(c) TFEU. According to this conception, the duty not to favour oneself would be the logical and spontaneous consequence of the principle of equal treatment. For more on this point see: ANNA LICASTRO, 'Il self-preferencing come illecito antitrust?' (2021) in *Il diritto dell'economia*, Year 67, n. 105 (2 2021), 401-408 < https://www.ildirittodelleconomia.it/2021/09/02/anna-licastro-il-self-preferencing-come-illecito-antitrust/ > accessed 2 January 2022

[348] On this, a good example may be the vocal assistant. Indeed, Apple severely restricts the possibility for users to install voice assistants other than 'Siri', and at the same time does not guarantee the functioning of its voice assistant on non-Apple operating systems. In this case, the company undermines

Article 6(1)(f) requires that gatekeepers that supply operating systems provide third parties of ancillary services the same and equal access to their own ancillary services as well as interoperability[349].

A digital platform does not limit itself to offering one or more essential services to end-users, but a series of further services are configured around them, which may be provided by third parties or by the gatekeeper itself. It appears evident that the position of a gatekeeper allows it to develop and promote the use of its own services rather than those of third parties[350].

Moreover, in the interest of the norm, there is no need for the gatekeeper and a third-party to be in a competitive relationship in ancillary services.

Interesting for this analysis is the recent case, Enel X against Google, which ended with a sanction against Google of about one hundred million euros.

The Italian Antitrust Authority fined Alphabet Inc., Google LLC and Google Italy for violation of Article 102 of the TFEU.

The first point of this decision indicated that through the Android operating system and the Google Play app store, Google holds a dominant position that allows it to favour its Google Maps to the detriment of other companies' applications. In this regard, Google did not allow the interaction of the Juicepass app (owned by Enel X) with Android Auto, an Android feature that allows people to use apps while driving in compliance with safety and distraction reduction requirements. The Italian Antitrust Authority is now requiring Google to make available on Android Auto the Enel X app

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interoperability in the voice assistant market and also contribute to eliminate end-users' choices between different applications. On this see: Lewis Crofts, Nicholas Hirst 'Growth of Alexa, Siri, Google Assistant raises EU antitrust concerns' (Mlex 2021) < https://mlexmarketinsight.com/news/insight/growth-of-alexa-siri-Google-assistant-raises-eu-antitrust-concerns > accessed 22 December 2022

[349] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (n 254), 537

[350] Example of this is Apple's system of payment, i.e. Apple Pay, which use the Near Field Communication (NFC) technology, embedded in iOS devices, to make payments on the web, in apps and even in physical shops, directly from the device and with a simple click. There are currently several payment apps on the market that could potentially compete with the one owned by the giant, if it were not for the fact that Apple prohibits third-party applications from accessing the NFC functionality and thus technically operate on iOS devices. Indeed, in this regard, European Commission started an antitrust investigation against Apple to ensure whether its payment system is violating competition law or not.

which, among other things, allows the search for and booking of a charging station as well as the management of the charging session.

Google's conduct violates competition law since it prohibits Enel X from exercising one of its main activities by preventing it from acquiring clients. Google also favours its own app, Google maps, which, like JuicePass, allows one to search for and book a charging station. Thus, this limits the possibility of choices for users and also this gives Google an unfair advantage over Enel X. [351]

For these reasons, the Italian Antitrust Authority obligated Google to make available to Enel X Italia, as well as to other app developers, tools for the programming of apps interoperable with Android Auto; moreover, the authority stated that it will monitor the effective and correct implementation of the obligations imposed[352].

As far as Article 6(g) is concerned, gatekeepers that provide advertising services shall give free access to their performance measuring tool and information at the request of advertisers and publishers to independently control the ad inventory[353].

This provision comes from the fact that the lack of transparency as well as information asymmetry in the online advertising and publishing sector is severely damaging innovation and competition.

In addition to being subject to direct control by gatekeepers, it is possible that advertisers are reluctant to publish content because they do not have enough information to assess the real impact of an ad on the consumer sphere[354].

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[351] Oscar Borgogno, Giuseppe Colangelo, 'Platform and Device Neutrality Regime: The Transatlantic New Competition Rulebook for App Stores?' (2022) TTLF Working Papers No. 83, 32 < https://dx.doi.org/10.2139/ssrn.4000597 > accessed 28 January 2022

[352] Autorità Garante della Concorrenza e del Mercato 'Sanzione di oltre 100 milioni di euro a Google per abuso di posizione dominante' (2021) < https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf > accessed 2 January 2022

[353] Miriam Caroline Buiten, 'Exploitative abuses in digital markets: between competition law and data protection law' (2020) 9 (2) Journal of Antitrust Enforcement, 275-280 <https://doi.org/10.1093/jaenfo/jnaa041 > accessed 3 January 2022

[354] Australian Competition and Consumer Commission (ACCC), 'The Impact of Digital Platforms on News and Journalistic Content' (2018), 31-38 < https://www.accc.gov.au/system/files/ACCC%20commissioned%20report%20-%20The%20impact%20of%20digital%20platforms%20on%20news%20and%20journalistic%20content%2C%20Centre%20for%20Media%20Transition%20%282%29.pdf > accessed 2 January 2022

Article 6(h) is linked with privacy concerns. Indeed, it requires gatekeepers to provide effective data portability for both business users and end-users. Basically, the gatekeeper guarantees effective data portability to business users; furthermore, the gatekeeper must provide end-users with the necessary tools to exercise data portability, in line with the GDPR.

The possibility for users to transfer their personal data from one platform to another has been considered an effective solution to mitigate privacy concerns and the use of data as a source of competitive advantage in data-driven markets[355].

The DMA obligation in question could be seen both as an extension of this right to the sphere of business users as well as a form of enforcement of the right to data portability, since, although platforms already provide mechanisms that allow users to download their data, this is clearly not sufficient[356].

It is useful here to focus on the effects of data portability on competition and on the activity of digital platforms. It shall be noted that switching costs are negatively correlated with data portability: the possibility for users to move their data between different platforms implies lower costs (direct and indirect) in switching from one to the other, which means more freedom of choice and less lock-in effect[357]. This, therefore, translates into a greater demand for alternatives and a more remarkable ability on the part of competing platforms to compete against dominant ones[358].

Furthermore, data portability could benefit competition in the market in two ways: by reducing barriers to market entry and mitigating the competitive disadvantage of smaller platforms[359].

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[355] Organisation For Economic Co-Operation and Development 'Data portability, interoperability and digital platform competition' (2021) Competition Committee Discussion Paper, 14-24 < http://oe.cd/dpic > accessed 3 January 2022

[356]Organisation For Economic Co-Operation and Development 'Ex ante Regulation in Digital Markets' (2021), 39-45 <https://one.oecd.org/document/DAF/COMP(2021)15/en/pdf > accessed 3 January 2022

[357] Barbara Engels, 'Data portability among online platforms' (2016) 5(2) Internet Policy Review, 2-7 < https://policyreview.info/Articles/analysis/data-portability-among-online-platforms > accessed 3 January 2022

[358]Organisation for Economic Co-operation and Development, 'Data portability, interoperability and digital platform competition' (n 355), 29

[359]Australian Competition and Consumer Commission, 'Digital platforms inquiry - final report' (2019), 15 <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report > accessed 2 January 2022

The ninth obligation, Article 6(i), requires gatekeepers to allow business users access and the use free of charge as well as effective, high quality and real-time aggregated and non-aggregated data generated or provided in the use of basic services of the platform by business and end-users; in addition, the sharing of personal data is subject to the consent of the end-user.

This obligation refers to the disintermediation effect that gatekeeper platforms have on commercial users.

In addition, this obligation incentivises the sharing of data held by the gatekeeper platform with commercial users to ensure fairness and transparency.

Commercial users are aware of the gap between the amount and type of data in their possession and those held by the large digital platforms on which they operate[360]. However, not all data are equal and lend themselves to easy sharing and dissemination. Indeed, with regard to personal data it is clear that, for a commercial user, having information such as an end-user's email available represents an important opportunity to promote its offer also outside the platform that acts as an intermediary.

Personal data, however, are the type of data whose sharing is the most discouraged not only by large platforms but also by regulations that tend to guarantee privacy and the protection of personal data. Other types of data contain information about user behaviour on the platform, such as the type and number of searches.

The sharing of so-called depersonalised - not attributable to a specific individual - aggregated and non-aggregated data could grant commercial users access to information that is usually only in the possession of the gatekeeper and guarantee the latter the exercise of strong market power[361].

Article 6(j) provides a specific data access right for search engines. Search engines have to provide access to ranking, query, click and view data[362].

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[360] Vaida Gineikytė, Egidijus Barcevičius, Loreta Matulevič 'Platform data access and secondary data Sources' Analytical paper (2019), 17-20 <https://platformobservatory.eu/app/uploads/2020/09/Analytical-paper-1-Platform-data-access-and-secondary-data-sources_final.pdf > accessed 3 January 2022

[361]Organisation for Economic Co-operation and Development 'Consumer Data Rights and Competition' (2020), 24-40 <https://one.oecd.org/document/DAF/COMP(2020)1/en/pdf > accessed 3 January 2022

[362] Oscar Borgogno, Giuseppe Colangelo, 'Platform and Device Neutrality Regime: The Transatlantic New Competition Rulebook for App Stores? (n 351), 39

According to the US Antitrust Authorities the possession of a large amount of click-and-query data is exploited in different ways by search engines[363]. First, the more data the platform has, the better the algorithms work and the more they make search results relevant. In addition, by accumulating data, it is possible to define the preferences and types of content searched for by users in a more precise way and to make the content more visible to them.

In the end, query data can be used to improve the offer of advertisements on the search engine.[364]

The last obligation in this Article 6 concerns app stores and requires gatekeepers to apply fair and non-discriminatory general terms and conditions for access by commercial users to its software application shops.

The fact that some app stores are unique gateways to certain operating systems allows the provider of a store to freely impose conditions and constraints on app developers. Indeed, the high fees imposed on app manufacturers and suppliers and the unfair practices of in-app purchasing and how this causes a lot of harm not only to business users but also to end-users have been stressed in-depth in this work.

In the end, before moving from the analysis of the DMA to the other example of modern competition law enforcement worldwide, it is useful to sum up the main findings of the previous sections.

It has been highlighted that the actual antitrust approach is no longer useful to maintain fairness in the digital markets. This comes from the fact that in digital markets it is important to act as soon as possible since the more time lost, the more power Tech Giants acquire. In addition, companies are systematically evading the law thus increasing their dominance on the relevant market, becoming gatekeepers or gateways. In this context the proposed Digital Markets Act should be inserted. This regulation follows an ex-ante approach, providing criteria to establish whether a company is a gatekeeper or not and provides obligations that gatekeepers must respect at the same time. These obligations come based on experience and the various antitrust

[363] Ibid, 40

[364] In all the work it was stressed the link between data acquired by the platform and the power of the platform, indeed, the DMA aims to both ensure compliance with GDPR as well as ensure that all companies may enjoy data available on the market. Hence ensuring the appropriate distribution of personal and non-personal data on the market is one of the main instruments to re-establish the fairness of competition.

investigations conducted by both the European and the Member State antitrust authorities. Here are found identified the conducts which systematically harm competition and users and that must be prohibited if market fairness is to be reached.
Despite the fact that the Digital Markets Act reduces the power of Member States' antitrust authorities, Member States are approving antitrust norms in order to face the issue created by gatekeepers. Therefore, many authors believe that eliminating the expertise that these authorities may furnish is not a good idea.
Hence, in the next sections the new antitrust norms proposed by Member States to fight Tech Giants will be analysed.

2.6 Antitrust enforcement in Germany: the new Article 19 tool

Having analysed the proposed Digital Markets Act, it is useful in this work to focus also on other examples of antitrust enforcement in various countries.
The first example of antitrust enforcement in the Member States that will be studied is the German one. On 18 January 2021 the Tenth Amendment to the German Competition Act[365] was adopted. This amendment includes many legal changes which aim to protect competition in the field of digital marketing and, in general, in the time of digitalization.
Major innovation introduced by the new law is contained in Article 19 (a) of the German Competition Act and gives new powers to the German Antitrust Authority when acting against large digital platforms[366].
Like the DMA, the new Article 19 tool deviates from the traditional antitrust approach, proposing a new one more similar to the DMA's.
How does the tool in Article 19 deviate from traditional competition norms?
There are four different arguments which describe the differences between the German approach and the traditional one.

[365] Marcio da Silva Lima, Meren Steier, 'The German Parliament Approves the Competition Law Reform providing the Competition Authority with Regulatory tools to impede Market-Dominant Companies active in the Digital Markets from possible abuses of their Competitive Dominance' (2021) Concurrences, 2 < https://www.concurrences.com/en/bulletin/news-issues/january-2021-en/the-german-parliament-approves-the-competition-law-reform-providing-the > accessed 1 February 2022

[366] Franck, Jens-Uwe and Peitz, Martin, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) CRC TR 224 Discussion Paper Series 2021, 513 < http://dx.doi.org/10.2139/ssrn.3838759 > accessed 3 January 2022

First, it addresses the position of firms as gatekeepers or intermediaries. Indeed, both Article 102 of the TFEU and Article 19 of the German Competition Act fight unilateral conduct of companies dominating a defined market. The difference is that section 19(a) of the German Competition Act addresses unilateral practices made by digital platforms because of their position as gatekeepers or intermediaries, thus they are considered to offer essential intermediation services and to control an interface between markets without having regard for whether there is actual dominance on the defined market[367].

The second main difference evident in Article 19 is the burden of proof. The German Competition Authority (Bundeskartelamt) is indeed entrusted with the task of determining, measuring and balancing the competitive effects (maybe pro-competitive or anticompetitive) of the evaluated conduct. Thus, on a case-by-case analysis, firms may be forced to furnish all the available information in their sphere of influence[368]. Article 19 instead provides an explicit shift for the burden of proof, which is applicable to a list of practices presumed to be anticompetitive[369].

The third element of difference concerns the self-executory obligations. Traditional competition norms identify rules and standards which are binding on addressed market agents and that could be invoked by private parties before the courts[370]. The difference is that, according to Article 19, an antitrust authority has discretion in the prohibition of listed practices thus the role of the authority becomes more like the one of a regulatory authority.

The last difference concerns abbreviated judicial control. This comes from the fact that, traditionally, the decisions of the German Competition Authority were subject to a two-level judicial review. Now, according to Article 19 of the German Competition Act, decisions may be reviewed by only the German Federal Court of Justice which acts as Court of first and last instance.

Let us now focus on the main mechanism behind the Article 19 tool.

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[367] Ibid, 515

[368] Section 26(2) of the Administrative Procedures Act (Verwaltungsverfahrensgesetz)

[369] Later in this section there will be an analysis of these conduct, it is worth to mention already that the prohibited conducts are similar to those identified by the proposed Digital Markets Act

[370] [370] Franck, Jens-Uwe and Peitz, Martin, 'Digital Platforms and the New 19a Tool in the German Competition Act' (n 366), 517

First, the German Antitrust Authority has to state whether a firm is of paramount significance for competition across markets[371] and its decision will be effective for five years[372]. When doing so, the German Competition Authority can prohibit certain types of conduct which are set to be considered anticompetitive[373].

Let us first point out what the main companies that will be affected by the new competition regime are. It is crystal clear that when developing this type of norm politicians have in mind the companies of the GAFAM group. On the other hand, it is important to highlight that those are not the only companies which will be affected by the new norms. Therefore, the criteria listed in the new Competition Act shall be further analysed.

Article 19 (a) concerns only firms which are active to a significant extent on markets within the meaning of section 18(3a) of the German Competition Act. The latter refers to multi-sided markets and networks. It is worth highlighting that being "multisided" is not a feature of the market, but rather a feature of the firm; hence, the reference to Article 18(3a) means that Article 19 (a) applies to companies operating in multi-sided platforms[374] and are intermediaries between different user groups linked through cross-group network effects.

Moreover, by including the term networks in the provision, it has been clarified that business models and products should already be covered when they are characterised by direct network effects between their users.

In addition, a firm can be addressed by these new norms only if its activities as a two-sided platform are considered significant. Indeed, the criterion was inserted to clarify that only firms whose activity is focused on digital business models are subject to the rule[375].

This statement comes from the intention to exclude any companies whose activity as a multi-sided platform have only a subordinate role compared to its other activities or which plays a minor role compared to the role of its competitor[376].

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[371] Section 19a(1), 1st and 2nd sentences of the Competition Act.

[372] ibidem

[373] Section 19a(1), 3rd sentences of the Competition Act

[374] Franck Jens-Uwe, Peitz Martin, 'Digital Platforms and the New 19a Tool in the German Competition Act' (n 366), 518

[375] Ibidem

[376] Ibid, 520

The main criterion for the application of Article 19(a) is that the addressed firm is of paramount significance for competition across markets[377].

Hence, Article 19(a)(1) provides for criteria which shall be taken into account to identify firms which pose risks to competition and which cannot be adequately faced by the existing antitrust norms. The criteria are:

(1) dominance on one or more markets

(2) financial strength and access to resources

(3) vertical integration and activities on otherwise related markets

(4) access to data relevant for competition

(5) a gatekeeper position

The need for a new competitive approach clearly derives from the risks of the digital market, but on the other hand it could be noted that the first three criteria are not necessarily linked with digital markets, revealing to us the goal of providing a new competition law which does not have eyes only for digital markets.

In addition, Article 19 (a) is applicable also to firms which are dominant, or which are not dominant yet in the relevant market. Hence, this reduces the intervention threshold when compared to Article 102 of the TFEU or section 19 of the German Competition Act, and it will make it easier for the Bundeskartellamt to determine the addressee status.[378]

In the end, the norm does not give to the authority the freedom of whether to define the relevant market or not, indeed both the criterion of paramount significance for competition across the market as well as the criterion mentioned above presuppose the concept of a defined market[379]. On the other hand, Article 19 may make disputes easier since market dominance is not required for its application.

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[377] In the memorandum prepared by the responsible parliamentary committee to report the finalized version of the Tenth Amendment to the Competition Act, the potential addressees of the 19a tool are described as firms that, for example due to their financial, technical or data-related resources or as cross-market digital ecosystems or platforms, are particularly capable of extending their position of power across market boundaries or securing their unassailable position.

[378] Jens-Uwe Franck, Martin Peitz, 'Market Definition in the Platform Economy' (2021) Discussion Paper Series CRC TR 224, 11-16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3773774 > accessed 3 January 2022

[379] Section 18(4) of the Competition Act provides for a presumption of market dominance for firms with a market share of at least 40 per cent. The CJEU has established a presumption of dominance applicable

Thus, the German Competition Act introduced a new instrument which targets digital ecosystems or small groups of firms, i.e. the GAFAM firms. But it shall be noted that there is no criterion or provision which states that the provisions in Article 19 must be limited only to these few companies. On the contrary, it is likely that more firms will be addressed.

Moving on to the conduct prohibited by the new German Competition Act, it is clear that the law identifies seven types of practices that should be prohibited:

(1) self-preferencing by vertically integrated firms

(2) hindering supply or sales activities of other firms (including non-competitors)

(3) hindering competitors in markets where the 19 (a) firm may rapidly expand its position

(4) using collected data to raise market entry barriers or requiring user permission for such use

(5) hindering competition by denying or impeding interoperability or portability of data

(6) withholding information on the performance of the 19(a) firm

(7) demanding disproportionate (monetary or non-monetary) compensation from business customers

These conducts are presumed to be abusive since there is the risk that companies, identified according to the criteria mentioned above, use their key strategic position to expand their market power and to distort competition; moreover, there is the risk that these companies transfer their market power to other markets and, in the end, these companies take advantage of economically dependent companies.

The first conduct prohibited here is self-preferencing. Article 19 prohibits firms from treating "*the offers of competitors differently from its own offers when providing access to supply and sales markets*"[380].

Self-preferencing, according to what has been stated many times in this work, is set to be considered an abusive conduct since it may lead to market foreclosure and may also

to undertakings with a market share of 50 per cent or more. On this see: Judgment of 3 July 1991, Case C-62/86 AKZO v Commission, EU:C:1991:286, para 60.

[380] German Competition Act 2021 art 19 a (2) (1)

lead competitors not to develop their technologies or ideas, increasing the competition to enter in the market and reducing the competition within the market itself[381].

The second conduct prohibited is also linked with self-preferencing as it regards practices which "*hinder other companies in their business activities on procurement or sales markets[382] ".* Thus, here also conducts which are not directly damaging competitors but which digital ecosystems may employ to secure their unassailability are prohibited [383].

The third provision refers to strategies thanks to which not yet dominated competitors are driven out. These practices may be of various types, such as predatory pricing, anticompetitive exclusivity agreement or tying and bundling practices.

The fourth prohibition states that companies are prohibited from processing collected data "*to create or appreciably raise barriers to market entry or otherwise hinder other companies, or to require terms and conditions that permit such processing*"[384].

This prohibition aims to stop the combination of relevant data acquired by gatekeepers through different sources[385].

The fifth prohibition states that the German Competition Authority may prohibit the denial or "*the interoperability of products or services or the portability of data, thereby hindering competition[386]*".

The rationale behind this provision is to weaken the lock-in effect, thus making it easier for users to switch from platform to platform. As the problem of lock-in effect has been discussed already, it won't be stressed again here.

Article 19(2)(6) provides that the Competition Authority has the power to force companies identified under Article 19(a) to furnish their business customers with *"information about the scope, quality or success of the service provided or*

[381] When developing this provision, the conduct considered was Google's conduct as identified by the European Commission in Google-Android case.

[382] German Competition Act 2021 art 19 a (2) (2)

[383] Franck, Jens-Uwe and Peitz, Martin, 'Digital Platforms and the New 19a Tool in the German Competition Act' (n366), 522

[384] German Competition Act 2021 art 19 a (2) (4)

[385] The provision moves from the consideration elaborated in Facebook- Germany case, indeed the theory of harm and the possibility to punish exploitative abuse comes from the considerations elaborated in that decision. On this see Franck, Jens-Uwe and Peitz, Martin, 'Digital Platforms and the New 19a Tool in the German Competition Act' (n 366), 523

[386] German Competition Act 2021 art 19 a (2) (5)

commissioned' and may prevent 19a firms from 'otherwise mak[ing] it difficult … to assess the value of this service".

This prohibition aims at avoiding the asymmetry of information about costs for consumers, clicks or other parameters which help in determining whether a platform is good or not. In this way the prohibition helps assess the real value of platforms, thus making the switch from one platform to another easier.

With the last provision, the German Competition Authority has the power to intervene when companies ask their customers disproportionate consideration for their services. The provision is inspired by a particular category of abuse listed in section 19 of the Competition Act which is meant to address an abuse of buyer power by dominant firms that demand benefits from suppliers[387].

According to German Federal Court, this provision is set to protect competing buyers from the competition's distortion and suppliers from unfair terms and conditions[388].

Before ending this section, it is useful to briefly sum up its content. It was analysed that the DMA is not the only example of a new approach in competition law, indeed Germany adopted in January 2021 a new set of competition norms aiming to re-establish fairness in the market.

Even if these norms follow the idea of providing stronger regulation in the field of digital markets, these are not set to be applicable only to Tech Giants. Article 19 of the Competition Act like the DMA provides conducts that are presumed to be abusive and anticompetitive, and which can be prohibited by the German Antitrust Authority.

The New German Competition Act may be inserted into the environment of major changes in the field of competition law, and given the current state of the art in this field, it is possible to analyse the major differences emerging from the proposed Digital Markets Act and the German law[389].

Two major differences appear. First, the potential firms which fall under the scope of the DMA are wider than the firms which are subject to the new German competition

[387] Franck Jens-Uwe, Peitz Martin, 'Digital Platforms and the New 19a Tool in the German Competition Act' (n 366), 524

[388] BGH, 23 January 2018, KVR 3/17 – Hochzeitsrabatte I, Juris, paras 55–57.

[389] Bundeskartellamt 'Amendment of the German Act against Restraints of Competition' (2021)

act. This comes from the qualitative criteria of the DMA which trigger a presumption that the firm may be designated as a gatekeeper[390].

Second, the DMA's provisions are more likely an ex-ante regulation approach since when a company is designated to be considered a gatekeeper according to the criteria provided by Article 3 of the DMA, it is automatically forced to respect the obligation provided by Article 5 and Article 6 of the DMA[391].

Germany has now opened a testing ground for regulation in digital platforms and markets and it is foreseeable that other Member States will try to learn as much as possible from the German experience, but, on the other hand, this may lead to a non-harmonization in the field of digital platform regulation around Member States.

In fact, even if the proposed DMA is a regulation, Member States are still free to adopt stricter regulations concerning gatekeepers to pursue legitimate interests.

Moreover, national competition rules prohibiting forms of unilateral conduct, i.e. those that do not fall under Article 102 of the TFEU and that impose 'additional obligations on gatekeepers, will also remain unaffected by the DMA.

Thus, pursuant to recital 9 of the DMA proposal, the *Regulation is without prejudice to Articles 101 and 102 of the TFEU[392], to the corresponding national competition rules and to other national competition rules regarding unilateral behaviour that are based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question[393]*.

In the end, Article 19 of the German Competition Law shares the goal of both Articles 101 and 102 of the TFEU and of the corresponding national measures, thus Germany's goal is to ensure the fairness of the market and freedom of choice for users and consumers.

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[390] Franck Jens-Uwe, Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (n 366), 524

[391] Philipp Bazenov, 'The Digital Markets Act (DMA): A Procompetitive Recalibration of Data Relations?' (2021) Journal of Law, Technology and Policy, 11-13 <http://dx.doi.org/10.2139/ssrn.3970101> accessed 3 January 2022

[392] Franck Jens-Uwe, Nils Stock, 'What Is 'Competition Law'? – Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements' (2020) 39 Yearbook of European Law, 323-325 < http://dx.doi.org/10.2139/ssrn.3676271 > accessed 3 January 2022

[393] Recital 9 of the DMA proposal

The concrete application of the Article 19 tool must follow a precise case by case analysis, taking into consideration the relevant market, the position of the firm in the market, and the behaviour of the company. In addition, German Law recognises the possibility for the firm to invoke an efficiency defence in order to justify its behaviour. Hence, German law shall be considered another national competition rule according to the above-mentioned criteria of the DMA and for these reasons it should be exempt from harmonization through the DMA.

Therefore, it is easy to predict that digital platforms will have to fight against a fragmented legal framework concerning competition law in their sector. Thus, for this reason, let us move to the analysis of the other major examples of law enforcement in the field of digital ecosystems. In the next section the Greek experience will be analysed.

2.7 The Greek law on digital ecosystems

Moving on from the German experience, whose approach was, in some respects, similar to the one in the proposed Digital Markets Act, it is now time to analyse other examples of antitrust enforcement which do not follow the same approach of the DMA but instead aim at completing the DMA by addressing its blind spot regarding antitrust enforcement.

In 2020, the Hellenic Competition Commission had the task of revising Greek competition law with the goal to make it fit better for the digital age.

The main issue for the Greek Commission was the enforcement gap which resulted from the importance of dominance in the relevant market. Hence, the Greek Commission proposed including a new norm in the Competition Act according to which the Hellenic Competition Commission is able to prohibit firms which have a dominant position, in an ecosystem of paramount importance with regards to competition in Greece, from abusing its dominance[394].

The new norm is applicable when provisions of Articles 1 and 2 of Greek Competition Law[395] and the provision in Articles 101 and 102 of the TFEU cannot solve that

[394] Michael Jacobides, Ioannis Lianos, 'Ecosystems and competition law in theory and practice' (2021) SSRN, 30 <http://dx.doi.org/10.2139/ssrn.3772366 > accessed 3 January 2022

[395] Greek law 3959/2011, "Protection of Free Competition" is based on European legislation. Articles 1 and 2 of the Antitrust Law are generally applicable provisions prohibiting, respectively, anticompetitive

particular competition issue[396]. It is worth highlighting that the concept of abuse is the same as the one in the context of Article 102 of the TFEU, with the main difference being instead the specific field of competition which is, in this norm, an ecosystem rather than a relevant market.

The provision is based on the legal definition of "dominance" as "*a position of economic strength*" enjoyed by a company in order to restrict competition "*by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers*."[397]

The above-mentioned concept indicates that the position of the firm is capable of having an appreciable influence on the conditions under which the competition will develop; and also, the firm is considered to be able to act without taking into consideration competition norm as long as its conduct does not operate to its detriment[398].

The Greek Commission, on the other hand, felt that adding the term ecosystem next to the term market in Greek law was not enough to face the issue under discussion, instead they believed that metrics for measuring dominance in the context of a relevant market was not applicable in an efficient way in the context of digital ecosystems since the relationships between competing actors cannot be qualified as horizontal, but rather as vertical or conglomerate, and in addition, competition in such markets would not be for market share, but instead for the surplus value of the ecosystem.

Another major issue for the Greek Commission was providing a definition for both ecosystem and central position. Ecosystem was defined as: "*a web of interconnected and largely interdependent economic activities carried out by different undertakings with the intention of supplying products, services or a nexus of products and/or services that impact the same set of users, or a platform of economic activities carried out by different undertakings with the intention of supplying products, services or*

behaviour and abuse of dominance. The wording of those Articles is a literal translation of the equivalent Articles 101 and 102 of the TFEU.

[396] Michael Jacobides, Ioannis Lianos, 'Ecosystems and competition law in theory and practice' (n 394), 32

[397] Ibidem

[398] On this point see: Judgment of 14 February 1978, C- 27/ 76, United Brands company and United Brands Continental v Commission [1978] EU:C:1978:22, paras 65, 113; Judgment of 13 February 1979, C- 85/ 76, Hoffman- La Roche & Co v Commission EU:C:1979:36, paras 38-39

nexuses of products and/or services that impact the same users or different categories of users"[399].

The definition of ecosystem thus covers both multi-product and multi-actor ecosystems. The first part is also concerned with product system competition, in which all products are sold to the same group of end-users. This allows for a direct examination of the vertical interactions between consumer demand for the primary product and aftermarket products. Instead, the second part expands the definition of ecosystem to comprehend it in conglomerate interaction and vertical interactions.[400]

The concept of an ecosystem, as defined in Greek law, includes many independent companies linked by complex relationships of dependence and must therefore be distinct from conventional vertical relationships between actors in supply chains.[401]

The actors that form an ecosystem are usually independently owned, but financially and technologically interconnected due to three different factors: i) a highly complementary relationship between the resources needed to participate, ii) users receive a coherent and financial integrated offer even when multiple actors are involved, iii) the sunk costs that complementors must frequently invest in order to be with other major companies which may result in them being locked in.

The new Greek regulation, unlike the proposed DMA, is not regulating ex-ante conducts, it instead concerns ex-post competition law enforcement. In fact, it aims at addressing its provision to anticompetitive issues raised by how widespread ecosystems are and it also aims to impact a large number of sectors. Thus, Greek law does not aim to substitute the DMA; on the contrary, it should complement it[402].

In order to understand the field of application of the Greek norm, it is important to point out when an ecosystem is presumed to be of paramount importance. It is, in fact,

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[399] Michael Jacobides, Ioannis Lianos, 'Ecosystems and competition law in theory and practice' (n 394), 33

[400] Amelia Fletcher, 'Digital competition policy: Are ecosystems different?' (2020) Organisation for Economic Co-Operation and Development, 10 <https://one.oecd.org/document/DAF/COMP/WD(2020)96/en/pdf > accessed 4 January 2022

[401] Orestis Omran, Daniel Colgan, Andreas Politis, Ioannis Asimakopoulos, 'Special competition rules on digital ecosystems: Greece joins the club' (DLA Piper Insights 2021) <https://www.dlapiper.com/it/italy/insights/publications/2021/09/special-competition-rules-on-digital-ecosystems-greece-joins-the-club/ > accessed 3 January 2022

[402] Michael Jacobides, Ioannis Lianos, 'Ecosystems and competition law in theory and practice' (n 394), 34

when failure to participate in the market affects the exercising of third-party economic activities.[403]

To assess the structural importance of an ecosystem there are a few elements that must be taken into account: i) the ecosystem's economic power in one or more sectors in Greece, ii) its access to important resources such as users that depend on the ecosystem, iii) the importance of its activities regarding the access of third parties to procurement and sales markets in the Greek territory. The new norm will not be applicable if the concern is outside the scope of the DMA. The gatekeepers, in particular, are defined in the proposed regulation and the conducts prohibited are those prohibited by the DMA itself[404].

Moreover, Greek law puts forward the concept of a central position in an ecosystem as a trigger for competition law intervention in order to distinguish it from the concept of dominance that is assessed at the level of a relevant market. Hence, a few elements must be taken into account when assessing the central position of a company in an ecosystem: first, whether or not the company controls resources or infrastructures mandatory for the activity of other undertakings; second, a company's ability to impose rules for operation in the ecosystem and for third-party access to it; third, a company's increase of bargaining power with respect to business users and end-users of the ecosystem; and fourth, user dependency on the company for the provision of intermediation services paramount for their access to the market also when there are no alternatives to that intermediary. In addition to these elements, the Commission shall consider other factors such as: the ecosystem's business model, the rules governing the relationship between third parties involved in the ecosystem, and the objective justification of the observed commercial practices[405]. This was intended both to focus the investigation and to delimit the scope of Article 2 in order to avoid abusive application by the Commission.

[403] Ibid, 35

[404] Rationale behind this choice is that Tech Giants shall be fight at European level and not at national level

[405] Michael Jacobides, Ioannis Lianos, 'Ecosystems and competition law in theory and practice' (n 394), 36

The new Greek law has three main goals. First, it complements the DMA framework and provides the Greek Competition Commission with the tools to fight abuse of power in digital ecosystems carried out by business entities that fall outside the criteria listed in Article 3 of the DMA but that, on the other hand, are considered central actors for the Greek Competition Authorities[406]. The second goal is that the Greek provision adds weight to a wider agenda - opening up closed ecosystems which were created after significant public investments were made to create platforms that would allow Greece to develop new economic activities and manage its digital transition. Some of the economic entities formed in this manner were privatised former state monopolies that orchestrated important ecosystems for the Greek economy while not necessarily holding a dominant position in an antitrust-relevant market. These entities have advantages resulting from public investments or exclusive rights inherited from their period as state monopolies - advantages that they may seek to leverage by reproducing the closed ecosystem architecture in other economic activities or sectors of the economy, thus reducing competition and innovation.[407] The third goal is still linked with monopolies created with state intervention. State intervention, indeed, created ecosystems in a field that will be paramount for the next digital transition of the economy. It provides a surgical tool for structural deficiencies and rent-seeking[408].

Thus, it emerges that regulating digital ecosystems is in no sense an easy task. However, enforcement in this sense is fundamental since ecosystem growth is creating new issues in the market. Hence, the problems that the antitrust authority is called upon to face are totally different.

Moving on to an analysis of the obligation, the bill introduces Article 2A which prohibits the abuse of power in an ecosystem of structural importance for competition.

[406] Greek law would apply to companies like Booking.com or Airbnb which do not hold a dominant position in their sector but has a significant share of the sector. Since they do not meet the criteria listed in Article 3 of DMA, they are not subject to its obligations.

[407] Michael Jacobides, Ioannis Lianos, 'Ecosystems and competition law in theory and practice' (n 394), 35

[408] ibidem

Article 2 of the Antitrust Law prohibits any abuse by one or more undertakings of a dominant position within the national market or in a part of it.

This abuse may, in particular, involve:

- imposing unfair trading conditions
- limiting production, markets or technical development to the prejudice of consumers
- applying different conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts

From these examples it appears evident that the provision does not distinguish between horizontal (exclusionary) and vertical (exploitative) practices, therefore both aspects of possible abusive practices are covered. Hence, the exact form of abuse of dominance may vary.

Therefore, the scope of the new bill seems to be sufficiently broad to cover all cases that would not be subject to the DMA and would not fall under the standard competition rules on abuse of a dominant position.

Let us briefly recap the main finding of this section to assess whether the Greek enforcement norm is suitable to the scope or not.

On 6 August 2021 the new draft of the Greek Competition Bill was published, and it amends the Greek Competition Law. It aims to transpose Directive (EU) 2019/1[409] in order to enhance the enforcement powers of the Hellenic Competition Authority but

[409] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

also to modernise the existing framework by introducing special competition rules on digital markets[410].

As far as the relationship between these new norms and the DMA is concerned, the introduction of special competition rules on digital markets comes at a time when the DMA is pending.

The new bill and the DMA, though they aim to achieve comparable outcomes, embark on their objectives from different starting points. On the one hand, the DMA aims to regulate gatekeepers by imposing ex-ante prohibitions that gatekeepers must comply with. On the other hand, Greek law constitutes an amendment to traditional competition rules in Greece, targeting online platforms and introducing certain dominance criteria.

In that sense, the new bill takes a novel approach by adjusting its competition rules to online platforms in a way similar to that of Germany and consistent with traditional competition rules[411].

Concerning the obligation, the bill prohibits the abuse of power in an ecosystem of structural importance for competition.

Moving to another of the main features discussed above, the assessment of the structural importance for competition does not rely on dominance as the standard Article 102 of the TFEU does, yet it factors in which are:

- the economic strength or the market share or inflows of the ecosystem relative to one or more sectors of the Greek economy
- access of the ecosystem to important resources, such as business users that rely on the ecosystem to reach end-users and sensitive data related to competition

[410] Georgia Tzifa 'Main Developments in Competition Law and Policy 2020: Greece' (Kluwer Competition Law Blog 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2021/01/08/main-developments-in-competition-law-and-policy-2020-greece/ > accessed 4 January 2022

[411] Michael G Jacobides, Ioannis Lianos, 'Regulating platforms and ecosystems: an introduction' (2021) 30 (5) Industrial and Corporate Change, 1132 <https://doi.org/10.1093/icc/dtab060 > accessed 4 January 2022

- the importance of the ecosystem for third-party access to the Greek supply and sales market
- the entire business model of the ecosystem when performing its assessment
- the sufficiently substantiated objective justifications put forward by the parties in relation to the relevant practices

However, it is deemed that there is no structural importance for competition when there are at least four independent ecosystems in the market that constitute a viable alternative for the users[412].

The new bill tries to strike a balance between legal certainty and flexibility when it comes to competition cases involving the digital market[413]. On the one hand, it sets out a quantitative threshold above which this provision is deemed inapplicable, while on the other hand it provides the Hellenic Competition Authority with sufficient flexibility when performing assessment of economic significance to consider efficiencies that may result from the relevant business model and practices without binding it under a list of ex-ante prohibitions, as is the case under the DMA[414].

Thus, the Greek norm follows the example of Germany's antitrust enforcement, i.e. adapting the existing norm to face the issue raised in digital markets, bearing in mind that the DMA's proposal is an ambitious regulation which will have the power to intervene in many of the antitrust cases raised by Tech Giants.

Hence, national antitrust enforcement shall focus on the blind spot left by the DMA and enforce it since neither is there a need to create a separate regime from the DMA, nor does anyone benefits from a fragmented antitrust system. In the end, Greek law is another important example of antitrust enforcement worldwide. It is aimed at regulating sectors outside the scope of the DMA and at properly acting to protect digital ecosystems in Greece.

[412] Ibid, 1133

[413] Ibid, 1134

[414] Ibidem

2.8 Other major Antitrust enforcements in EU Member States: Austria and Italy

Greece and Germany are not the only countries in Europe which are active in the field of antitrust enforcement, as many other member states are working on their internal antitrust norms to provide a solution to the main issues that are disturbing the market. An example is Austria, that introduced significant changes to its antitrust law[415].

These changes affect three main relevant aspects of competition law:

- merger control
- restrictive agreements
- dominance

Concerning merger control there is a revision of the income threshold. Indeed, a new income threshold is added to the existing income-based threshold whereby each of the two parties must have had income exceeding €1 million in Austria in addition to their combined income in Austria exceeding €30 million.[416] One of the main expected results from this new norm is to reduce the number of transactions in Austria which must be reported to the Austrian Competition Authority.

When evaluating mergers, Austrian law introduced the significant lessening of competition standards for the substantive assessment of mergers.

In fact, Austrian merger control rules enable the Cartel Court to approve transactions that would otherwise significantly lessen competition in the following cases: first, if the transaction may improve the general conditions of competition to such an extent that the transaction's negative effects are outweighed; second, if the transaction is necessary to maintain or improve the parties' international competitiveness and the transaction is justified based on macroeconomic grounds; or third, if the transaction's macroeconomic advantages significantly outweigh the transaction's adverse effects[417].

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[415] Maria Dreher, Florian Reiter, 'The Austrian government amends the Cartel and Competition act introducing new rules on merger control and digital platforms' (2021), Concurrences, 1 < https://www.concurrences.com/en/bulletin/news-issues/september-2021/the-austrian-government-amends-the-cartel-and-competition-act-introducing-new > accessed 3 January 2022

[416] The other elements of the existing jurisdictional thresholds in Austria remain unchanged

[417] Michael Mayr 'Austria Introduces Significant Changes to its Competition Law' (Kluwer Competition Law Blog 2021) <http://competitionlawblog.kluwercompetitionlaw.com/2021/09/20/austria-introduces-significant-changes-to-its-competition-law/ > accessed 4 January 2022

Factors that the Court may consider in this assessment include economic growth, innovation, full employment, the increase of overall welfare etc.

The second major implementation is related to restrictive agreements. The revised competition law acknowledges sustainability considerations as a potential justification for restrictive agreements through the statement that consumers are deemed to participate in the benefits resulting from the agreement if the agreement contributes significantly to an ecologically sustainable or climate-neutral economy.

Regarding the third area of intervention, which is digital markets and dominance, there is the introduction of new criteria for determining dominance in digital markets.

Hence, the new Austrian law adds three criteria which must be taken into account when assessing the dominant position of a company in the market. These criteria are the significance of a company's intermediation services with regard to the ability of other companies to access upstream or downstream markets, the access to data, and network effect.

Moreover, the concept of relative market power is expanded in order to include providers of intermediation services in multi-sided digital markets that could be considered dominant if their customers rely on access to these intermediation services[418].

In the end, the Austrian Cartel Court will have the power to declare companies which operate in multi-sided digital markets as dominant at the request of the Federal Competition Authority[419].

This dominance declaration has indicative value for potential successive proceedings for alleged abuse of dominance, which is intended to make such proceedings more expedient and efficient.

Hence, Austrian antitrust enforcement differs from the German and Greek experience evaluated before. As previously stated, there is an eye on the issue of dominance in multi-sided markets, but the law also focuses on other features of antitrust law which need enforcement, since also restrictive agreement or merger control are crucial sectors for competition law.

[418] Ibidem

[419] Worth mentioning that the company which was declared dominant can ask the Cartel Court to declare that the dominant position no longer exists if the relevant factual circumstances that were the basis for the declaration of dominance have changed.

Worth mentioning is also Italy's law on competition which is under discussion in its parliament. The aim of the proposed law is to promote the development of competition, also with a view to ensuring access to markets for smaller companies; to remove regulatory and administrative barriers to market opening; and to ensure consumer protection.

The proposed law introduces many different elements into the Italian competition system, but for our analysis it is worth mentioning what the main innovation concerning competition law in digital markets is[420].

The most significant innovation concerns the Italian Antitrust Authority's powers. In fact, the bill strengthens the authority's powers in the assessment of mergers, introduces a presumption of economic dependence in cases in which a company uses the intermediation services provided by a digital platform that plays a decisive role in reaching end-users or suppliers, and in the end introduces the settlement procedure with reference to investigations initiated by the Italian authority for alleged anticompetitive agreements or abuse of a dominant position. In effect it expands the Italian authority's investigative powers[421].

It emerged then that many Member States are enforcing their antitrust systems, but these interventions are not homogenous. This is due to the fact that countries have

[420] The new German rules extended to digital intermediaries the discipline of abuse of economic dependence. Here it is worth remarking that the German model is clearly one of those who most inspired the Italian Competition Authority. This can be seen in the report the authority sent to the Government containing the reform proposals for the annual law on competition. Regarding the issue in question, the Italian Government has only partially accepted these proposals hence the draft law, in fact, does not contain any reference to the German case of super dominance, but introduces a specific provision aimed at strengthening the fight against abuse of economic dependence. Therefore, according to Colangelo, one of the main risks raised by the Italian norm is that competition law may be used to protect some competitors rather than the market and consumers. On this see GIUSEPPE COLANGELO, 'Piattaforme digitali e squilibrio di potere economico nel disegno di legge annuale sulla concorrenza: l'araba fenice della dipendenza economica', in *Associazione Etica ed Economica,* (2021), 1-4 <https://www.eticaeconomia.it/piattaforme-digitali-e-squilibrio-di-potere-economico-nel-disegno-di-legge-annuale-sulla-concorrenza-laraba-fenice-della-dipendenza-economica/ > accessed 4 January 2022

[421]Alessandro Boso Caretta, Domenico Gullo 'Approvato il Disegno di legge annuale per il mercato e la concorrenza' (DLA Piper insighits 2021) <https://www.dlapiper.com/it/italy/insights/publications/2021/12/antitrust-bites-novembre/ > accessed 4 January 2022

different exigencies and priorities. Furthermore, the most significant enforcement against Tech Giants will be provided by the DMA, hence there is no need to create norms with the same content it provides. It is, instead, more useful to provide integration with internal law while taking into consideration the major issues as identified by the competent authorities, whose expertise is still essential to establish fairness in the market[422].

Before concluding this work, the new cooperation on antitrust enforcement between the US and the EU must be analysed since the US is quite probably our most important partner in the challenges faced regarding Tech Giants.

2.9 The US and the next possible steps against Tech Giants; has the Chicago School been overcome?

Not only are Europe and its Member States making important steps in antitrust enforcement, but the United States is also discussing new antitrust norms to face the issues created by Tech Giants in the market.

Indeed, in December 2021, European Commission Executive Vice-President Margrethe Vestager, the US Federal Trade Commission Chair Lina Khan and the Assistant Attorney General for Antitrust of the US Department of Justice Jonathan Kanter launched the EU-US Joint Technology Competition Policy Dialogue in Washington DC[423].

In the joint statement published in August 2021, the EU and the US underlined the intention to collaborate in order to ensure and promote fair competition based on the

[422] This opinion comes from the fact that according to Article 32 of DMA National Competition Authorities (NCAs) will have a residual role of assisting the Commission with non-binding advice on the implementation of decisions in the context of a Digital Markets Advisory Committee. The rationale behind this choice is that DMA wants to ensure the single market by avoiding market fragmentation from diverging rulings. However, it is far from the most cost-effective option. Indeed, while the Commission could rely on the NCAs' skills and resources, it would have to invest in them under resource and time constraints, which would result in high administrative and learning costs, slowing enforcement and, thus the effectiveness of the regulation. For more on this see: Christophe Carugati, 'The Role of National Authorities in the Digital Markets Act' (2021) SSRN, 3-8 < http://dx.doi.org/10.2139/ssrn.3947037 > accessed 4 January 2022

[423] European Commission 'Competition: EU-US launch Joint Technology Competition Policy Dialogue to foster cooperation in competition policy and enforcement in technology sector' (2021) Press Release < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6671 >

common belief that vigorous and effective competition enforcement benefits consumers, businesses, and workers on both sides of the Atlantic.

Indeed, a Joint Technology Competition Policy Dialogue (TCPD) was launched that will focus on developing common approaches and strengthening cooperation on competition policy and enforcement in the technology sector. Thus, the TCPD aims at sharing insights and experience with the further goal of coordinating as much as possible on policy and enforcement.

In addition, concerning the US approach to antitrust, there are two main activities that must be highlighted. First, the US has opened a series of investigations against Tech Giants and competent authorities are also publishing many reports highlighting how Tech Giants are causing trouble in the market. Second, US senator John Kennedy introduced the American Innovation and Choice Online Act in October. This particular act is a very important piece of legislation concerning antitrust enforcement in the field of digital markets[424], but also worth mentioning are many other pieces of legislation that are under discussion in the field of competition law.

We will not analyse the ongoing cases in the US, but it is useful to mention what the main ones are and what conducts are being contested.

First to mention is the lawsuit filed by the US Department of Justice, along with 11 state attorney generals, against Google. It states that Google uses "anticompetitive and exclusionary" practices in its search engine and ad business. Moreover, the Department of Justice of the US (DOJ) has stated that Google maintained a monopoly by entering into exclusivity agreements that forbid pre-installation of any competing search service and entering into tying and other arrangements that force pre-installation of its search applications in prime locations on mobile devices and making them undeletable, regardless of consumer preference[425]. Hopefully, the final decision will arrive in 2023 and not earlier.

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[424] 'Kennedy, Klobuchar, Grassley introduce American Innovation and Choice Online Act to rein in Big Tech' (John Kennedy Press release 2021) < https://www.kennedy.senate.gov/public/2021/10/kennedy-klobuchar-grassley-introduce-american-innovation-and-choice-online-act-to-rein-in-big-tech > accessed 3 January 2022

[425] United States Department of Justice 'Justice Department Sues Monopolist Google for Violating Antitrust Laws' (2020) press release <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-Google-violating-antitrust-laws >

In a very long and recent report entitled "Investigation of Competition in Digital Markets", staffers for the House Judiciary Committee's antitrust panel wrote that there is significant evidence to show that the companies' anticompetitive conduct has hindered innovation and reduced consumer choice.

It is also underlined that these firms have too much power and that that power must be reined in and subject to appropriate oversight and enforcement [426].

Furthermore, the subcommittee attorney said that tech companies have successfully used the data they accumulate in one area of business to gain tremendous advantages when they expand into related businesses. In addition, as far as Facebook is concerned, the report said that it has maintained an unassailable position in the social network market for nearly a decade and has solidified its power through a series of targeted acquisitions designed to eliminate would-be rivals[427].

According to the concepts above, it is possible to affirm that US institutions now have a clear idea of the issues Tech Giants are creating in the market. On the other hand, there is still no clear idea on how to face the issues and there is not even a clear approach considered the right one to follow. In this work, there will be just a brief analysis of the solutions under discussion to see whether the US is following the European approach or not.

First to point out is what shall be enforced between antitrust and regulation.

To clear the path, antitrust faces the issues related to market power through a horizontal system of prescription with a backward-looking procedure. In this sense, antitrust serves a preventive function by safeguarding the competitive process rather than imposing market outcomes. Regulation instead is more prescriptive, as it favours a forward-looking intervention based on precise rules in which the identified conduct is made clear from the beginning.

In the US, following the application of a plain repugnancy standard, antitrust laws have predominated over regulation[428]. On the other hand, the US Supreme Court has

[426] David Cicilinne 'Investigation of competition in digital markets' (n 198), 11

[427] Ibid, 36-44

[428] See United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

recently suggested antitrust deference to regulation because of expertise and costs concerns[429].

Indeed, according to the Court's reasoning, when there is already a regulatory structure designed to fight the issues and harms in the market, the benefit to competition law provided by antitrust enforcement will be small[430].

Moreover, the risk of erroneous antitrust violations and the relative costs is considered to be particularly serious as it has the potential to stifle the conduct that antitrust law is intended to protect[431].

Furthermore, some actions consisting of anticompetitive violations may be beyond the practical ability of an antitrust Court to control, requiring an effective day-to-day supervision of highly detailed decrees.

Another solution, which is considered to be the most difficult, is the one concerning break-up[432] of Tech Giants and bans on vertical integration.

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[429] *I]n the century-long seesaw battle over how to design competition policy, [antitrust law] has turned out to be more enduring than regulation. … Antitrust can say no but struggles with saying yes. … antitrust is a poor framework for price setting or for establishing affirmative duties toward rivals. Price setting in a nonmarket context often requires detailed industry knowledge and often turns on political decisions about levels of service and the rate of return to capital needed to provide those services. … However, antitrust says no very well, while regulators often have a hard time saying no. Area-specific regulation through special agencies gives rise to the fear that the regulators will be captured by the regulated industry*." See Nancy L. Rose '*Economic Regulation and its Reform: what have we learned'* (National Bureau of economic research 2014)

[430] Marco Cappai, Giuseppe Colangelo 'Taming digital gatekeepers: the 'more regulatory approach' to antitrust law' (n 252), 8

[431] Ibid, 11

[432] For what concern the break-up of Tech Giants, it is worth recalling that Microsoft's break-up was already under discussion a few years ago. In that case judge Thomas Penfield Jackson stated that Microsoft had illegally tied the sale of its Internet browser to that of its operating system Windows, which represented a de facto industry standard and, as such, granted Microsoft unmatched ubiquity on the end-users' desktops. Hence, judge Jackson proposed that Microsoft be split into two separate "baby bills" following the example of AT&T's breakup. Microsoft, on the other hand, never went under break-up since the Court of Appeals later rejected Jackson's rationale by stating that technological integration should be subject to a rule of reason approach, rather than to the per se rule normally applied to tying claims.

Hence it is more likely that the break-up approach will not have success in the light of the Microsoft experience as well as the famous break-up of AT&T, in both cases that solution was not adequate and it is likely to not be adequate also in this scenario, thus US authorities are moving towards other

On this topic, US Senator Elizabeth Warren proposed restoring competition to the technology sector by designating Tech Giants as 'platform utilities' that should be prevented from competing on their own platforms.[433]

In addition, Lina Khan suggested restoring the common carriage regime[434] and implementing structural changes to ensure that new bottleneck facilities do not distort competition[435].

According to this view, the best way to maintain fair competition and also to preserve other essential values of a democratic society, i.e., privacy, free speech, and non-discrimination, is to ban any vertical integration.[436]

The US House Judiciary Committee's Antitrust Subcommittee has then shared these concerns and has recommended considering legislative reforms drawing on both structural separation and line-of-business restrictions in order to reduce the conflict of interests faced by dominant platforms functioning as critical intermediaries[437].

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solutions. For more on AT&T's break-up see: Roberto Pardolesi, Andrea Renda, 'The European Commission's Case Against Microsoft: Fool Monti Kills Bill?' (2004) Le Lab Working Paper at-07-04, 2-6 < http://www.law-economics.net/workingpapers/L&E-LAB-COM-23-2004.pdf > accessed 4 January 2022

[433] Maham Usman, 'Breaking up big tech: lessons from AT&T' (2021) 170 University of Pennsylvania Law Review, 9-13 < https://dx.doi.org/10.2139/ssrn.3859441 > accessed 26 January 2022

[434] Generally, a common carrier is one that must provide its services to anyone willing to pay its fees unless it has good grounds to refuse. Hence, many politicians and important authors believe that a solution against gatekeepers could be to treat tech platforms like railroads and telephone companies and regulate them as common carriers. Tech platforms like Facebook are so dominant in their markets and so central to the transfer of information today that they serve the same function that telephone, and telegraph companies used to. Therefore, the thinking goes, those platforms should also be forbidden from excluding speech they find objectionable. For more on this see: Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review, 980-983 <https://ssrn.com/abstract=3180174 > accessed 30 January 2022

[435] Nikolas Guggenberger, 'Essential Platforms' (2021) Stanford Technology Law Review, 245 <https://law.stanford.edu/publications/essential-platforms/ > accessed 4 January 2022

[436] David Cicilinne 'Investigation of competition in digital markets' (n 198), section 3

[437] The fact that US authorities are discussing the imposition of new norms in the field of antitrust law is very importance since the antitrust approach in the US is strongly influenced by the Chicago school. The Chicago School is associated with a conservative approach to antitrust enforcement that believes in efficient markets but is skeptical of the value of judicial intervention to correct anticompetitive practices. Chicago's approach was based on the supremacy of the market and its ability to self-correct. Indeed, it is assumed that people are rational actors and will always try to maximize their own self-

Moving on to legislation which is already under discussion, Senators Amy Klobuchar and Chuck Grassley proposed the American Innovation and Choice Online Act. The goal of this bill is to update antitrust law in order to establish fairness in markets dominated by Tech Giants. The first element to highlight is that the bill will explicitly target a small group of firms which operate covered platforms.

The bill has also identified the criteria to define covered platforms which must have 50 million monthly active users or 100,000 monthly active business users, have sales or a market capitalization exceeding $550 billion, and be a "*critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform*." Thus, it is easy to see that the target of the bill will be only the largest and most dominant tech platforms.

The first goal of the bill will be to limit conducts on the part of big companies in which they leverage their dominant platforms to preference their own products and services, effectively removing other companies that compete on the platform[438].

It is paramount to highlight that the bill will explicitly prohibit conduct which "*unfairly preference[s] the covered platform operator's own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform*[439]."

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interest. Additionally, market efficiency is a must to protect. The Chicago School therefore advocated for a laissez-faire economy and markets free of government intervention because government interference will lead to less, rather than more, efficient markets. As a corollary, the Chicago School saw no evil in market power per se as dominant firms may be more efficient. And as long as there is competition, consumers enjoy the benefits of both efficient markets and competition.

Thus, it appears to be a great evolution, compared to this idea, the acknowledgment of modern issues created by Tech Giants on the market, also, US authorities are going beyond the idea that market self regulates and also, they realised the concept that dominant firms, especially in few fields, may distort competition and, above all, harm users. According to Colangelo, already in 2002 judgements by the United States Supreme Court in cases such as Kodak as well as the debate surrounding the Microsoft monopoly have led to the view that antitrust has entered the post-Chicago era, in which previous immoderations are tempered, and more refined and accurate analyses take precedence. For more on this see Antonio Cucinotta, Roberto Pardolesi, Roger Van den Bergh, '*Post-Chicago Developments in Antitrust Law*' (Edward Elgar Pub 2002)

[438] 'Senate Zeros in on Big Tech with Latest Antitrust Reform Bill' (2022) 12(2) The National Law review, 2 < https://www.natlawreview.com/Article/senate-zeros-big-tech-latest-antitrust-reform-bill > accessed 4 January 2022

[439] American Innovation and Choice Online Act section 2(a) 1

Furthermore, the bill will prohibit unfair competition with competitors seeking to offer their products, services, or lines of business on the covered platform if those options compete with the covered platform operator's own products or services.

Lastly, the bill will prohibit firms that operate covered platforms from discriminating against other business users on the platform when applying or enforcing their terms of service.

In addition, the bill identifies seven specific business practices by which big tech firms leverage covered platforms for competitive advantage as unlawful conduct.

One of the most important of the above-mentioned practices is the one restricting competitors' ability to "*access or interoperate with the same platform, operating system, hardware or software features that are available to the covered platform operator's own products, services, or lines of business that compete or would compete with products or services offered by business users on the covered platform*"[440]

Moreover, the bill will help keep Tech Giants from "*treat[ing their] own products, services, or lines of business more favorably relative to those of another business user than they would be treated under standards mandating the neutral, fair, and non-discriminatory treatment of all business users*[441]*"*, including in *"search or ranking functionality offered by the covered platform."* This prohibition appears to target Google, whose competitors have long accused the company of skewing search results to favour its own products and services. Here we can see an approach which is very similar to the one adopted at the European level, showing that there is a common interest in the fight against Tech Giants.

The American Innovation and Choice Online Act is not the only piece of legislation currently discussed. The House Antitrust Subcommittee has also proposed the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act which requires platforms to maintain a set of transparent, third-party-accessible interfaces in order to enable the secure transfer of data to a user. In addition, the Ending Platform Monopolies Act was proposed that prohibits technology platforms with at least 50,000,000 monthly active US-based users and a market capitalization of over $600 billion from selling products or services that they own and control. There is also the Platform Competition and Opportunities Act that shifts the

[440] American Innovation and Choice Online Act section 2(b) 1

[441] American Innovation and Choice Online Act section 2(b) 6

burden of proof in merger review, requiring covered platforms to demonstrate that their acquisitions are lawful.

Furthermore, Senator Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act of 2021, which increases antitrust enforcement budgets, strengthens prohibitions against anticompetitive mergers, and updates the Clayton Act[442] to prohibit exclusionary conduct that presents an appreciable risk of harming competition[443].

What has emerged in this section is that also the United States is trying to adapt its framework in order to establish fairness in the market as well as reduce the harm to users. Thus, it appears that the European example is guiding also the US's next steps.

A deeper analysis of the main findings of all this work will be provided in the conclusion. There we will analyse all the concepts discussed in the light of the rationale behind this work, i.e. how Tech Giants are damaging the market and not only what the adopted approach to the problem is but also what the main solutions implemented by different countries are and what solutions are expected to be implemented in the near future.

[442] The Clayton Antitrust Act is a piece of legislation, passed by the US Congress and signed into law in 1914, that defines unethical business practices, such as price-fixing and monopolies, and upholds various rights of labour. The act is enforced by the FTC and prohibits exclusive sales contracts, certain types of rebates, discriminatory freight agreements, and local price-cutting manoeuvres. It also forbids certain types of holding companies. According to the FTC, the Clayton Act also allows private parties to take legal action against companies and seek triple damages when they have been harmed by conduct that violates the Clayton Act. It must be highlighted that a deep analysis of the functioning of the Clayton Act, Sherman Act, and the Federal Trade Commission Act is outside the scope of this work. Indeed, rather than highlight what is missing in every single antitrust norm, it is more useful to focus on the general issues in the market through the analysis of the main harm to both consumers and competition in order to ease the identification of proper enforcement. There is no need to point out the shortcomings of all these pieces of legislation, also because it is clear from the various initiatives worldwide that market is not fair and hence there are issues to be solved and also it appears evident that the actual instruments are not capable to fight it. For more on the US antitrust legislation see: Robert Mahari, Sandro Claudio Lera, Alex Pentland, 'Time for a New Antitrust Era: Refocusing Antitrust Law to Invigorate Competition in the 21st Century' (2021) 1 Stanford Computational Antitrust, 1-4 <https://ssrn.com/abstract=3943548> accessed 28 January 2022

[443] Jerrold Nadler, David N. Cicilinne 'Investigation of competition in digital markets' (n 198), sections 3-4

Conclusions

Antitrust enforcement and competition policy in the digital economy is high on the agenda of authorities and policymakers. The flood of reports and policy papers recently released reflects the ongoing debate over the capability of current antitrust rules and tools to handle the emergence of large technology platforms to scrutinize their practices and business models[444].

The distinctive features of these markets apparently require a rethinking of the antitrust regime. The presence of strong economies of scale, extreme indirect network effects, remarkable economies of scope due to the role of data as a critical input, and conglomerate effects, along with consumers behavioural biases and single-homing tendency, would represent significant barriers to entry that make digital markets highly concentrated, prone to tipping and not easily contestable.

Therefore, large incumbent players appear not to be under threat and hard to dislodge.

Their market power is not merely temporary and can be expected to persist at least in the short to medium term. Moreover, online platforms act as gatekeepers and regulators, and frequently play a dual role, being simultaneously operators for the marketplace and sellers of their own products and services in competition with rival sellers.

Because of this regulatory role and the related intermediation power, dominant platforms should bear a special responsibility in ensuring a level playing field.

Because of the combination of the aforementioned factors, along with strategic investment policies, sunk costs and strong corporate cultures, competition in the digital economy is increasingly a competition among ecosystems[445].

A circular relationship exists among network effects, the data advantage and portfolio effects, which design the perimeter of the digital ecosystem in their reciprocal interactions. The more users are attracted to the platform, the more the platform is considered valuable, the more data are collected, the more the service provided can be

444 Marco Cappai, Giuseppe Colangelo ‘Taming digital gatekeepers: the ‘more regulatory approach’ to antitrust law’ (n 252), 4

445 Ibid, 5

improved (either by means of a higher level of personalization or by means of a wider range of services offered to the logged user), the more the user is encouraged to stay within the digital ecosystem and discouraged from trying the competing services.

Once a digital ecosystem has been established, it increasingly attracts hardware, devices, software, apps, websites and a varied range of complementary services. This centripetal force facilitates the creation of ecosystem technical standards, which can pose serious protocol interoperability problems and, in so doing, increase switching costs and lock-in scenarios.

The above-mentioned multi-layered technical architecture is fostered by a deep knowledge of user behaviours, especially when commercial use is made of their personal data and attention. Online platforms are able to inspire customer loyalty and to steer demand by leveraging on a wide range of sophisticated techniques, including consumers' stickiness with default settings (status quo or confirmation bias), free-effect, addiction, ever-greater use, short-term gratification, salience or impatience.

The ability of Tech Giants to take advantage of such behaviours significantly limits multi-homing and further increases barriers to entry. In summary, all these features make digital markets highly concentrated, prone to tipping, and not easily contestable[446]. Hence, incumbent platforms appear hard to dislodge.

In addition, large online platforms act as gatekeepers and regulators due to their rule-setting role within the ecosystem. Indeed, online platforms develop ranking algorithms, determine the conditions under which a business user can enter the network, and fix the criteria governing the suspension, delisting, dimming or termination of their accounts and of the associated goods/services sold via the platform.

Such actions are perceived as particularly threatening whenever Tech Giants perform a dual role, acting as both an intermediary and a trader operating on the platform, because in such a circumstance the Tech Giant may have the incentive of discriminating to its own benefit.

446 Mark A. Lemley, Andrew McCreary, 'Exit Strategy' (2020) Boston University Law Review, 37-40 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506919 > accessed 26 January 2022

Hence digital markets challenge antitrust law in more than one way[447]. These challenges relate not only to the application of antitrust prohibitions, but also to the design of remedies aimed at restoring competition. Designing remedies is difficult because the market power of monopoly firms in digital markets appears more durable than that of most monopoly firms in brick-and-mortar markets. Network effects, economies of scale and scope, and learning-by-doing effects combine to create substantial incumbency advantages, and qualitatively stronger monopoly positions.

Conventional antitrust remedies might thus not restore competition in digital markets. This, in turn, motivates a search for alternative remedies. This task is of utmost importance for ensuring that technological innovation delivers improvements in consumer welfare. Moreover, the design of effective remedies affects incentives to bring antitrust suits in the first place and is thus a condition of effective enforcement. The remedial issue is also timely in light of recently opened investigationa against digital firms.[448]

Antitrust remedies seek to deter anticompetitive conduct. Once an anticompetitive conduct has occurred, they also seek to restore a competitive equilibrium as close as possible to the "but for" world that would have prevailed absent the anticompetitive conduct, while not imposing excessive implementation costs on antitrust courts and agencies and preventing the reoccurrence of the unlawful conduct.

It is generally agreed that antitrust remedies applied to date in digital markets have not met these goals and have largely been ineffective. Hefty fines have done little to change market conditions[449]. And other remedies have either taken a long time to produce effects or have been difficult to implement.

447 European Commission, 'Competition Policy for the Digital Era' (2019) Final Report, 13 < https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf > accessed 27 January 2022

448 Michal S. Gal, Nicolas Petit, 'Radical restorative remedies for digital markets' (2021) 37(1) Berkeley Technology Law Journal, 2 < https://ssrn.com/abstract=3687604 > accessed 26 January 2022

449 Through all this work we stressed the many reasons why fines are not the proper instrument to fight large companies' dominant position and their anticompetitive behaviour; indeed, this issue is particularly relevant for the Tech Giants since we remarked that the possible fine will be lower compared to the gain in terms of consolidation of dominance as well as economic incomes. Hence, for a more specific idea on this see chapter 2

Some cases brought recently by the European Union tell a similar story. Antitrust remedies imposed in search engine, social network, and online retail markets have produced minimal impact on the competitive landscape [450]. At best, antitrust enforcement might have been socially beneficial by virtue of its deterrent effect.

Antitrust in digital markets has two perceived problems: it is weak, and it is slow.[451] Scholars primarily blame the liability or evidentiary standards embedded in antitrust laws for this unfortunate state of affairs. But both criticisms are also highly relevant to the design of remedies.

This is because they reveal a frustration with the inability of antitrust law to remove durable monopoly power attained or sustained by digital firms as a result of unlawful business conduct, be it concerted action, unilateral monopolization or anticompetitive mergers and acquisitions.

Indeed, in this work, we analysed the issues raised by the presence, in digital markets, of dominant platforms which must be considered as gatekeepers. Gatekeepers, due to their dominant position, are capable of distorting competition in such a way that it is impossible to consider market fair.

They also seriously harm their competitors by not allowing them to enter the market or by forcing them to use the gatekeepers' platforms in order to carry out their own business. Gatekeepers also harm end-users by limiting their choice, imposing very strict terms and conditions, not recognising the possibility of customising access to services based on users' free choice and, last but not least, they harm users' fundamental right to privacy through a series of behaviours aimed at exploiting data without complying with the rules on data processing.

We stressed that the current antitrust norms are not capable of keeping pace with Tech Giants, thus there is the need for a revolutionary change of approach in antitrust law[452].

450 Michal S. Gal, Nicolas Petit 'Radical restorative remedies for digital markets' (n 448), 2

451 Ibid, 8

452 Giuseppe Colangelo 'Evaluating the Case for Regulation of Digital Platforms' (2020) 26 The Global Antitrust Institute Report on the Digital Economy, 912 <https://dx.doi.org/10.2139/ssrn.3733741> accessed 26 January 2022

A new approach was subsequently analysed for the regulation of online platforms which is embraced by several antitrust authorities, policymakers and academics.

They have stressed the inefficiency of relying solely on ex-post antitrust enforcement and called for an ex-ante regulatory framework to complement antitrust rules in addressing competition issues in digital contexts.

This is the common thread of all this work. Indeed, in the first chapter the main conducts, identified by antitrust authorities, systematically carried out by gatekeepers in digital markets and are damaging competition and harming consumers was analysed.

Therefore, based on the findings of chapter 1, it could be stated that the current antitrust approach as well as competition norms, both at the European and the Member State level, are no longer adequate in tackling the problem of competition in digital markets.

The approach followed by the European institution was analysed in this paper. This approach is based on ex-ante prohibition of pre-identified conducts by gatekeepers and it may be defined as more regulatory since it is based on the integration of an antitrust toolkit with ex-ante prohibitions to prevent anticompetitive conducts by gatekeepers.[453]

The role of timely intervention becomes indispensable since the traditional ex-post enforcement may cause delays in investigations; the best approach is to apply simple ex ante rules of conduct.

Following this approach the European Commission proposed the Digital Markets Act, approved by European Parliament in December 2021.

The rationale behind the DMA is to establish a set of new harmonised rules at European level to guarantee fairness in market where also gatekeepers are present. Among the goals there are: to promote innovation, enhance the quality of digital products and services, the promotion of fair and promoting prices, and the improvement of high-quality choices for users.

453 Ibid, 922

Here it is useful to just recap the main features of the DMA as well as the main features of the new Member States' new antitrust law concerning competition in digital markets.

The first element to reassess is who is subject to the obligation of the DMA. In chapter two we stressed that it is set to be applied to the Core Platform Services. By that the European Commission refers to: online intermediation services, online search engines, social networking, video sharing platform services, number-independent interpersonal electronic communication services; operating systems; cloud computing services; and advertising services.

Furthermore, in order to assess whether a Core Platform Service shall be considered a gatekeeper, DMA provides a combination of both quantitative and qualitative criteria in order to designate whether a company shall be considered a gatekeeper.

When a company is considered to be a gatekeeper according to the criteria set by Article 3 of the DMA, it is subject to the prohibition identified by both Articles 5 and 6 of the DMA.

The obligations described in those Articles consist of many prohibitions and in a series of practices to be implemented in order to achieve the objectives set by the DMA itself.

According to what was stated in chapter two, obligations are divided into two main groups:

1) a first group containing the obligations of the gatekeepers which are of a more specific nature and indiscriminate applicability to all gatekeepers, that are covered by Article 5. These are self-executing; thus, they are directly applicable even without a decision by the Commission.

2) a second group composed of obligations that may be subject to further specifications - i.e., rules to be adapted to specific cases – are contemplated by Article 6. This second bunch of norms provides a set of rules that result from the possibility that the Commission establishes a direct regulatory dialogue directly with the gatekeeper

interested. Those are also self-executing, but they could be elaborated further through the adoption of specific Commission's decisions[454].

Apart from this central enforcement, which comes from the European's institutions idea that the actual legal framework is no longer adequate for facing the gatekeepers' conducts in markets they dominate, also various Member States have approved their internal norms in the same sector in which the DMA seeks to spread its effects.

This comes from the fact that the DMA is the "central" answer to a problem which is recognised worldwide. Obviously, all Member States, especially through the activity of their internal Competition Authorities, are themselves capable of identifying the major issues in their internal market which they consider to be a priority.

As stressed in paragraph 2.6 Germany, adopted the Tenth Amendment to the German Competition Act which gives new power to the German Competition Authority.

The mechanism introduced in Germany by the new Article 19 tool is based on the possibility, recognised to the German Competition Authority, to state whether a firm is of paramount significance for competition across markets[455] and its decision will be effective for five years. Basically, the German Commission proposes a set of clear rules of conduct[456] for dominant online platforms.[457].

454 For a more specific description of the prohibitions of both Article 5 and Article 6 of the DMA see chapter 2.

455 Section 19a(1), 1st and 2nd sentences of the Competition Act.

456 Giuseppe Colangelo 'Evaluating the Case for Regulation of Digital Platforms' (n 452), 923

457 On the same grounds, the French Competition Authority considers it useful to draw up a list of practices that raise concerns specific to structuring digital platforms. In this work French activity in the field of digital markets was not mentioned, but it must be remarked that the French Competition Authority, following the need for an ex-ante approach rather than an ex-post, identified a list of practices that should be prohibited. The non-exhaustive list could cover practices that consist in: disfavoring competing products or services using their services, hindering access to markets in which they are not dominant or structuring; using data in a dominated market to make access to that market more difficult; making interoperability of products or services more difficult; making data portability more difficult; hindering the use of multihoming. For more on this and for more on various countries' intervention against Gatekeepers see: Government of Netherlands 'Considerations of France, Belgium and the Netherlands regarding intervention on platforms with a gatekeeper position' (2020) < https://www.government.nl/documents/publications/2020/10/15/considerations-of-france-and-the-

In this work we have analysed other relevant examples of competition law enforcement in various Member States such as: Austria, Greece and Italy.

Of course, these are not the only countries which are enforcing their internal competition law systems and also it was outside the scope of this work to provide a normative analysis of every single EU Member States' new competition norms.

The scope of this work is to point out two major concepts:

- 1) the actual competition law regime does not fit with digital markets, and this is proved by the fact that, despite a large number of antitrust investigations, a few companies are still abusing of their dominance to systematically perform conducts which are recognised to be anticompetitive.
- 2) in order to properly address the issues created by Tech Giants and re-establish fairness in the market we must point out that it is not enough to enforce already existing measures; instead, a new approach is what we need.

Both the European Commission and Member States are moving towards a new ex-ante approach with norms that should pre-identify prohibited conducts to be able to intervene promptly to crack down on anticompetitive conduct and prevent damage to competition and fundamental rights.

In assessing possible future developments related to this work, however, it is necessary to dwell on an issue that has been little discussed, i.e. the relationship between the central enforcing model described in the proposed DMA and the network of National Competition Authorities.

National Competition Authorities have played a key role in the past years in the fight against gatekeepers, moreover their activity was central to identifying the conducts prohibited according to Article 5 and Article 6 of the DMA proposal.

With this consideration in mind, we can conclude this work by analysing what the future developments in the sector might be, starting from the role that private enforcement will play.

netherlands-regarding-intervention-on-platforms-with-a-gatekeeper-position > accessed 27 January 2022

This question, which is of salient importance for the future development and coordination of the DMA has culpably received little attention[458].

There are in fact, many concerns regarding how the DMA is going to be enforced and what will be the link between the European Institutions and National Authorities when tackling gatekeepers.

The DMA does not indeed include any provision concerning the role of National Courts or national remedies or even the role of mechanism of co-operation between the European Commission and the various national courts.

However, the EU officials have stressed the self-executing nature of the DMA's norms, and they seem to take private enforcement for granted. Member States are insisting on the need for the DMA to expressly recognise the possibility for private enforcement and to identify specific instrument to enhance it as well[459].

This issue should not be underestimated at all. The power, for private parties, to enforce the DMA before National Courts comes from the fact that the DMA is going to be an EU Regulation and thus, pursuant to Article 288 of the TFEU, it will be entirely binding and directly applicable in all Member States. This means that, by reason of its nature and its function in the system of the sources of EU law, it has direct effect and is, as such, capable of creating individual rights which National Courts must protect[460].

On the other hand, the fact that the DMA will be a regulation does not necessarily mean that its provision will have direct effect. Indeed, regulation provisions, in order to be considered directly applicable, need to be sufficiently precise and unconditional

458 Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (2021) Concurrences, 425 <https://awards.concurrences.com/IMG/pdf/komninosliber_amicorum_eleanor_fox.pdf?75048/e1ae28257c5dc40700157fa4d478155c490680df > accessed: 27 January 2022

459 Ibid, 426

460 Judgment of 14 December 1971, Case 43/71, Politi s.a.s. v. Ministero delle finanze della Repubblica Italiana, ECLI:EU:C:1971:122, para. 9

to create rights for individuals and thus to be relied upon by individuals before National Courts[461].

In the light of the consideration above, the substantive provisions of the DMA are Article 3, Article 5 and Article 6. Article 3, which provide the criteria for considering a Core Platforms Service a gatekeeper, states that the designation of gatekeepers may happen only through a decision of the Commission; then following the designation of gatekeeper the obligation identified by the two above-mentioned Articles became applicable. It follows that, national courts cannot designate gatekeepers, but also prior to the Commission's decision designating a platform as a gatekeeper the rules of Articles 5 and 6 do not create obligations and thus cannot be invoked before national courts[462]. On the other hand, Articles 5 and 6 are without any doubt sufficiently unconditional and precise so they can be invoked before National Courts by individuals who base rights on them.

In the second chapter we stressed that the provisions under Article 6 are those which are susceptible to being specified further. Hence the rules of Article 6 are not specifiable and adjustable in and of themselves; only the required compliance measures mean that the content of the legal rule is not affected by the "specification" process and therefore obligations under Article 6 are set to be considered unconditional and precise legal rules and hence they are generally applicable and directly effective.

This means that concerning the actual DMA proposal, Articles 5 and 6 can be invoked by individuals before national courts and thus private enforcement of the DMA should be taken for granted. The fact that the DMA rules are enforced by the Commission and that the DMA provides for a particular method of public enforcement does not mean per se that private enforcement is excluded. Public enforcement does not exclude private enforcement of the DMA.

461 On this point see Judgment of 13 December 2001, Case C-253/00, Antonio Muñoz y Cia SA and Superior Fruiticola SA v. Frumar Limited and Redbridge Produce Marketing Limited, ECLI:EU:C:2001:697, para 47

462 Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (n 458), 428-430

Moving forward from the above-mentioned considerations it is now possible to deal with one of the most important topics concerning the future development of ex-ante regulation in Europe, i.e. how to deal with the risk of fragmentation.

It appears indeed clear that as the DMA proposal currently stands, private enforcement will be a reality. Hence, National courts would have the power to apply both the Articles of the DMA which provides gatekeepers' obligations and also National courts will be capable of deciding whether there is a violation of these obligations or not. This means that National Courts will be competent to order gatekeepers to take specific measures to the extent that the applicable national procedural law gives them. On the other hand, these judicial pronouncements will not have erga omnes effects, but will be considered *res judicata inter partes*[463].

However, such national decisions may inevitably result in a considerable degree of fragmentation within the EU. Parallel to and notwithstanding the centralized system of enforcement by the Commission, there will be full decentralization to the level of countless National Courts of a generalist nature deciding on countless cases, leading to countless "mini-regulations" with *inter partes* effects within the EU.

They may not produce *erga omnes* effects and would only bind the parties to the litigation, but, from a practical point of view, their disintegration and fragmentation effects are obvious.

This kind of fragmentation within the internal market will be distractive since gatekeepers will be cooperating with about 27 National Authorities rather than one central enforcer[464] and also, they will be forced to defend their practices in front of many courts and in a lot of trials[465].

463 Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (n 458), 435

464 Ibid, 436

465 The problem of fragmentation is accentuated by the parallel application among different policy tools, such as consumer and data protection laws, on top of competition law. For more on this see: Svetlana Yakovleva, Wessel Geursen, Axel Arnbak, 'Kaleidoscopic data-related enforcement in the digital age' (2020) 57(5) Common Market Law Review, 1461-1494 <: https://www.ivir.nl/publications/miscellaneous/competition-law/ accessed: 27 January 2022

By the way it should be remarked that the concept of harmonisation and avoidance of fragmentation are considered paramount to the DMA proposal.

Furthermore, the proposal strongly emphasizes that there should be no national competence to legislate and enforce the DMA.

In fact, the DMA proposal as well as the Impact Assessment Report which accompanies it strongly emphasize the risks raised by a completely decentralised system of enforcement and, in addition, both defend the choice of passing to a more centralised system.[466]

If there is a high risk of fragmentation with 27 specialist administrative authorities, surely it is much higher with potentially thousands of generalist courts having full decisional powers on Articles 5 and 6 of the DMA proposal.[467]

An unlimited private enforcement may also disrupt public enforcement.

In addition, judgments of a National Court cannot bind the Commission while the Commission is entitled to adopt individual decisions under Articles 7, 8, 9, 15, 16, 22, 23(1), 25, 26 e 27. It shall be remarked that the Commission maintains this power even in case a gatekeeper's conduct has already been judged by a National Court and the Commission's decision conflicts with that national judgment[468].

However, a degree of disruption in that case is inevitable.

Besides, it was pointed out that there is a serious risk to the uniform, consistent and effective application of the DMA's rules. Moreover, we have stressed throughout this work that the DMA is an innovative passage in antitrust law. It constitutes a revolution "for the ages" in competition law enforcement and since it is a completely new piece of legislation, we must assess that National Courts will be called upon to adjudicate on a new system of norms.

466 DMA Explanatory Memorandum, 9

467 Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (n 458), 436

468 See Judgment of 14 December 2000, Case C-344/98, Masterfoods LTD. v HB Ice Cream LTD, ECLI:EU:C:2000:689, para 48

In addition, the fact that the DMA proposal does not provide for a cooperation mechanism or a coordination mechanism is not helpful at all[469].

These risks cannot be brushed aside simply by counting on the role of the CJEU and of the preliminary reference proceeding, which acts as an ultimate safeguard to ensure the uniformity and consistency of application of EU law. While decentralized enforcement remains the rule in EU law and centralization is the exception, a degree of centralization and the introduction of certain rules of precedence are sometimes appropriate.

On the other hand, when discussing the risks of fragmentation concerning the DMA, we should not forget where the DMA comes from. In the first paragraphs of chapter two, we indeed stressed that the identification of conducts that will be prohibited according to the DMA proposal comes from the decision of National Authorities at Member States level, thus National Authorities are European institutions' most important allies in the fight against gatekeepers.

For this reason, even if the risk of fragmentation is not underestimated, it is also important to continue to the role of National Authorities as fundamental role since their expertise was pivotal in the birth of the DMA and after the DMA proposal is approved, they will be effective.[470]

469 Indeed, the Commission's proposal, presented on 15 December 2020 is completely silent on this point. The only reference to national Courts appears only (and informally) in the context of the various Q&As published by the Commission itself on the webpage dedicated to the Digital Markets Act. However, more attention seems to have been paid during the ongoing legislative procedure, which is still in progress. Indeed, the version approved by the European Parliament in December 2021 introduces the new recital 77 which recognizes the importance of National Courts underlining that they should be allowed to ask the Commission to send them relevant information concerning the application of the DMA itself. On this see: CRISTINA SCHEPISI, 'L'enforcement del Digital Markets Act: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale' in *Associazione Italiana Studiosi di Diritto dell'Unione Europea*, 2022, 2 < https://www.aisdue.eu/wp-content/uploads/2022/01/Post-Cristina-Schepisi.pdf > accessed 27 January 2022

470 Oliver Budzinski, Juliane Mendelsohn, 'Regulating Big Tech: From Competition Policy to Sector Regulation?' (2021) 27 (154) Ilmenau Economics Discussion Papers, 16-21 <https://dx.doi.org/10.2139/ssrn.3938167 > accessed 28 January 2022

In line with this argument then it is possible to identify the two main issues of the proposal:

- first of all, digital is not a sector but a technology that pervades the whole economy, so a one-size-fits-all approach is questionable, with the introduction of rules that are the same for everyone when faced with very different business models;
- Moreover, the new framework favours a centralised enforcement model, based on the exclusive competence of the Commission.

There is no reason why the successful experience of the European Competition Network should not continue to be fully exploited in this matter especially in the light of the significant contribution that National Competition Authorities have so far demonstrated with regard to digital markets.

Moreover, it is also necessary to avoid that the lack of resources that the Commission will be able to devote to carry out its new tasks may lead to dangerous gaps in protection of competition, with consequent damage to the fundamental rights of economic operators and to the competitive structure of the markets[471].

Indeed, the text of the DMA provides for a clear exclusion of National Authorities as enforcement organs.

The Commission seems to think that involving National Courts can bring benefits in the field of the enforcement gap generated by the perceived inability of the Commission to deal with most important competition cases. But yet the provision does not recognise this possibility.

It is difficult to understand how fragmentation can be avoided by excluding National Competition Authorities while at the same time national courts are still included in the DMA's enforcement.

On the one hand, we have a small number of experts of the sector whose expertise has been decisive in the identification of prohibited conducts (the National Competition

471 Autorità Garante della Concorrenza e del Mercato (AGCM) ' Relazione annuale- Presentazione del presidente Roberto Rustichelli' (2021), 2-3 <https://www.agcm.it/dotcmsdoc/relazioni-annuali/relazioneannuale2020/PresentazionePresid_2021.pdf>

Authorities), while on the other hand we have a vast number or generalist organs (National Courts).[472]

Hence, the DMA proposal has to be completed by introducing a mechanism of coordination and cooperation between the Commission and National Courts, following the example provided by Articles 15 and 16 of Regulation 1/2003.[473]

From these considerations it appears to be clear that the DMA shall introduce a supremacy rule on the model of Article 16 of the Regulation 1/2003[474].

In case the DMA does not enforce any rule of precedence, National Courts may be called to apply the DMA's provisions at the same time as the Commission creating issues concerning the consistency of the application of the DMA's norms.

For these reasons there is the need for a provision which states that, where national litigation takes place before the Commission has adopted a decision, National Court must avoid adopting any decision which could conflict with the one contemplated by the Commission.

A National Court should be allowed to ask the Commission if it has started any investigation or proceedings concerning the same conducts identified by the National Court. Furthermore, the desired norm, should also provide that National Court may consider staying its proceedings till the Commission has adopted a decision. Moreover, in case that the Commission has already adopted a decision, National Court shall not decide in an adverse way with respect to the Commission's decision[475].

There are, then, two major reasons why private enforcement shall be playing a central role in the application of the DMA;

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472 Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (n 458), 437

473 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

474 Alexandre de Streel, Richard Feasey, Jan Krämer, Giorgio Monti, 'Making the Digital Markets Actmore resilient and effective' (2021) Centre on Regulation in Europe, 72-76 < https://cerre.eu/wp-content/uploads/2021/05/CERRE_-DMA_European-Parliament-Council-recommendations_FULL-PAPER_May-2021.pdf > accessed 28 January 2022

475 Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (n 458) 442-444

1) The first reason is that where specific and unconditional obligations are imposed on certain private operators and where the breach of such obligations is likely to affect the rights of others, individuals who consider themselves wronged must be able to bring an action before the national courts to protect their interests[476].

Thus, the fact that the act in question, in introducing such obligations, expressly provides for a system of public enforcement and/or does not make sufficient mention of the role of the national court is not in itself relevant, it being sufficient that a specific rule infringed is, by its very nature, directly enforceable in the courts.

The right recognised to citizens to ask for judicial remedies, provided for in an individual legal system, is a fundamental principle of the European Union and is independent of an explicit reference to private enforcement contained in a primary provision or a secondary act.

2) The second reason is more pragmatic. Indeed, looking at the competition sector, there is no doubt that private enforcement has over time assumed an increasingly decisive role in ensuring the effectiveness of the competition rules laid down in the Treaty[477].

It is not by chance that the Commission has progressively insisted on strengthening the powers of National Courts in all competition sectors, not least because of the deterrent function that the actions of private individuals (be they consumers or competitors) can play with regard to the anticompetitive behaviour of companies.[478]

Stand-alone actions also contribute to the detection of unlawful conduct that may not yet have been brought before the Commission or National Authorities. It is worth noting that it is precisely in such cases that the National Court can promptly take precautionary measures and prohibit a given conduct in the market as a matter of urgency.

476 Cristina Schepisi, L'enforcement del Digital Markets Act: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale' (n 469), 4

477 Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (n 458), 427-431

478 European Commission 'Commission Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC' (2004) para. 2 <: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(03)&from=IT >

The complementarity between public and private enforcement is moreover increasingly reaffirmed in the case law of the Court of Justice. Both systems are considered to be instrumental to the pursuit of the public interest in free and effective competition in the single market[479]. Far from being two separate systems, they constitute composite parts of a whole and are interconnected, with the further consequence that concepts, principles and rules applied in one sector may, where necessary, also produce effects in the other sector.

This final consideration helps us to understand why, when discussing what will be the future developments concerning competition law, the main question that must be discussed is how can we ensure an adequate level of cooperation between Member States and European institutions while, at the same time, guarantee the equal application and interpretation of DMA's provisions in all Europe?

Starting from this question it is possible to remark that European Commission has to find a system capable of granting DMA's enforcement without excluding National Authorities from this process.

This concept will become even more important as soon as more Member States enforce their internal legal systems with new norms in the field of competition law in digital markets dominated by gatekeepers.

We already discussed, in chapter 2, that countries like Germany and Greece, are adopting (or have already adopted) norms in the same area of the DMA. This comes from the fact that, even if DMA constitutes the central answer to the issues raised by gatekeepers in digital markets, it is also true that single countries, especially thanks to their National Competition Authorities, are capable of identifying conducts which are set to be more dangerous in their internal market.

479 *As stated in paragraph 25 of this judgment, the right to claim compensation for damage caused by an agreement or conduct prohibited by Article 101 TFEU ensures the full effectiveness of that Article and, in particular, the effectiveness of the prohibition laid down in paragraph 1 thereof. That right strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union.* On this see Judgment of 14 March 2019, Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy* EU:C:2019:204, paragraphs 43-45

Our hope is that a solution can be found, as it will genuinely strengthens competition and fairness in the digital markets, while at the same time making the most of the experience accumulated by the National Competition Authorities.

For these reasons, for the future of the DMA and ex-ante regulation in Europe the next mandatory step is to identify the right instrument to ensure the cooperation of the European Competition Network.

Apart from this aspect, which is something that needs to be clarified to ensure the proper application of the DMA, any critics to the DMA proposal is outside the scope of this work. This is due to the fact that DMA is still a proposal, and it is not applicable yet.

Moving to the US approach, any criticism is not within the scope of this work since US is still far from adopting a clear decision on the issues created by gatekeepers.

On the other hand, it is worth remarking that the US institutions working on a proposal to fight gatekeepers is itself already an important target that shall be highlighted. As stressed in chapter 2, the US approach to antitrust law is very different from the EU one, indeed the US, following the theories of the Chicago School, are unlikely to intervene by imposing norms in competition law. For these reasons it is very important to keep an eye on the US's next steps concerning digital markets.

The next two or three years will be essential to assessing whether EU institutions made the right choice with the DMA and to assess whether the prohibition identified by the norm will need to be updated soon or not.

Furthermore, it will be interesting to see whether users will be "loyal" to the gatekeepers or if preventing anticompetitive conducts will lead to the birth of new competitors capable of acquiring a large number of users.

All these considerations lead to the last message of this work. The various type of use of new technologies in the market have posed new and significant challenges, even jeopardising respect for fundamental principles. The traditional regulatory tools used so far to remedy violations and abuses have shown their limits over time.

The hope is that the DMA is going to be the first step of a new approach to law enforcement capable of promptly identifying possible violations and prepared to repress violations concerning different areas of law, as the convergence of competition

law and personal data protection shows. The reality in which we live demands answers that match its complexity, which only a transversal approach can provide.

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