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Collusion in an oligopolistic market and the "Apple – Amazon" Case

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Introduction

The subject of this thesis is the analysis of the discipline of abuse of a dominant position dictated by EU and national antitrust law in relation to an international case.

Even unknowingly, in our everyday lives we enter market dynamics that we do not control, directly or indirectly. For example, when turning on the television, until recently, Rai and Mediaset were in a duopoly and the other television networks were completely irrelevant. Another example is rail transport, the choice can only fall between two companies: Italo or Trenitalia.

So, even without knowing what it is, without having any interest in the subject, the market and its dynamics are of interest to us, the end users.

Several studies claim that in the last 30 years the competitiveness and competitiveness of markets have been increasingly at risk, while market failures proliferate, also thanks to an antitrust policy that is not always efficient and effective in its instruments and timing. More concentrated markets, greater profits in the hands of fewer and fewer players are just some of the signs: to grasp the problem at its root, it is necessary to develop a more modern vision of the new market frontiers, and to understand the evolution of the concept of competition in markets governed by big data and big analytics as well as by the pricing algorithms that are their concrete realisation.

In the first chapter, basic economic notions are presented regarding the market, the concept of competition, the emergence of discriminating positions in the market, reporting which conditions may favour them, and explaining the implications of a firm's choice of price discrimination. It also introduces the basics and reflection of the Big Data phenomenon and its correlation with business and market phenomena.

In the second chapter, antitrust and abuse of dominant position legislation is presented. In the first part of the chapter, the current regulations are briefly presented, comparing EU and national regulations, developments and thinking on antitrust.

Finally, in the third chapter, a real case is illustrated involving two international giants, Apple and Amazon. The case in question refers to the sale of Apple and Beats products on the Amazon marketplace. An affair that divided public opinion, stirred consciences and set a not insignificant precedent. From the analysis of the measures, the preliminary investigation and the

documentation collected and made available by the Antitrust Authority, I have tried to objectively illustrate the facts and the assessment procedure applied by the Antitrust Authority, and then try to draw my own personal considerations.

1 Chapter – The Market and Big Tech

1.1 Market definition

The term “market” comes from the Latin verb *mercari*[1], which means to buy, to trade.

When we use the term market our first thought is a physical place, where producers and consumers exchange goods and services.

However, the concept of market is much broader. With this expression we mean: the set of negotiations that concern the purchase and sale of a certain type of good or service. It is an economic organization based on the interaction of supply and demand, or their interdependence, considering the types of goods to be produced, their quantity, the production systems to be employed, and the recipients of these goods.

In a perfect market economy, everyone always acts to protect his own interest.

The multiplication of means by which sellers and buyers can get in touch (mail, telephone, fax, internet) was the basis of this expansion of the notion of market that goes from being a physical place where sellers and buyers meet, to a place, even abstract and figurative, where the meeting of demand and supply of a good or a service takes place.

In order to be able to speak of a market, it is necessary that the exchange of a specific good or service be systematic. The definition of the exchange is linked to an organizational model that puts buyers and sellers in relation and establishes the conditions and price at which the transaction takes place.

There are three elements present in a market:

- the subjects that operate in it, that is, buyers and sellers
- the goods being exchanged, which can be goods, services, securities such as shares and bonds
- the price, i.e., the amount of money needed to purchase a given good or service.

Our time is characterized by a global market that affects the entire world population.

[1] https://www.treccani.it/vocabolario/mercato/

Geographically it can be subdivided into national, regional, local markets, while taking into consideration the areas of exchange, we speak of sectoral markets or individual products.

Among the sectoral markets, it is significance mentioning for the role they play in contemporary society:

- the labor market, where people find their own professional sphere within a community
- the financial market, where capital and savings circulate;

In observing the market or markets, it is appropriate to keep in mind certain basic principles:

- the criterion of interdependence, according to which all markets and the subjects that form them present situations of reciprocal interrelationship whereby the behaviors that take place in one market often condition what happens in other markets and vice versa.

  In particular, the interdependencies generated at the international, national and local levels between economic reality and social dynamics, the world of economics and cultural processes should be emphasized. This close correlation between economy, society and culture forces individual and collective subjects to discern the extent of reciprocal influences in order to avoid simplified or superficial analyses;

- the criterion of product substitutability, a typical aspect of the Western economic system strongly based on the differentiation of the offer and on the continuous search for new products and services that can find favor with the potential client;

- the criterion of the condition of entry, which indicates the ease with which a company or a product can enter a market in which it wishes to insert itself.

These three postulates determine the conditions for what is called market economy, within which the degree of freedom of initiative of the subjects operating within it presents a very high field of variation and depends on the constraints and rules that the system has given itself in defining the countless decisions that are taken by producers and consumers.

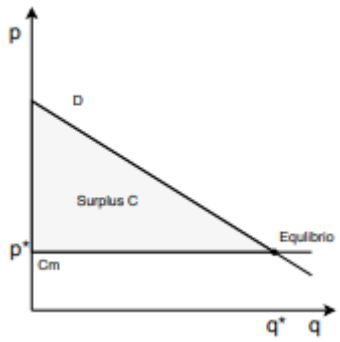
1.2 The three types of market in the economic theory

In economic theory, three types of market are essentially considered: perfect competition, monopoly and oligopoly.

Perfect competition is the purely ideal situation that is used as a paradigm. The assumptions of this model are: the existence of an infinite number of companies and consumers, perfect information, homogeneous product or service under consideration. The company is price taker, and its behaviour does not influence the market trend.

According to the first theorem of welfare economics, perfect competition is the ideal configuration because it is Pareto efficient. It allows, at equilibrium, to maximize the total surplus, or the sum of the consumer's surplus and the producer's surplus. To the equilibrium the price turns out equal to the marginal cost; considering the constant marginal costs the surplus total corresponds to the surplus of the consumer and the enterprise does not produce profits (figure 1). All the enterprises are price taker and do not have therefore influence on the price of the goods and services.

Figure 1: Equilibrium in perfect competition



Source: Besanko, Braeutigam (2020)

This model is defined ideal, in that it is highly improbable that the hypotheses under which the model is born they are manifested contemporarily.

Monopoly is the market condition diametrically opposed to perfect competition: in this case there is only one firm on the market that does not face any competitor. For this, the company becomes price maker and can impose on the market the price that maximizes its profit without worrying about the existence of substitute goods, since, by definition, there are no other productive

companies on the market under consideration. This condition is the worst at the level of surplus and at equilibrium generates the so-called dry loss. At the mathematical level, the problem of the monopolist is solved by maximizing the profit function:

$$\pi^M = q^M p(q^M) - C(q^M) \tag{1.1}$$

The price depends only on the quantity placed on the market by the monopolist himself. Given homogeneous products and a linear demand function, the profit function becomes:

$$\pi^M = q^M(\alpha - \beta q^M) - cq^M \tag{1.2}$$

The point of maximum is found by doing the derivative of the profit function:

$$\frac{\partial \pi^M}{\partial q^M} = 0 \tag{1.3}$$

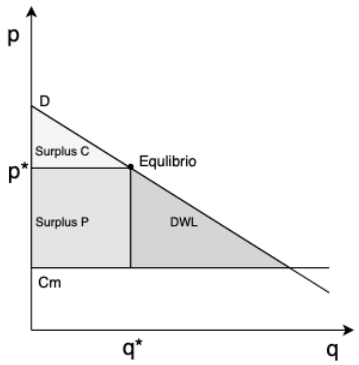
the optimal quantity to be placed on the market is:

$$q^{M*} = \frac{(\alpha - c)}{2\beta} \tag{1.4}$$

And the profit:

$$\pi^M = \frac{(\alpha - c)^2}{4\beta} \tag{1.5}$$

Figure 2: Monopoly equilibrium



Source: Besanko, Braeutigam (2020)

The oligopoly is a form of market rather common, that sees to clash in the competition a finite number of enterprises. Although in this case the companies are not price makers, they have a significant influence on the market and with their choices can influence the behaviour of competitors, creating strategic interactions. There are various models of oligopoly, in this paragraph we will briefly describe the oligopoly à la Cournot. In this model, firms compete on quantity, products are homogeneous and are selected by consumers based on price. Take for example two firms A and B, each of which competes in the marketplace with the goal of maximizing its profit. The profit function of a firm is:

$$\pi_A = q_A p(q_A, q_B) - C_A(q_A) \tag{1.6}$$

Considering homogeneous products and the linear demand function it becomes:

$$\pi_A = q_A[\alpha - \beta(q_A + q_B)] - c_A q_A \tag{1.7}$$

The point of maximum is found by doing the derivative of the profit function:

$$\frac{\partial \pi_A}{\partial q_A} = 0 \tag{1.8}$$

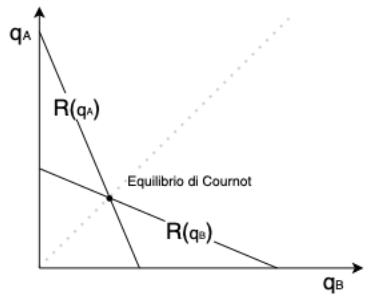
you find the optimal quantity to market, called the reaction function:

$$R_{(q_B)} = q_A^* = \frac{(\alpha - \beta q_B - c_A)}{2\beta} \tag{1.9}$$

From the function of the reaction curves of the two companies we find the outcome of competition à la Cournot between two firms and the profit results:

$$\pi_A = \frac{(\alpha - c_A)^2}{9\beta} \tag{1.10}$$

Figure 3: Competition à la Cournot between two companies A and B



Source: Besanko, Braeutigam (2020)

The achieved equilibrium is strategically stable and is called Nash equilibrium, from the mathematician who theorized it within the study of game theory. It is important to know that this equilibrium is not the best possible for the enterprises: it exists in fact a space of points that dominate, according to Pareto, the Nash-Cournot equilibrium but are not strategically stable.

1.3 Competition

1.3.1 The defeats of the competition

The study of the relevant market makes it clear how and to what extent an economic subject exercises market power and is therefore "competitive" with respect to competitors. This term is used to refer to the set of companies present on the market in a given territory that produce a product/service designed to satisfy the demand of the same end client. The physical equality of the product/service is not a necessary condition to define competition, but rather it is the capacity of the product/service to satisfy the same need, even if, very often, competing companies belong to the same market sector and produce similar or equivalent goods.

The relationship between a company and its competitors is the basis of market dynamism. Every firm observes the choices of competing firms (e.g., prices, product characteristics, advertising, etc.) before outlining its marketing strategy.

There are different degrees of competition. The degree of competition is represented by the concentration rate (or crowding rate) of the market and is determined by the barriers to entry that prevent new competing businesses from entering the market. The absence of competition is

defined as monopoly and is characterized by only one company operating in a given market, while the presence of a few companies is defined as oligopoly. On the other hand, competition is said to be perfect when there are many competing companies operating in the market.

Freedom of competition and freedom of economic initiative are the essential prerequisites for economic development. They produce the effect of inducing companies to make every effort to introduce innovations suitable to make possible the reduction of costs and the improvement of product quality and to exclude from the market the marginal and inefficient companies as well as to promote the differentiation of products and to avoid an excessive concentration of economic power in the hands of a few subjects.

"When, on the other hand, the play of competition is hindered, limited or suppressed, the few companies operating on the market are assured monopoly rents to the detriment of the overall efficiency of the system and to the detriment of consumers"[2]. Given these foundations, it is with them that the adhesion to a market economic system is founded on a theoretical level, which relies on "decentralized" decision-making mechanisms, by virtue of which "each option regarding "what", "how", "where" and "how much" is the result of the sum of an unspecified number of free individual choices, respectively of producers and consumers"[3].

Although a competitive market is seen as the example to strive for and be inspired by, this is often not manifested, and it is necessary to study and investigate the causes of this eventuality.

1.3.2 Market failures

A market failure occurs when at least one of the conditions of the first welfare theorem is lacking, namely:

- information asymmetries are present
- there is presence of externalities
- there is presence of barriers to the income or the exit
- the economic operators are not price takers
- non-exclusive and non-rival public goods are taken into consideration

[2] P. Auteri, G. Floridia, V. Mangini, G. Olivieri, M. Ricolfi, P. Spada, Diritto Industriale, Proprietà Intellettuale e Concorrenza, Giappichelli, Aprile 2012
[3] Ibidem

All forms of market other than perfect competition are market failures. This justifies public intervention which, depending on the conditions that arise, attempts to make the best corrections so that the market tends towards a more competitive stage. This regulation takes place ex-ante, when it is the State that sets the regulatory policies, and ex-post, when it supervises and intervenes when necessary. To a large extent, its work is carried out by a specifically established authority, called the antitrust authority, which operates in different countries with different names and forms: the Italian one is called AGCM, *Autorità Garante della Concorrenza e del Mercato*.

In general, Antitrust is an authority that operates in many countries with the objective of regulating the game of competition[4]. The antitrust body is a combination of rigor and pragmatism: on the one hand, it is based on rules, norms and principles born and stratified over time; on the other hand, it is a policy tool through which it meets the most practical sphere of the reality of problems and intervenes to make the most appropriate decisions. The reality in which Antitrust operates is permeated by legal and economic factors, both of which are essential, disciplines which have their roots in history and society, and which make the activity of the authority fascinating and complex. In Europe, as well as in the United States and other countries around the world, it operates to control the same type of conduct, such as restrictive practices or abuse of dominant position, but with aims, instruments and principles that do not always coincide. The interpretative nature that characterizes its sphere of operation is such as to have given rise, at times, to methodologies and objectives that appear to be opposed, in the various countries, even if the ultimate shared aim is always the protection of the market and competitiveness. In Italy, both the Treaty of Rome and Law 287/90[5] attribute to the authority the role of subject in charge of enforcing the law and, more generally, the role of promoter of competition, removing institutional obstacles to its work. The Treaty of Rome, at the European level, has political aims, but its main objective is the creation of a common market[6] governed by principles of competition and populated by efficient businesses, of which the Commission itself and the local authorities of the member states are guarantors. In Europe, antitrust activity moves within the sphere of administrative law, as opposed to the United States where it moves within the sphere of civil and criminal law, giving the impression that the American legal system sanctions violations of

[4] F. Silva, Regola dell'efficienza e politica antitrust. Libero Istituto Universitario Carlo Cattaneo, 1997
[5] Legge n. 287 del 10 ottobre 1990 "Norme per la tutela della concorrenza e del mercato"
[6] http://www.politicheeuropee.gov.it/it/normativa/approfondimenti-normativa/trattati-di-roma/

competition law with greater vigor: the effect of this difference between the areas of law involved in the activity of antitrust bodies, as well as the difference in the levels of sanctions applied by the various legal systems, has a lesser effect in discouraging misconduct in Italy, compared to the case across the Atlantic. In addition, American antitrust law has been in force for longer than European antitrust law, in fact, in 1890 the Sherman Act was passed, which still today, together with the Clayton Act of 1914 and the Federal Trade Commission Act of 1914, form the three cornerstones of the law.

Although not made explicit in the legislation, the goal of the antitrust agencies is the economic well-being of the country[7]. And as has already been mentioned, the measure of well-being is total surplus. This measure is not free from criticism both from a conceptual and an application point of view. First of all, surplus usually refers to a partial equilibrium perspective, when a more precise evaluation should be defined in a general equilibrium framework; on the other hand, it is not easy to evaluate the tendentially contrasting and not easily comparable trend of producer's surplus and consumer's surplus. This distinction is particularly relevant to the work of the Antitrust Authority since total surplus and consumer surplus can have opposite trends. Consider the case in which an efficient monopolist replaces inefficient producers: within reasonable variations in efficiency, it is possible that the price will be worse, decreasing consumer welfare, but will be counterbalanced by the efficiency of the producer, with an increase in total welfare. In fact, the consumer's surplus is central to the legislation, as can be seen in the Law of October 10, 1990[8] Art. 4. which authorizes the possibility of allowing agreements that "have such effects as to result in a substantial benefit to consumers".

However, the aseptic evaluation of surplus as a measure to guide the decisions of the authority is rather limited. If one relied solely on this measure, in agreement with economic theories, it would seem that the desirable market configuration is perfect competition. Given the fact, however, that for various reasons, including those listed at the beginning of this section, perfect competition is not attainable in many of the existing market realities, the goal of the antitrust authority is to start from a given market equilibrium that can be achieved given all the existing limits, such as information asymmetry or barriers to entry, and to prevent behavior that deviates from it by promoting competitive bidding. Therefore, by verifying the legitimacy of a given balance, starting

[7] F. Silva, Regola dell'efficienza e politica antitrust. Libero Istituto Universitario Carlo Cattaneo, 1997
[8] Legge n. 287 del 10 ottobre 1990 "Norme per la tutela della concorrenza e del mercato"

from the specific situation, the authority will be able to legitimize, for example, monopolies that have been established for reasons of real efficiency. In the oligopolistic market where companies operate strategically maximizing their own profit compatibly with the adversary choices, the antitrust authority can reasonably use the Nash equilibrium as a benchmark to evaluate the legitimacy of the market, given that this turns out to be the best solution given the constraints. In addition, in this interpretation of oligopoly there is an implicit concept of interdependence between the choices of the market players which is outside the area of law, in particular agreements, because it is a physiological condition of the competitive game in which companies that are not price takers compete.

In the oligopolistic market illustrated previously, the products are considered homogeneous, and competition takes place on price. This is useful to theoretical level, but in the practice the markets are characterized from goods differentiated both horizontally and vertically. We speak of horizontal differentiation when the goods are not directly comparable under the profile of the quality, and it is not possible to say objectively which is preferable. One speaks of vertical differentiation when the goods possess such characteristics as to be able to carry out a ranking and to compare them under the profile of the quality. Especially in the case of vertical differentiation, in real oligopolies, it is common to see that competitors invest heavily in R&D and Marketing to differentiate their products in different quality ranges, meanwhile their profits are very high, and their pricing policy may appear somewhat collusive[9]. The situation could be physiological and justifiable because it is part of a process of investment in innovation and quality: this suggests that, although very useful, Cournot's model is in most cases not representative of reality, and it is necessary to use different models and indicators of welfare.

This condition is one of the reasons why, in an apparently anti-competitive market, it is not sufficient to bring as evidence of collusion the outcome of competition in the market, but evidence of an actual agreement is required.

[9] F. Silva, Regola dell'efficienza e politica antitrust. Libero Istituto Universitario Carlo Cattaneo, 1997

1.3.3 Cartels, abuse of dominant position and concentration operations

If market failures are an almost physiological condition of the market itself, there are different situations in which market players limit competition. According to Italian law there are three relevant phenomena[10]: cartel, abuse of dominant position and concentration operations.

The term "collusive agreements" refers to all agreements agreed upon between companies, and prohibited are those "[...] which have as their object or effect the prevention, restriction or substantial distortion of competition within the national market or in a relevant part of it"[11]. In other words, we talk about collusive agreements: these agreements can be stipulated in an explicit form, when companies interact directly and their behavior is clearly aimed at suppressing or at least reducing rivalry, or in a tacit form, when there are no explicit agreements, but a collusive result is reached and maintained. This distinction is fundamental since, from the economic point of view, what is disadvantageous is the collusive result, which manifests itself with both types, while from the legal point of view what is prohibited is a determined behavior and tacit collusion does not therefore fall within the prohibition.

The possible agreements are of various types and can have different objectives; let's take now the most obvious example of a collusive agreement that foresees that two companies agree on the quantities to put on the market and consequently set higher prices than those that would be in a non-collusive market.

Taking up Cournot's theory of duopoly, it was said that the stable solution reached by competition requires that each firm place a given quantity on the market (equation 1.9).

That if compared with the amount of monopoly, equation 1.4, is greater. But knowing that the monopolist maximizes the profit then there are conditions for a collusive agreement if the profit of the monopolist divided between competing firms is greater than the profit they would make if they behaved competitively.

That is, it means that it would be convenient for the firms, in terms of profit, to produce a smaller quantity and set higher prices. Now, if competition in the duopolistic market under consideration took place over a finite horizon of time, collaboration would not emerge, in fact there would be a high incentive to deviate from the collaborative relationship.

[10] Legge n. 287 del 10 ottobre 1990 “Norme per la tutela della concorrenza e del mercato”
[11] Ibdem

If, on the other hand, an infinite time horizon is considered, future profits carry enough weight to drive the firm to collude.

This is functional in understanding Harrington's definition of collusion: "[collusion is] a situation in which firms use a reward punishment scheme to coordinate their behavior for the purpose of producing a supercompetitive outcome"[12].

In other words, the cartel, as defined in economic theory, is the most extreme form of explicit collusion, in which a group of operators work together to maximize the total profits of the group. To achieve this goal, the group behaves as if it were a monopoly, considering the market demand curve as the demand curve of the "monopoly" and finding on it the point (the price and quantity produced) that maximizes total profit. Each member must demand the agreed price (cartels are often referred to as price-fixing agreements) and each is allocated a share of the total production of the cartel. This last step is critical, as if a member produced and sold more than their allocated quantity, then the group's total output would increase, and the price would fall below the agreed upon profit-maximizing level.[13]

Collusive agreements can be differentiated by whether they involve horizontal or vertical markets.

Horizontal agreements involve firms that compete in the same market, relate to the same type of demand. These agreements essentially involve: fixing prices, setting production quotas and dividing up the market, either geographically or in terms of customers. These objectives can be achieved in a variety of ways, for example by using the same formula for calculating prices, avoiding discounts, through advertising and public announcements, which veiledly send messages to competitors about the pricing strategies adopted, communications in auctions and so on.

Vertical agreements, on the other hand, involve companies belonging to different levels of the production chain and are historically considered less harmful than horizontal agreements. Vertical agreements can be somewhat efficiency enhancing, which is somewhat unlikely for horizontal agreements. If the companies in the same production chain do not coordinate among themselves but act independently, it is possible that the phenomenon of double marginalization may occur and, as a result, the final prices for consumers will be higher. From this point of view, it seems legitimate to allow the vertical market to be interconnected in order to limit inefficiencies, always

[12] J.E. Harrington, The Theory of Collusion and Competition Policy, MIT Press Ltd, 2017
[13] M. Lieberman, R.E. Hall, Principi di Economia. Maggiole Editore

bearing in mind that anti-competitive results can also occur when talking about vertical agreements. In particular, from this point of view, one of the most delicate agreements is the RPM, Resale price maintenance, that is the imposition of a determined resale price. This agreement can be more or less rigorous; in some cases, a determined price is imposed, in others a price is suggested to which the seller can choose not to conform, or at other times a minimum price floor or a maximum price ceiling for resale is indicated. This imposition can generate a sort of collusive agreement at a horizontal level orchestrated from above with the aggravating circumstance of guaranteeing the loyalty of the retailers to the agreed price. Even exclusivity clauses can in many ways be a threat to competition: with these agreements one party is obliged to contract exclusively with another party. This can happen, for example, when a manufacturer grants a vendor the right to be the only one to sell its product in a particular geographic area, generating a kind of local monopoly and increasing the cost of finding another retailer. Conversely, a retailer might enter into an exclusivity agreement whereby he agrees to sell only the contracting manufacturer's good or service to avoid competition from the same retailer. These agreements, although they play a favorable role in the antitrust discipline, can be considered illegitimate if excessively burdensome to the competitiveness of the market: the more the agreement involves dominant players in the market, with high market shares, the more the vertical agreements must be scrutinized to verify their raison d'être.

Art. 3 of the Law of October 10, 1990[14] states that "the abuse by one or more undertakings of a dominant position within the national market or in a substantial part thereof is prohibited". A dominant position is defined as one firm having a distinct commercial advantage over others and being able to behave "in a manner significantly independent of competitors, suppliers and consumers. This is generally the case if it has a high market share in a particular market"[15]. The principle of this rule is that it is not per se prohibited to assume a dominant position, but it is prohibited to abuse it, i.e. to take advantage of this superiority in order to distort competition. This can occur in a variety of ways, for example by hindering competitors in the market by charging low prices for a sufficient period, so-called predatory prices, which are unsustainable for competitors who, if they do not have the financial resources to withstand such a regime, will have to leave the market. Another practice is cross-subsidization, a situation in which a company

[14] Legge n. 287 del 10 ottobre 1990 “Norme per la tutela della concorrenza e del mercato”
[15] https://www.agcm.it/competenze/tutela-della-concorrenza/intese-e-abusi/

operates in two markets, using its dominant position in the first to sustain its position and increase its power in the second. Other practices that can generate abuse include pure loyalty discounts in which the client undertakes not to buy from others, top-slices rebates and target discounts.

Merger operations refer to all "those times when two or more companies merge", "one or more persons in a position of control of at least one company or one or more companies acquire directly or indirectly, either by purchase of shares or assets, or by contract or any other means, control of the whole or parts of one or more companies", "two or more companies proceed, through the constitution of a new company, to the constitution of a joint venture"[16]. Mergers are not prohibited as such but may become so in the light of considerations of the future of the market in which the operation takes place: if they lead to the strengthening or creation of a dominant position in the market that has the effect of substantially and durably reducing competition. This condition is assessed in the light of market conditions such as entry barriers, supply and demand trends, the possible choice of suppliers, companies' access to sources of supply and the structure of the market itself. This legislation therefore has an anti-monopolistic purpose, and in line with this purpose, merger operations in general must be communicated in advance to the competent authorities when the turnover of the companies involved exceeds certain thresholds established annually; after which the authorities may permit or prohibit the operation or allow it under conditions such as to reduce the possible negative effects on the competitiveness of the market.

1.4 Collusion and price discrimination in the marketplace

1.4.1 Price discrimination

An ambiguous position in terms of impact on well-being is occupied by so-called price discrimination: this term should not be understood in a negative sense, in that, by discrimination is meant the act of differentiating the price of the same good according to the category of the client, which in itself does not imply an improvement or worsening of market conditions. However, it is a practice that can only be implemented in the presence of a market failure, in particular only if a company has market power and is not a price taker.

[16] Legge n. 287 del 10 ottobre 1990 “Norme per la tutela della concorrenza e del mercato”

To be precise, the necessary conditions for price discrimination to exist are: that the firms are not price takers and can influence the market with their choices, that there is useful information on consumer preferences, that it is impossible to engage in arbitrage.

Price discrimination allows the monopolist firm to maximize its profits by segmenting consumers of the relevant good or service and their willingness to pay. This is made possible by the commercial strategy of imposing on different consumers, different prices or different properties for the purchase of the product/service, depending on the characteristics with which we can discriminate demand.

The surplus that the monopolist will be able to obtain will also depend on the amount of information that this will have available. The greater the monopolist's ability to discriminate demand, the greater the potential surplus. Introducing a policy of discrimination requires a strategy aimed at the target market; it would be inefficient or even impossible to use the same strategies in different markets.

As mentioned above, it is essential that two conditions are in place to be able to discriminate in the marketplace: ability to identify the consumer and prevention of arbitrage.

Not only will the monopolist have to overcome the hurdle of acquiring the information and characteristics that enable it to discriminate against the consumer, but it will also have to be able to prevent arbitrage, i.e., ensure that buyers of the good or service at a lower price do not place it back on the market in order to make a profit for themselves to the detriment of the company. This is plausible in the case of resaleable products, such as an electronic device.

This can be done by using a customized service, such as insurance, customized medical expenses or legal fees.

The types of discrimination were classified into 3 categories:

- First degree or custom pricing
- Second degree or menu pricing
- Third degree or group pricing

First degree discrimination is also called perfect discrimination. In this view, the seller knows the reserve price of each customer and offers the good at exactly that price.

The sale of one more unit of product in this case never affects the price, so the monopolist produces exactly as if it were in perfect competition, because it would gain from every single product sold.

In this case the monopolist will be able to grab the entire surplus available. The scope of the first-degree discrimination strategy is the two-part tariff and block pricing.

The use of this method requires the monopolist firm to set an initial fee, such as a membership in an online platform, that confers the right to use the good. The consumer must then pay a price or fee for each unit of product/service actually purchased, such as benefiting from a particular product or service within the online platform itself.

This discrimination, where possessing a large amount of data and information about the user is essential, comes closest to the central analysis of our research. Repeated online purchases confer an increasing amount of data to companies. This information has changed competitive environments and brought tremendous advantages to those with the ability to identify market needs.

Thanks to the online platforms that have emerged in two-sided markets, new business models and bidding systems with ad hoc pricing for each type of consumer have emerged. These data allow not only the identification of availability but also the avoidance of an arbitrage effect.

Second-degree discrimination is carried out by the vendor when there is no a priori information to distinguish between different groups of clients, and so strategies are implemented to ensure that the clients themselves select the proposal that best suits their preferences. The vendor proposes different pricing schemes and the consumer is forced to choose by unknowingly communicating useful information to the vendor, who can use it to develop increasingly appropriate proposals.

Obviously, in this case, the two-part tariff would produce no advantage to the monopolist because he does not have enough information.

Consumers could trivially make the most advantageous choice.

Any offer programmed for high-availability consumers must leave them with a surplus at least equal to what they would get by choosing the offer intended for low-availability consumers, otherwise they would be inclined to lie.

Obviously, the more advantageous the high availability proposition, the greater the chance that the consumer will reveal their segment even though it will lead to lower profits than the case seen above.

Third-degree discrimination or group pricing allows the monopolist to behave as if it had two separate applications in two different markets.

It can be chosen if the monopolist firm:

- Possesses information about easily observable characteristics such as: age, gender, location
- Is able to avoid arbitrage between different groups
- Predicts exactly the same unit price for each group, it will then be the consumer will then reveal their own (linear pricing).

Third-degree discrimination is most commonly used in the case of differentiated offers, such as luxury and economy books; business class and economy class. With this method a characteristic of the product or service is made observable, which will give the consumer the opportunity to make a rational choice, if he considers it advantageous; in this way he will declare his willingness to pay.

This type of discrimination, however, does not always increase social welfare, which will only happen if the company's output increases.

It is important to note that the first two modes of discrimination are non-linear, there is no linearity between total price and quantity, the unit price of the good varies. Only third-degree discrimination is linear, i.e., it involves a constant unit price of the good.

1.4.2 Intertemporal price discrimination

A particular case of discrimination that merits a dedicated study is that of intertemporal discrimination, i.e., the act of differentiating not on the basis of the category of client but on the basis of the time at which the good is sold. This discrimination can exist alone or in conjunction with the price discrimination described above. Even if reference is made to time as the discriminating variable, the characteristics of the client are, however, also correlated to the instant of time in which the purchase is made: for example, a ticket for an airplane flight bought at the last minute before departure will cost more both because there is a temporal discrimination with respect to the situation in which the ticket is bought in advance, but also because those buying the

ticket shortly before departure will probably be businessmen or clients with pressing needs who will have a greater willingness to pay and a more rigid demand[17]. Price discrimination can be effectively ap- plicated in all those sectors where demand is highly variable and subject to peaks, such as in the context of electricity distribution, which has different costs depending on the time slot in which it is used, but also for tourist packages subject to seasonality.

In other market environments, intertemporal price discrimination envisages higher prices when the good is launched on the market, destined then to fall over time as the good becomes obsolete, take, for example, the electronics market.

Such price discriminations work because there are segments of customers with very different willingness to pay and also a very different impetus to obtain the good, i.e., a non-negligible discount rate. For these categories of products, the fruition of the good can give a greater satisfaction the more it is anticipated, think of the difference between seeing a film just released versus waiting time to enjoy it months later.

In addition, companies deploy various methods to fuel the realization of this discrimination, one strategy is to invest in advertising to make it clear to consumers that the price of the good will not be subject to change: this practice has the effect of increasing the reputation and perceived quality of the goods sold, the most obvious case of the use of this strategy is Apple.

1.4.3 The search discrimination

Another price discrimination is the so-called search discrimination, developed thanks to the advent of the Internet and has become the central pivot of some of the most profitable businesses in recent years, such as Google. It focuses on several products at the same time trying to direct each buyer towards its range of reference: the presentation of search results has a considerable influence on the purchase and it is a sure fact that users rarely read the results beyond the first page provided by the search engine[18]. Search discrimination is in a sense an extension of the other types of discrimination because it is still based on dividing customers into categories with different willingness to pay, but instead of providing different prices for the same good, it provides different

[17] P. Seele et al., “Mapping the Ethicality of Algorithmic Pricing: A Review of Dynamic and Personalized Pricing”, Journal of Business Ethics, 2019

[18] J. Mikians et al., “Detecting price and search discrimination on the internet”, Proceedings of the 11th ACM workshop on hot topics in networks, 2012

results for the same search. This practice is carried out in the Internet world essentially by search engines and all those services offered free of charge to customers, such as social networks, which in return access data from users for commercial purposes, for example exploiting them to present ad hoc advertising. The practice of search discrimination can eventually lead to exclusionary strategies against products or services that are in some way competing with the business of the one providing the results, or in favor of particular sellers who pay higher commissions: this practice is called price steering.

1.5 Big Tech and its Abuse

1.5.1 New type of Enterprise and new Competences

Globalization and digitization have favored the birth of a new market on a global scale, namely the Digital Market.

In this new market, a series of companies have developed which, by taking advantage of the tools offered by the market, have succeeded in a short time, but not with little effort, in reaching a size such as to acquire greater weight in terms of market influence, compared to their competitors.

This new market is, however, also subject to strong financial turbulence and has seen an increase in the phenomenon of abuse of competition.

The companies that have grown up in this market are now "technology giants", also known as Big Tech. They are the largest and most dominant industrial companies in the world and those with the highest turnover.

Alongside the Big Techs, Fin Techs have developed, defined by the Financial Stability Board as "ttechnology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of financial services"[19].

These companies have expanded their businesses into a wide range of economic and social spheres, and the digital revolution has meant that Google, Apple, Facebook, Amazon, Alibaba,

[19] FSB, FinTech and market structure in financial services: Market developments and potential financial stability implications, 14 Feb 2019 https://www.fsb.org/wp-content/uploads/P140219.pdf

Tencent and Microsoft have supplanted energy giants and big banks from the top spots in terms of capitalization.

In fact, now "7 of the top 8 positions are occupied by big tech. The monopoly/oligopoly positions acquired in highly scalable businesses have allowed these companies to gain market share even outside their initial core businesses. Today the lines of expansion go towards sectors with a high process content (e.g., financial services, automotive, travel, etc.) where technology can create value through the automation of repetitive activities"[20].

One of these expanding segments is the financial sector. As described in the article "*Big Tech e Fintech: la sfida è un nuovo sistema finanziario*" of June 12, 2020 by Financialinnovation.it[21] , in some business areas such as payment services, leveraging the spread of smartphones, the development of contactless payments/QR Code and security technologies including biometric, the growth of e-commerce, have found their strategic positioning in the value chain and are now an integral part of the ecosystem, if not indispensable players that have eroded some of the margins to traditional banks.

Particularly in Asian countries and emerging markets, where the payments infrastructure was poorly evolved and widespread, technology players like Alibaba and Tencent have essentially filled a "gap" in the financial system by basing their competitive advantage on integrated multiservice platforms, low-cost financial services, and accessible technology.

However, it is not only in Asian countries that there have been success stories.

eBay has well exploited the synergies between e-commerce and payments with Paypal, which has become a giant in financial services. This service represents, for many Internet users, the main "alternative" means of electronic payment, avoiding the direct use of credit cards in online transactions.

Amazon, which already launched Amazon Pay in 2007, offers its customers the opportunity to pay, using their own account, the sellers present on the platform and adhering to the service. The e-commerce leader, moreover, has launched in the USA the first Amazon-branded credit card,

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[20] C. Giugovaz, Banche e big tech: "scontro tra titani", Bancaria Editrice, https://www.bancariaeditrice.it/download/GetDownloadSfogliatore/2Cllr0dIJuMZvOkqIu2HbFrseMMvTwcZrXOSJ2hgMpWiDqiFpWhmHbFrsqjm2gkIxeSkIxeS

[21] https://www.financialinnovation.it/elements/Fintech/Articoli/BigTech-e-Fintech-la-sfida-un-nuovo-sistema-finanziario/

developed in collaboration with JP Morgan Chase and Visa and, more recently, also a system of installment payments.

Also, Apple, after Apple Pay, has proposed on the American market the Apple Card, the credit card conceived in collaboration with Goldman Sachs and MasterCard.

Recently, also Samsung has launched, after Samsung Pay, its own payment card, at the moment only in North America, in partnership with MasterCard and the fintech SoFi.

The Observatory on "Financial Innovation 2020"[22] made by AIFIn - The Financial Innovation Think Tank and MarketLab - Financial Marketing & Research, highlights how these innovations have a significant impact on the banking, insurance and financial sector and in some cases, can be a threat to the industry sector.

Customers are increasingly digital and traditional ways of using financial services are becoming obsolete. The shopping and service experiences customers have on Amazon, Netflix, etc. do not match those offered in the banking, insurance and financial sectors generating a gap in satisfaction and expectations.

1.5.2 Big Data and Anticompetitive Practices

Given the amount of activity carried out by BigTecs, the amount of information they possess, as well as the benefits that can be derived from anti-competitive practices, it is not difficult to imagine that they are very often accused of anti-competitive attitudes.

Amazon has been accused many times of anti-competitive practices because of the way it manages the American market relative to online purchases and uses the data of the companies that sell through its channels to develop its own line of products that it puts in competition with those of its customers.

Amazon is not the only company in a dominant position in diversified markets to worry the Authorities. Three other American companies are constantly under the Antitrust lens and are commonly referred to as the "Big Four Tech" or "GAFA", which stands for Google, Apple, Facebook and Amazon.

[22] http://www.aifin.org/sezioni.php?id_s=11&year=2021#FID_2022

Apple is under indictment for its overbearing and opaque management of the app store. Through the Apple Store, in fact, the company has the possibility to impose on apps developer's advantageous conditions, exploiting its ecosystem and market share. In this regard the Committee has opted for a policy of non-discrimination towards apps developers.

While Facebook and Google are now considered quasi-monopolies of social networks and search engines. Google, conversely, is being watched for control of the Android ecosystem. In addition, there is a lot of concern about the increasing monopoly of web search, through products like Google Maps or Google Shopping.

In particular, in recent years, with the explosion of Big Data and algorithm optimization, these companies have raised concerns about the risk of possible abuse or malfeasance to the detriment of competition. The U.S. House Judiciary Committee recently compiled a report analyzing these competitive conditions of Bigtech. The article by Berti and Zumerle[23] outlines the main implications for the companies involved.

Among the report's most interesting proposals regarding the containment of these monopoly implications are:

- "Structural separation" policies, to prevent big tech from competing on its own platforms and outbidding its suppliers
- Greater attention to privacy, seeking to align with the European GDPR

This last point highlights a further problem: the US Antitrust doctrine is rather conservative and unlikely to intervene forcefully on this front, as argued by Longo and Mannoni[24]. The European Commission, on this front, appears decidedly less accepting of the operations of these monopolists. It is precisely the European side that is working on a new directive to strengthen the powers of the Antitrust Authority to limit the spread of the domains of these multinationals. Mainly the concern is directed at the apparent stifling of innovation, due to numerous acquisitions to the detriment of startups and young competitors. The finger is also pointed at Amazon, accused of investing in startups in order to absorb technologies and know-how, replicating innovation with its own products and making these small companies leave the market.

[23] R. Berti, F. Zumerle, "Big tech, una sola etichetta per tanti abusi diversi: quali rimedi per l'antitrust Usa", Network Digital 360, 2020

[24] A. Longo, S. Mannoni, "Big tech accusate di uccidere l'innovazione, negli Usa ed Europa: ecco i punti chiave", Network Digital 360, 2020

In addition to this type of abuse, very often these companies are guilty of misusing a very delicate tool in their possession: Big Data.

This term is used to define an immense set of "data" containing information (sometimes personal), whose exchange value with other subjects is very high and whose elaboration and "extraction of value or knowledge" for the company's own use helps to discover the links between different phenomena (e.g., correlations) and to predict future ones, thus allowing to reduce costs, shorten timelines, develop new products and optimize offers.

Collecting this type of data is not in itself a crime, but diverting the market and consumer preferences around the information that comes out of research and data processing can constitute a crime and anti-competitive behavior.

In addition, the phenomenon occurs whereby "whatever is requested from the various devices that are the offspring of the respective Big Tech, is searched through the websites belonging to the same manufacturing companies, favoring, in the search results, the most profitable products for the company itself, or to the fact that said devices store data of any kind or nature regarding our movements, our habits, our preferences, etc., until they are able to know with absolute certainty whether we are at home or away from home, providing, in this way, possibilities for hacking that would determine dramatic consequences"[25].

[25] https://www.altalex.com/documents/news/2020/06/17/ruolo-data-acquisizioni-big-tech

2 Market Protection Policies

2.1 The 4 Pillars of American Antitrust

Antitrust, intended as a set of rules to protect the free market, was born in the United States as a result of the situation that arose at the end of the 19th century and the American government's reaction to the creation of a number of trusts in the transport and communications sector due to the rapid expansion of railways, telegraph lines and telephone services throughout the American territory.

West's Law & Commerce Dictionary of 1988 defined a trust as a means by which several companies in the same sector could work together for their mutual benefit, eliminating any form of harmful competition, controlling the quantity of the good produced by regulating and maintaining prices, but at the same time preserving their individual autonomy, i.e. without resorting to any form of concentration[26].

Trusts became widespread because of falling transport and communication costs, which led not only to the creation of a single large national market but also, and above all, to an intensification of competition as competition between companies had now spread throughout America.

The only way for all companies to make a profit was to collude and respond to the price war with agreements to maintain controlled outputs and high profits. All these factors led to the demand by small entrepreneurs and wholesale producers, crushed by the cartels that had been created, for protection by the US government and to the birth of the first embryonic form of antitrust regulation: the Sherman Act of 1890.

Today, antitrust laws are diverse and each federal and state government has its own version and interpretation of antitrust law. The Antitrust Division of the Department of Justice is the primary enforcer of US antitrust laws, although private parties also play a crucial role.

Antitrust laws are statutes or regulations designed to promote free and open markets. They are also called "competition laws," with the goal of prohibiting unfair competition. Competitors in an industry cannot favour tactics such as market sharing, price fixing or non-compete agreements.

[26] M. Motta, M. Polo, Antitrust: Economia e politica della concorrenza. il Mulino, 2005

Also, companies cannot abuse their monopoly power to force smaller competitors out of the market. Consequently, consumers who pay an inflated price for a product due to an antitrust violation can generally bring an antitrust lawsuit for treble damages, three times the amount they overpaid.

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three-core federal antitrust laws still in effect today[27].

The Sherman Act[28] does not prohibit every restraint of trade, only those that are unreasonable, for example, a formation of a partnership may restrain trade, but do not do so unreasonably. There are two broad types of Sherman Act violations:

- Violations “per se”: price fixing, market division schemes, bid rigging, and group boycotting. Actions that almost always restrain trade and require little investigation into its impact on competition are called “per se” violations. When prosecuting a per se violation, the action’s intention does not need to be proven, only the fact that the action took place.
- Violations of the “rule of reason”: monopolies, tying, exclusive dealings, and price discrimination. Some business practices must be examined in context and a business practice violates the Sherman Act under a “rule of reason” analysis if it is found to unreasonably restrain trade.

The penalties for violating the Sherman Act can be severe: criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, if either of those amounts is over $100 million, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime.

The growing number of mergers, which intensified from 1897 until 1902, necessitated the extension of antitrust law with the introduction of the Clayton Act. Proposed by Henry De Lamar Clayton, MP, and enacted in 1914, it filled the legislative gap in the Sherman Act by introducing a

[27] https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws
[28] E. M. Fox, The Sherman Antitrust Act and The World, Let Freedom Ring, Vol. 59, No. 1, American Bar Association

more effective control of merger operations by prohibiting the implementation of mergers through the purchase of shares or assets if the operation could lead to a reduction or weakening of competition or the creation of a monopoly[29].

The Clayton Act expands on the Sherman Act by prohibiting activities likely to lessen competition. The Act attempts to stop the formation of unlawful monopolies by requiring companies to notify federal agencies of impending mergers and acquisitions.

The Clayton Act also prohibits anticompetitive conduct which may take place through:

- Exclusive Dealings: requiring a buyer or seller to do buy or sell all or most of a certain product from a single supplier such that competitors are unable to compete in the market.
- Price Discrimination: selling similar goods to buyers at different prices.
- Tying & Bundling: selling a product or service on the condition that the buyer agrees to also buy a different product or service.

The Federal Trade Commission Act was enacted in 1914 and it bans "unfair methods of competition" and "unfair or deceptive acts or practices, and created the Federal Trade Commission (FTC), which promotes competition and challenges anticompetitive business practices in the marketplace.

The Commission is responsible for:

- Prosecuting companies for federal antitrust law violations
- Evaluating pre-merger notifications to determine the merger's impact on competition
- Developing policy for continued protection against anticompetitive activity
- Educating consumers and businesses about current laws and regulations

In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.

[29] Altalex, Introduzione al diritto della concorrenza, 2014
https://www.altalex.com/documents/news/2008/02/12/introduzione-al-diritto-della-concorrenza

In addition to these three historic US antitrust regulations, in March 2022 the US Department of Justice approved new legislation, the American Innovation and Choice Online Act, aimed at limiting the economic power of major digital platforms and preserving the free market and competition[30].

In other words, it is a proposed law applicable to the largest 'online platforms', defined as a 'website, online or mobile application, operating system, digital assistant or online service' that enables a user to generate or interact with content on the platform, facilitates e-commerce between consumers or third-party companies, or enables user searches that display a large volume of information.

The legislation would prohibit companies such as Amazon and Google from favouring their own products and services on their proprietary platforms: this would represent the first step in the strategy to counter the power of Big Tech anticipated and supported by the Biden administration, as well as a significant change to the antitrust measures currently in place.

A letter to the bipartisan leaders of the Senate Judiciary Committee, signed by Peter Hyun, Assistant Attorney General for Legislative Affairs at the Department of Justice, highlights an important new element in interpretation, namely that the dominant position of platforms gives them unchecked power to influence the fate of other companies and that restricting the conduct of platforms would bring significant benefits.

This rule, which complements the previous ones, introduces new forms of infringements:

- "Unfair" preference of the products of a platform operator; "unfair" limitation of the products of another seller competing with the platform operator; Discrimination in the application of the platform's terms of service between similarly situated business users, with injury to competition;
- Restriction of the ability of entrepreneurs to operate with operating systems, hardware or software functionality of different platforms available for the platform operator's products;
- Access, preference or placement on the platform conditional on the purchase or use of other products offered by the platform operator;

[30] R. Tracy, Antitrust Bill Targeting Amazon, Google, Apple Gets Support from Doj, WSJ News Exclusive, 28/03/2022

- Use of non-public data obtained or generated on the platform from a commercial user's activities or from a platform user's interaction with a commercial user's products to offer or support the platform operator's product offerings;
- Restricting or preventing platform users from uninstalling pre-installed software applications or changing default settings.

It is a rule that applies only to large online platforms, known as 'covered platforms', which have the following characteristics[31]:

- At least 50 million monthly active users (or 100,000 corporate users);
- An annual market capitalisation or US net sales in excess of $550 billion;
- Act as a "critical business partner" for their corporate users.

Based on these characteristics, the platforms subject to this law are certainly Apple, Alphabet, Amazon and Meta.

Although the Department of Justice is pushing ahead with this legislation, its future is not yet defined, facing resistance from the industry and uncertainty from some members of the House. It is likely that changes will be made in order to receive full support.

However, also in Europe, we are witnessing a progressive restriction of the "freedoms" and power of Big Tech, in fact, also the Digital Markets Act is going on the legislative adoption process, going to configure a new set of obligations that large platforms, called "gatekeepers", will have to face.

2.2 Antitrust in Europe

In Europe, the protection of competition began to be discussed after the Second World War, as a reaction to the monopolistic and prohibitionist systems of previous periods, with the Treaty of Paris of 1951.

The treaty, signed by the six founding countries of the EU, gave birth to the ECSC (European Coal and Steel Community), introducing the prohibition of barriers to trade and practices that distort

[31] M.R. Carbone, Antitrust e big tech, accelerano anche gli Usa: quali impatti delle norme, Agenda digitale, 06/04/2022

competition between the markets of the member countries[32]: these include some of the fundamental concepts of current European antitrust law such as the prohibition of collusive agreements between companies, the discipline of abuse of a dominant position and the treatment of mergers between companies in the coal and steel industries[33].

As stated in Article 3(g), antitrust law took on greater significance in 1957 with the creation of the European Economic Community (EEC), which aimed to create "a system ensuring that competition in the common market is not distorted".

Currently, the TFEU and EC Regulation 139/2004 (Merger Regulation) are the main sources for EU antitrust, outlining the three anti-competitive cases: restrictive practices, abuse of dominant position and mergers.

The three main offences are governed by the founding articles of the Treaty:

- Art 81 TEC (Art 101 TFEU): prohibits trade practices between EU countries which could prevent, restrict or distort competition. The Article prohibits any agreements between undertakings, decisions made by associations of undertakings, or concerted practices affecting trade between EU countries which could prevent, restrict or distort competition. This refers in particular to agreements fixing purchase prices or other trading conditions, applying dissimilar conditions to equivalent transactions, etc. For the purposes of the application of this article, the offence must satisfy the following 4 characteristics: it must contribute to improving the production or distribution of goods or to promoting technical or economic progress; consumers must receive a fair share of the resulting benefits; the restrictions must be essential to achieving these objectives; and the agreement must not give the parties any possibility of eliminating competition in respect of substantial elements of the products in question.

  Here, the rule does not refer to all restrictive practices, but only to those that represent or could potentially represent an obstacle to internal competition in a European market. These are not only horizontal agreements, i.e., agreements between operators in the same market, but also vertical agreements. The latter represent agreements between undertakings operating along the same production chain but competing in different

[32] S. Bastianon, Diritto Antitrust dell'Unione Europea, Giuffrè Editore, 2011
[33] M. Motta, M. Polo, Antitrust: Economia e politica della concorrenza. il Mulino, 2005

sectors; they may concern, for example, exclusive arrangements, limitations or control of production, outlets, technical development or investments, sharing of markets or sources of supply[34].

- Art. 82 TCE (Art. 102 TFUE): An enterprise acquires a dominant position when it is in a position to exercise decisive influence on the market and enjoy significantly greater economic power than its competitors. The prohibition does not concern the dominant position itself, but rather the exploitation of this situation through abusive practices. In other words, “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.” Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

  This area of Antitrust represents the most relevant case for the Amazon case and the friction with the discipline regarding the e-book market.

  It is important to undelight that the offence is not holding a dominant position, but the abuse of that position. Indeed, in applying this rule, the first difficulty is to define a dominant position. The European Court of Justice defines a dominant position as "the economic power of an undertaking which enables it to restrict competition on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors. [...] Such a position enables the undertaking which enjoys it to have a considerable influence on the conditions under which competition will take place"[35].

  It follows that the expression "being able to behave to a large extent independently of its competitors" needs to be translated into economic terms by introducing the concept of

[34] Versione Consolidata Del Trattato Sull'unione Europea E Del Trattato Sul Funzionamento Dell'unione Europea (2012/C G.U. dell’Unione Europea 326/01)

[35] Hoffmann-LaRoche et co. ag vs.Commissione delle comunità europee. Causa 85/76 - Court Ruling Of Feb. 13, 1979

market share, i.e., the share of a company's sales in a given reference market (market share) compared to the total sales in the whole market.

It remains to determine the reference market in which the company operates, which may be geographical, product or by-product.

Once these variables have been verified, the Commission can assess the presence of an abuse of a dominant position by a company in relation to its competitors and impose the payment of the relative fine, implementing the market and consumer protection mechanisms of the EU.

- Art. 107 TFUE (ex art. 87 TCE) e art. 108 TCE: State Aid "are incompatible with the internal market in so far as they affect trade between Member States, or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain good. threaten to distort competition.

  There are cases where state aid is in conformity with antitrust law, for example, aid of a social character granted to individual consumers, aid to make good the damage caused by exceptional occurrences and natural disasters, aid to facilitate the development of activities in particularly underdeveloped regions or aid for the implementation of a project of Community importance. These provisions are complemented by Article 108 on the role of the Commission in sanctioning infringements and by the provisions of Regulation No 994/98 on the application of Articles 87 and 88 of the EC Treaty.

2.3 Antitrust Law in Italy

Article 41 of the Italian Constitution, in paragraph 1, establishes that private economic initiative is free, thus defending the regime of competition between businesses.

It then specifies in paragraph 2 that economic initiative cannot take place in contrast with social utility, while in paragraph 3 the law determines the appropriate controls so that public and private economic activity can be directed and coordinated for social ends.

However, effective competition is not a natural mechanism and the recognition of freedom of competition is not sufficient to ensure, in practice, that the market is effectively competitive, since

companies often have a greater interest and convenience in establishing collusive relationships among themselves.

For this reason, Italian legislation presupposes the recognition and protection of the freedom of competition (art. 41 Cost.), but at the same time imposes a series of prohibitions on conduct, individual or collective, capable of altering the proper functioning of the market.

The Italian antitrust law is based on the concept that "in a market economy, the protection of competition, by pushing companies to a constant comparison of merits, triggers a virtuous process of innovation, progress and efficiency, from which beneficial effects for the community derive"[36].

This is a rather recent regulation, which finds its foundation in the crisis of Italian public industry in the mid-1980s. In fact, Italy was the last EU country to adopt an antitrust law and the legislation is rather recent and dates back to the beginning of the 90's.

There are two models that national law has evaluated as a source of inspiration:

- the first is of American origin and attributes to the ordinary judge the task of ensuring, also through the imposition of criminal sanctions, the enforcement of antitrust law;
- the second, widespread above all in Europe, prefers instead to rely on independent Authorities, though without excluding the possibility of intervention by ordinary judicial authorities to protect the subjective rights of private individuals.

The Italian legislation is almost completely in line with the European one, so much so that the Italian legislator has decided to opt for the second solution, attributing to an independent authority specifically set up for this purpose (the Antitrust Authority), the task of implementing the provisions laid down to protect competition and the market.

Law no. 287/90 is made up of six titles, the first of which establishes the regulations relating to the regulation of agreements, abuses of dominant position and concentration operations; the second title establishes the body for the protection of competition, the Guarantor Authority for Competition and the Market; the third title concerns the cognitive and advisory powers attributed to the Authority; the fourth title contains some norms on the powers of the Government in the matter of concentration operations; the fifth title concerns the dispositions on participation in the

[36] P. Fattori, M. Todino, La disciplina della concorrenza in Italia, il Mulino, 2019

capital of credit institutions and, finally, the sixth title contains the norms relating to the application of sanctions and judicial protection.

Art. 1 of Law 287/90 defines the scope of application of the same, while art. 8 establishes that this law applies both to private companies and to public companies or those with prevalent state participation, while it does not apply to companies that manage services of general economic interest or operate under a legal monopoly in the market.

The following articles define the three types of competitive offences.

In particular, art. 2, law 287/1990 regulates competitive agreements, which are considered by the legislator to be the most relevant problem in the market, so much so that the need is felt to provide new and more effective instruments to be able to combat this phenomenon.

When companies, instead of competing with each other, agree to coordinate their conduct in the marketplace, they violate competition law. Cooperation between companies can have the object or effect of preventing, restricting or substantially distorting competition. This is the case, for example, when several companies jointly fix prices or share markets, or when several companies, representing a large part of the market, enter into several exclusive distribution agreements, such as to impair the ability of their actual or potential competitors to access the market. A cartel between companies is prohibited when it involves, even if only potentially, a significant restriction of competition within the national market or in a relevant part of it (article 2 of Law no. 287/90). If the agreements are capable of affecting trade between member states, the Antitrust Authority is obliged to apply Community legislation (article 101 of the Treaty on the Functioning of the European Union).

In compliance with Community legislation, the Authority, in order to combat cartels, has adopted its own leniency program that applies to companies that self-report, providing the evidence for the ascertainment of the infringement. In this case the Authority will not apply or will reduce the pecuniary sanction foreseen, depending on the timeliness and quality of the information provided by the companies for the purpose of discovering the agreement (Art. 15, paragraph 2 bis, law no. 287/90).

The purpose of the rule, therefore, is to prevent a party who holds a position in the market for products or services, by means of its contractual or economic power, from imposing obligations on

the other party in order to exploit that power in different markets as well, thereby creating distortions of competition in the latter.

On the practical side, Art. 2: (a) prohibits agreements that "directly or indirectly fix purchase and selling prices"; (b) prohibits agreements that "prevent or restrict production, outlets or access to the market, investment, technical development or progress"; (c) prohibits agreements aimed at "sharing markets and sources of supply". The sharing of markets can be done through agreements that do not sell outside the assigned areas; - lett. d) prohibits agreements that "apply in commercial relations with other contractors, objectively different conditions for equivalent services, so as to determine for them unjustified disadvantages in competition". In other words, criteria of proportionality are imposed between the prices and other conditions of sale practiced and the costs incurred; - lett. e) prohibits "the subordination to the conclusion of contracts to the acceptance by other contractors of additional services that, by their nature or according to commercial usage, have no relationship with the object of the contracts themselves". Therefore, so-called tying practices are prevented.

Typical cases of illicit agreements are horizontal agreements (cartels), i.e., those made by competing companies; and also, vertical agreements, i.e., those made by companies that are part of different levels of the same production cycle.

Art. 3, on the lines of art. 82 of the EC Treaty, establishes that the abuse by one or more companies of a dominant position is prohibited. The prohibition of abuse of dominant position is aimed at repressing anti-competitive conducts carried out by the company or companies with significant market power (abuse of individual dominant position, in the first case; abuse of collective dominant position, in the second). Similarly, conducts aimed at obtaining supra-competitive profits or other benefits that cannot be obtained in a competitive situation (exploitative abuse) or at preventing the entry or survival of competitors in the market (obstruction abuse) are considered abusive.

A firm has a dominant position when it can behave significantly independently of competitors, suppliers and consumers. This is generally the case when it has high market shares in a particular market. The fact that a firm reaches a large size does not in itself distort the market: sometimes, in order to operate efficiently, it is necessary to be active on a large scale or in several markets.

Moreover, a firm can grow precisely because of its "virtuous" behaviour, offering products that better than others, in terms of price and/or quality, satisfy consumer needs.

Therefore, the law does not prohibit the dominant position as such, but its abuse (article 3 of law no. 287/90), which takes place when the company exploits its power to the detriment of consumers or prevents competitors from operating in the market, causing, consequently, damage to consumers.

Similarly, to what happens in the case of agreements, when the abuse causes damage to trade between several EU member states, the Authority applies Community legislation (article 102 of the Treaty on the Functioning of the European Union).

The ability of an undertaking to impose certain conditions in a specific contractual relationship does not, in itself, determine a dominant position. However, the exploitation of this bargaining power may entail, when the conditions are met, an abuse of economic dependence.

Without prejudice to the application of Article 3 of Law 287/90 on the abuse of a dominant position, the Authority may intervene if it detects an abuse of economic dependence that is relevant to the protection of competition and the market (Art. 11, Law 57 of 5 March 2001). Abuse of economic dependence occurs when a company is able to determine, in its commercial relations with another company, an excessive imbalance of rights and obligations. Economic dependence is assessed by also taking into account the real possibility, for the party that has suffered the abuse, of finding satisfactory alternatives on the market (Art. 9, Law no. 192 of 18 June 1998).

Here are some examples of exploitation of dominant position:

- predatory pricing: prices that are particularly low so as to place other competing businesses in extreme difficulty;

- exclusivity obligations: obligation on the part of clients to procure supplies exclusively from the dominant business;

- bundled sales: combined sales between the product in which the business is a leader and another product from the same business that is less successful;

- de facto exclusivity: incentivizing purchases from the dominant firm with loyalty-building compensation;

- English clause: obligation on the part of the customer to provide details of prices offered by competing firms and to be able to accept them only if the dominant firm fails to offer a lower price.

A company can grow not only by increasing the sales of its products in the market (internal growth), but also by concentrating with other companies (external growth), merging or acquiring control, i.e., the possibility of exercising decisive influence over another company (Art. 7 Law no. 287/90). There is also a concentration operation when two or more companies proceed to the creation of a joint venture that exercises all the functions of an autonomous economic entity on a permanent basis (Art. 5 Law no. 287/90).

Art. 6 of Law no. 287/90 establishes a limit to the legitimacy of operations and not an express prohibition of the same. Therefore, the Authority may authorize or prohibit actions communicated to it on the basis of the creation or strengthening of a dominant position on the national market, capable of eliminating or reducing competition in a substantial and lasting manner. Also in this case, the Italian discipline, along the lines of the Community one, does not provide a definition of the operation of concentration, but identifies three typical hypotheses of realization of concentrations: the merger between companies, the acquisition of control over a company and the creation of a joint venture. A merger is an operation whereby separate companies are merged into a single entity, either pre-existing or newly created. Moreover, a distinction must be made between a merger in the strict sense of the term, where a new company is created, and a merger by incorporation, where one company remains in existence and absorbs the others. As far as the hypothesis of the acquisition of control of a company is concerned, the field of application is very broad, since it can include all operations that involve the transfer of control from one decision-making centre to another. This category includes the transfer of a company, whether by way of sale or lease, as well as all contractual instruments such as dominion contracts (i.e., those contracts whereby a joint stock company or limited partnership entrusts its management to another company) and any other means of ensuring control to a subject other than the previous one. Finally, the constitution of a joint venture, where art. 5 of Law no. 287/90 specifies that only joint ventures constituted in the form of a company are considered concentrations, excluding all other legal forms which will always be considered agreements between companies. By virtue of this discipline, the Antitrust Authority often has the last word in important operations of mergers

or acquisitions, in order to avoid creating companies with enormous competitive advantages and market shares such as to lead to the creation of monopolies.

When the Authority considers that a concentration entails the constitution or the strengthening of a dominant position, so as to reduce competition in a substantial and lasting way, it prohibits its implementation; the operation can also be authorized subject to compliance with certain conditions, aimed at eliminating possible restrictive effects on competition.

The abuse of dominant position differs from the concentration not so much from a qualitative point of view, but mainly for the type of assessment carried out. The assessment of abuse of a dominant position, in fact, is an assessment carried out ex post, in which the judge must first resolve the problem at the time when the company, which is assumed to be dominant, is in a position to exercise some market power. Once this ascertainment has been made, the investigation focuses on the possible concrete commission of abuses, irrespective of the ability of the company to maintain its position over time. Instead, in assessing the legitimacy of a concentration, the Authority must make a sort of forecast. That is, it is necessary to hypothesize ex ante the evolution of the economic situation in the market, in order to determine whether the company resulting from the operation is able to maintain unchanged over time the market power acquired with the concentration.

Among the most important characteristics of this law is its pro-Community structure, in other words, national law is harmonized with European law19. Therefore, the cases which damage competition governed by Law no. 287/90 are faithfully modelled on the corresponding community provisions as per articles 101 and 102 TFEU.

Finally, the law does not only deal with the conduct of businesses, but also with the public regulation of the economy, with the institution of an independent supervisory body, the Guarantor Authority for Competition and the Market (AGCM).

2.4 Foundation and competences of the AGCM

Competent to supervise the application of the anti-monopolistic discipline in Italy is the Autorità Garante della Concorrenza e del Mercato (AGCM or also simply Antitrust), an independent

administrative authority, that is, a body of the State itself with a high degree of independence from the executive power. These characteristics make this figure fall within the category of Independent Administrative Authorities, i.e., administrative subjects enjoying a high degree of autonomy and impartiality of judgment, conceived and constituted to differentiate themselves from more traditional forms of administrative organization in order to monitor specific social and economic areas.

The Guarantor Authority of the Competition and the Market has been instituted with the law n. 287 of 10 October 1990, bearing "Norms for the protection of the competition and the market".

The Authority is a collegial body, made up of the President and four members, subsequently reduced to two in order to reduce overall expenses. The college is endowed with full autonomy in the exercise of its functions; in fact, art. 10 paragraph 2 specifies that the Authority "operates in full autonomy and with independence of judgement and evaluation": this means that it applies the law to concrete cases without being subjected to any constraint by the organs holding the political address. The President and the components of the Authority are nominated by the Presidents of the Chamber and Senate and remain in office for 7 years, non-renewable. The college is made up of President Roberto Rustichelli (from May 6, 2019) and two members, Michele Ainis (from March 8, 2016) and Elisabetta Iossa (from February 1, 2022)[37].

In order to contain the overall expenditure of the Independent Administrative Authorities, the legislator reduced the number of Antitrust Authority members from five to three [Art. 23, paragraph 1, letter d, of Legislative Decree no. 214 of December 6, 2011, converted with amendments by Law no. 214 of December 22, 2011], including the Chairman.

The Secretary General, who has the task of supervising the functioning of the offices and is the head of the structure, is appointed by the Minister of Economic Development on the proposal of the President of the Authority.

The competences of the Authority are numerous and range from guaranteeing the protection of competition and the market to reporting distortive situations deriving from normative measures, and expressing opinions on legislative or regulatory initiatives.

[37] https://agcm.it/chi-siamo/

The Authority carries out different functions and exercises different powers according to whether it deals with concentration operations or with agreements and abuses of dominant position. In the first hypothesis, the Authority acts through a preventive control on the operation notified to it, which can end with a measure of full and unconditional authorization of the operation itself, but also of authorization conditioned to the respect of certain prescriptions imposed by the Authority, or, in some cases, of absolute prohibition of the realization of the operation. In the second case, on the other hand, if the Authority identifies an infraction to the antitrust discipline, it obliges the companies to put an end to the detrimental conduct, possibly prescribing also specific behavioural or structural measures necessary to restore the competitive functioning of the market; and, in the most serious cases, it imposes administrative sanctions. These sanctions range up to a maximum of 10% of the turnover for the year preceding the infringement, to be paid, as is now established practice, within 90 days.

However, there is a kind of leniency for cooperation: companies that have committed infringements can agree with the antitrust authorities to provide information to uncover cartels or other competitive arrangements and receive benefits, namely immunity or reductions in fines. The reductions are related to the degree of usefulness of the information provided by the company and can be up to 50% of the fine. However, the general principle should never be underestimated those benefits can never cover any criminal or civil action that may arise from the infringement committed. In the final analysis, the essential part of the punitive system of Law 287/90 is based on the fact that this, although based on sanctions of a pecuniary nature, does not have a purely punitive function. In fact, both the warnings and the sanctions are intended to correct distortions rather than repress them.

The central objective is, therefore, to put an end to unlawful conduct and restore market conditions to ensure free competition.

Finally, it should be added that the Italian legislation attributes to the Authority, in addition to the powers of vigilance, control and repression, also cognitive and advisory powers, that is, activities that are not essential to the tasks of direct intervention but which give it importance in the field of competition policy.

In essence, the AGCM has a broad and general competence, covering the following main macro-areas[38]:

1. Antitrust monitors and sanctions collusive behaviour, i.e., agreements on commercial policies between companies in the same market segment to harm competition and consumers; it also investigates the exploitation of dominant position and excessive market power related to integration operations, i.e., through mergers and acquisitions;
2. Consumer protection: The Antitrust Authority analyses and sanctions unfair commercial practices and misleading advertising by all means (from leaflets to TV), as well as ascertains the vexatiousness of contractual clauses included in consumer contracts. In 2007, its powers were extended: consumer protection against all unfair commercial practices by companies towards consumers was introduced. Therefore, if a company attempts to distort the economic choices of the consumer, for example, by omitting important information, spreading untrue information or even resorting to forms of undue conditioning, the Antitrust Authority can also intervene as a precautionary measure, imposing penalties of up to 5 million euros;
3. The issue of the Legality Rating: This is an ethical rating for Italian companies, attributed free of charge by the AGCM after electronic request. Certain requirements are necessary to request it, such as a minimum turnover of 2 million euros. Companies that have the rating have more possibilities to receive public and private financing; in case the financing is not granted, the entity is obliged to communicate the reasons to the Bank of Italy. In this way, we move from the aim of safeguarding free economic initiative to that of protecting the consumer, to the objective of the progress and efficiency of the economic system.

[38] https://agcm.it/competenze/

3 Apple and the Amazon cartel

3.1 Introduction to the Apple - Amazon Case

In this last chapter of my paper, we want to get to the heart of the research and try to verify the application of economic and legal norms to a real and rather recent case.

The previous chapters have focused on legal and economic aspects in a way that is functional to this chapter, so as to describe areas that are complementary to the Amazon-Apple case, such as the e-commerce market, the main barriers to entry, the company's strategies that are often attributable to below-cost pricing, and the consequences within the sector. Knowing and understanding all the concepts and tools that case law has drawn on in its investigation to assess Amazon's conduct, allowed me to focus my attention on the relationship with suppliers, understand the definition of dominance and the mechanisms that derive from it, the principle of 'rule of reason', and 'enforcement', so as to understand the procedural levers that led to the sanction.

These are all well-known concepts rooted in market logic, but related to the digital world they are rather recent. There has probably been no shortage of case law, inefficiencies and doubts. This is not the first and probably will not be the last case of violation of antitrust law in the digital market, but this only confirms the need for continuous updates in the Authority's methods of enforcing sanctions and for more and more stringent directives and disciplines in the field of competition.

A company operating in several markets has the possibility of gaining advantages from external actions and decisions not necessarily related to the market under analysis, it is therefore impossible to overlook the issue of the relevant market and investigate it from a global perspective.

The assessment of, for example, predatory pricing behaviour for companies operating in diversified online and international markets is today a very complex operation, bringing us back to the difficulty of circumscribing the relevant market by the Authorities. As in the e-book market case that put Apple under investigation, the attitude was not assessed as predatory, mainly because this conduct benefited the consumer.

Despite the difficulty in finding data and recognising the goodness of it, when a reduction in consumer welfare is established, the Authority intervenes swiftly. Consequently, today it is difficult to incriminate a company that manages to keep the consumer's surplus in the relevant market unchanged, while increasing profits in other markets.

3.2 The Case: Sale of Apple and Beats Products on Amazon Marketplace

In February 2019, the AGCM received a report from an electronics retailer regarding the online sales system of Apple and Beats branded products. According to the complainant, in 2018 Apple and the leader of online sales, Amazon, signed a commercial agreement, which provided for the removal from Amazon's Italian marketplace of all sellers not belonging to Apple's official authorised reseller programme, even though those sellers, until that moment, had legitimately offered Apple and Beats products through Amazon's marketplace.

Before getting to the heart of the matter, let us briefly outline the two companies involved.

Apple Inc. is a US corporation, headquartered in Cupertino, California, and the parent company of the eponymous group active in the design, manufacture, and marketing of mobile and multimedia communication devices, personal computers, and audio-video devices under the Apple and Beats[39] brands, as well as the sale of a wide range of related software, services, peripherals, and networking solutions, and third-party applications and digital content.

In 2019, Apple Inc. reported revenue of €231.57 billion[40], but more importantly, Apple is a publicly traded company on the New York Stock Exchange, and therefore widely held and not subject to the control of any company or person. Apple Inc. directly or indirectly controls the companies Apple Distribution International Ltd, Apple Sales International, Apple Italia S.r.l. and Apple Retail Italia S.r.l.[41], which owns the physical stores under the Apple brand.

The other major player in the case is Amazon.com Inc. a company active in e-commerce and the provision of additional information and communication technologies services, based in Seattle, Washington state. With a turnover in 2019 slightly higher than that of Apple, Amazon.com Inc.

[39] Decision of the European Commission, 25 luglio 2014, caso M.7290 – Apple/Beats
[40] Apple Inc. condensed consolidated statements of operations, 26 Sept 2020
[41] Apple Inc. Annual Report, 28 sept. 2019 (section 13 or 15(d) of the Securities Exchange act of 1934 of Apple Inc.

also operates in Italy through the companies Amazon Services Europe S.à.r.l., Amazon Europe Core S.à.r.l., Amazon EU S.à.r.l. and Amazon Italia Services S.r.l..

As mentioned above, the Amazon and Apple groups have entered into a commercial agreement whereby the sale of Apple and Beats products on the Amazon marketplace would be entrusted exclusively to Amazon and other official Apple resellers, to the exclusion of other economic operators legitimately selling such products.

Such an agreement, in fact, would seem to prevent access to intermediation services for the sale on marketplaces, in which Amazon represents the primary operator, with extremely high market shares[42], to a set of resellers of consumer electronics products who do not adhere to Apple's official distribution programmes, but who lawfully sell Apple and Beats products having purchased them through Apple's wholesaler channel.

The possible foreclosure of access to Amazon's marketplace services, therefore, would seem likely to create a significant barrier to entry into the market for online sales of electronics products for non-official resellers, reducing the online supply of Apple and Beats products, and for this reason the agreement infringes Article 101(1)(b) TFEU as it is intended to limit or control outlets.

In an era in which the use of e-commerce and distance shopping has become fundamental, such an agreement appears even more serious. In this sense, the excluded parties, usually small and medium-sized national companies, are unable to make use of the marketplace services provided by Amazon and are therefore unable to reach a large share of customers purchasing electronic products online.

Moreover, by limiting the number of companies making sales on Amazon, and thus of Amazon's competitors and Apple's official resellers, the agreement could also lead to a reduction of incentives to compete effectively on price for Apple and Beats products. This is not only within national borders, but certainly a restriction that could create obstacles to the integration of European markets and could limit parallel trade between Member States in consumer electronics products.

It should be emphasised that the restrictions imposed by this agreement do not concern a limitation in the sale of products, but rather a barrier for online sellers of Apple and Beats

[42] AGCM Order No. 27623 of 10 April 2019, Case A528 - FBA Amazon

products by foreclosing access to the services provided by Amazon, i.e. the main provider of marketplace services in Italy. Restrictions that cannot simply be traced back to the vertical distribution agreement, since Amazon is not only the provider of marketplace services to third-party sellers, which constitute a means to carry out the online sale of products, but is also the seller of Apple and Beats devices, as well as Amazon devices, on its own behalf.

These restrictions would appear to be part of a reciprocal agreement: on the one hand, Apple grants Amazon the official distribution of Apple products and, on the other hand, Amazon grants Apple the exclusive right to marketplace services only to Apple's official resellers, which includes Amazon. In addition, Apple and Amazon are also competitors in the production of electronics products, since they both produce goods in the same product categories, such as tablets and audio-video devices.

The restriction on access to Amazon's marketplace for unofficial resellers of Apple and Beats products also does not appear justified in light of the circumstance that there is no foreclosure of Amazon's marketplace for Apple's official third-party resellers, thus not being a restriction that would find its origin and justification in Apple's distribution contracts with its official resellers.

In conclusion, to summarise, the contractual restrictions on sales in Amazon's marketplace would appear to constitute an infringement of Article 101 TFEU, in that they unjustifiably restrict the possibility for resellers who are not members of Apple's official distribution programme to access the intermediation services offered by Amazon and, through this, to reach a substantial and diversified part of its customer base. Moreover, as noted above, these same restrictions could limit incentives to compete effectively on price for Apple and Beats products, as well as hinder the integration of European markets and limit parallel trade.

Moreover, before going any further, it is emphasised that Amazon is not the only firm in a dominant position in diversified markets that is of concern to the authorities. Three other American companies are constantly under the antitrust lens and are commonly referred to as the 'Big Four Tech' or 'GAFA', which stands for Google, Apple, Facebook and Amazon. In particular, in recent years, with the explosion of Big Data and the optimisation of algorithms, these companies have raised concerns about the risk of possible abuses or illegalities to the detriment of competition.

3.3 E-Commerce in Italy and Marketplace Brokerage Services

For the purposes of assessing the offence, pursuant to Article 101 TFEU, arising from the agreement between the two groups of companies, the definition of the relevant market is essential in order to identify the characteristics of the economic and legal context in which the agreement between the companies is placed, as well as to allow the identification of the product and territorial scope in which the effects arising from the unlawful competition are realised.

In particular, the agreement between Apple and Amazon affects two markets:

- Internet retailing of consumer electronics products
- The market for the provision of intermediation services for the sale and purchase of goods and services on e-commerce platforms[43]

E-commerce is the sale of goods or services via an online platform. More generally, the word e-commerce can be taken to mean all commercial transactions that take place online, i.e. on the Internet. When we talk about e-commerce, it is possible to distinguish four types of online sales, depending on who makes their products or services available and who performs the act of purchasing[44]:

- B2C. "B" stands for business, i.e. the company that, in this case, sells to C, the consumer, i.e. the customer. This is the most common scenario through which the company sells to its customers via the Internet
- B2B. Business that sells to another business. This refers, for example, to businesses that supply other businesses with goods or services
- C2C. Consumer to Consumer, i.e. customer to customer. For example, the possibility of being able to sell personal products (e.g. second-hand) to someone via an online platform
- C2B. Consumer selling to business. This can be, for instance, the case of authors who sell their books to large companies such as Amazon and earn money by leaving a percentage to the platform that acts as intermediary

[43] AGCM Order No. 27623 of 10 April 2019, Case A528 - FBA Amazon
[44] https://sumup.it/e-commerce/?msclkid=41d7ac65d04b11eca0cd9cdca99b7d84

There are three places where one has the possibility to sell online, without needing therefore a physical shop. The types of e-commerce can be classified into:

I. Online shop. The merchant creates a personal website that serves the function of representing his shop in an online format. Here he sells his products or services through what is called an e-commerce solution

II. Online platform. Many merchants rely on large platforms that allow several companies to sell their products and offer a space where the act of sale between seller and customer takes place

III. Social media. Facebook, Instagram or Pinterest are sharing platforms that can turn into a channel for e-commerce. Many companies use social media to share their inventory and direct customers, via links in the description, to the actual purchase on the site

From the merchant's point of view, the advantages of opening an e-commerce site are first and foremost in economic terms. In particular:

a. Lower costs. Setting up an e-commerce site has a much lower cost because the costs of running a shop (such as rent and employees) are cut

b. Sale 24/ 7. Compared to a shop, e-commerce allows your customers to buy at any time, thus expanding your earnings and sales possibilities

c. More customers. Entering the world of the Internet means being more exposed and thus having more customers, usually limited by territorial boundaries

E-commerce is an increasingly important phenomenon in Italy as well, and with Covid-19 it was one of the few sectors that did not suffer a negative backlash. In the aftermath of the pandemic, consumer behaviour and buying habits have shifted in favour of eCommerce, and these changes seem destined to remain and generate new balances in the world of global commerce. Not only that, but retailers' awareness of the role of digital has grown, as they have had to change their service modes to manage the strong acceleration of purchases.

More and more consumers are buying online, attracted both by a very wide offer in terms of choice and prices, but also by the convenience of being able to buy directly from home, within reach of a smartphone. This is why more and more companies, not only large ones but also small local businesses, are opening up to e-commerce. In fact, in 2021 Italian web shoppers amount to

27.7 million (+3% compared to 2020) and online shopping is no longer just an alternative to cope with emergencies but a real necessity, an integral part of the purchasing process[45].

The main reasons for consumers to shop online are related to greater convenience (71%), direct shipping to the home of the products (62%), as well as a greater product assortment (49%) and greater shopping comfort (41%).

In more mature markets such as China and the UK, for example, for every EUR 100 spent by consumers, around EUR 20 goes online. In markets where supply is developing more slowly, online is nevertheless gaining market share.

In 2021, online purchases will be worth EUR 39.4 billion (+21% compared to 2020), in a context characterised by contrasting dynamics. On the one hand, product purchases continue to grow, reaching €30.5bn, albeit at a slower pace (+18%) than in 2020 (+45%). On the other hand, purchases of services, after the strong crisis of 2020 (-52%), recovered (+36%) and reached €8.9bn. This latter trend in particular, although positive, still fails to compensate for the serious losses generated by the health emergency, as the gap compared to pre-pandemic values (13.5 billion €) is still high[46].

Going into the details of the product segments, in product eCommerce the sectors that contribute most to the overall growth are: Computers & Electronics are the most relevant sectors (+19% and a total value of EUR 5.3 billion) followed by Apparel (+16%, EUR 3.3 billion).

High growth rates are also recorded for Furniture & Home Living (+30%, EUR 1.7 billion) and Food & Groceries (+42%, EUR 1.6 billion). Publishing exceeded the billion-euro mark (+8%), while purchases in all other product segments were up +21% in 2019.

Worldwide, B2C e-commerce is worth $3,535 billion (+20% year-on-year). In 2019, it accounted for 14.1% of total retail sales worldwide. According to the latest statistics, each person spends about 3 hours online per day and 52% of traffic is now accounted for by mobile.

Among the countries in the Asian region, India, the Philippines, China, Malaysia, Indonesia and South Korea grew (+25% year-on-year). Latin America, the Middle East and Africa are growing by

[45] Pontiggia V., Il mercato eCommerce in Italia: tiriamo le somme!, osservatori.net, 18/01/2022
[46] Businessintelligencegroup.it, Quanto vale il mercato dell'e-commerce in Italia, Dec. 10th 2020

21%, while more stable markets such as North America and Europe are experiencing slower but still steady growth (14.5% and 10% respectively)[47].

In 2019, 70% of the European population bought online. Among the most dynamic sectors:

- Fashion with €89 billion (+10% compared to 2018)
- Consumer Electronics and Media with €76 billion (+10%)
- Leisure with €60 billion (+8%)
- Home and Furniture with €44 billion (+12%)
- Food and Health and Beauty with EUR 38 billion (+12%)

To meet the increase in online shopping and support new consumer needs, more and more merchants and retailers are investing in the enhancement of digital channels from a transactional and relational perspective, as well as in omnichannel models. Such interventions contribute to the consolidation of a technological infrastructure, aimed at optimising the operational processes supporting eCommerce (marketing, logistics, customer service, etc.) and simplifying the user experience. And it should be emphasised that the changes are not only affecting large realities but also some SMEs, which feel increasingly incentivised to approach digital and understand its potential.

The Netcomm Consortium, the Italian Digital Hub for the Evolution of Enterprises, in one of its reports, emphasises the possibility of access to demand that is guaranteed by intermediation platforms and the network and information acquisition effects[48].

It is no coincidence that the second reference market, for the purposes of this analysis, as mentioned, is that of marketplace brokerage services. First of all, the term marketplace refers to a two-sided platform that intermediates retailers on the one hand and consumers on the other. Through marketplaces, consumers can access the offer of goods belonging to one or more product categories of a plurality of sellers, who can offer their products online to consumers[49].

Such a platform, in economic terms, is characterised by the presence of network effects: its usefulness to users increases as the number of players using it increases. A distinction can be

[47] Mangiaracina R., Perego A., Rangone A., Pontiggia V., eCommerce B2c, osservatori.net, Ed. 2022
[48] Marzario P., Novità e Trend dai Grandi Marketplace, Netcomm, 13 Aprile 2022
[49] OECD, 2019, An Introduction to Online Platforms and Their Role in the Digital Transformation, OECD Publishing

made between direct network effects, when utility is a function of the number of users belonging to the same group/versant of the platform, and indirect network effects, when utility is a function of the number of users belonging to the other side of the platform.

In our case, an example of indirect network effects consists in the utility of consumers being able to buy from a plurality of sellers, who, in turn, benefit from positive network effects due to the presence of a potential pool of consumers that can be reached: as the number of consumers increases, the convenience of the platform for sellers increases; likewise, the higher the number of sellers, the higher the utility that consumers derive from the marketplace.

Instead, an example of direct network effects may be the utility for consumers to benefit from the shopping experience of other consumers (e.g. publication of user reviews, or questions and answers about products already purchased by other consumers in the platform).

Due to the internalisation of network effects among platform users, also known as 'network effects', the number of consumers and sellers becomes the key variable for the success of a platform.

According to Netcomm, marketplaces currently intermediate up to 50% of the products sold in Italy.

Looking at the positioning of marketplaces in Italy, it can be seen that Amazon is the leading intermediation platform with 64 million average monthly visits, followed by eBay with 26 million visits in July 2019. With regard to the choice of retailers, Amazon appears to be the platform most used by 38% of Italian retailers, followed by eBay with 19%.

Focusing again on Amazon, we see how Bezos' company has dealt with the pandemic. The spread of the virus inevitably shifted most purchases online, with an exponential growth of e-commerce to the detriment of small local businesses. In this scenario, Amazon emerged decisively strengthened, recording three times the net profit in the third quarter of 2020 compared to the same period of the previous year, as detailed by The Post (2020)[50]. According to the newspaper, the value of Amazon's shares has risen by about 60 per cent since the end of February, reaching the highest level in history, with more than 1.2 million hires.

[50] "Amazon prospera nella pandemia", Il Post, 30 novembre 2020

3.4 The Distribution System for Apple Products and Amazon Group Activities

Amazon has for many years been refining its strategies, enabling even small producers to be competitive against those with greater bargaining power. Methods and conduct, however, need to be constantly monitored and scrutinised, as abuse would lead to the almost complete cessation of many activities.

In fact, according to preliminary analyses by the Italian Competition Authority (AGCM), it appears that Amazon exploited its Fulfillment By Amazon (FBA)[51] service to give a substantial advantage to suppliers who accepted the terms of this service, a measurable advantage in terms of supply and a noticeable increase in sales, over those who did not require activation or who chose not to adhere to the terms Amazon subscribed to in order to use the service. As a result, the Authority found the exploitation of the company's dominant position given the important status it holds in the e-commerce market and the attempt to extend its power further by also involving suppliers who did not need the service, thus obtaining numerous advantages in financial and data terms for new subscribers. According to these allegations, Amazon would have significantly favoured sellers using the FBA platform.

Before drawing conclusions, in this paragraph, we would like to better illustrate what activities the two companies engaged in that led to the need to define their conduct as improper.

Apple operates as a manufacturer of electronic devices, such as smartphones, tablets, personal computers, notebooks, audio video devices. Apple also operates as a distributor of the Apple and Beats brands through an open distribution system[52], with the exception of Beats Wireless products, any retailer has the ability to resell Apple products (online and/or in physical outlets), without the need for authorisation by Apple. In addition, Apple's products are distributed through a dual distribution channel, wholesale and retail, through physical and online channels, via Apple Stores and its own website, respectively[53].

[51] https://www.channeladvisor.com/uk/solutions/fulfillment/
[52] Decision of the European Commission of 25 July 2014, Case M.7290 - Apple/Beats
[53] Annual report pursuant to section 13 or 15(d) of the Securities Exchange act of 1934 of Amazon.com Inc.

As far as wholesale distributors are concerned, several entities appear to operate in Italy, such as, for example, the companies Ingram Micro Inc. (Ingram Micro Italy S.r.l.) and Tech Data Corporation (Tech Data Italia S.r.l.), Attiva S.p.A., Daicom S.r.l., EDS Group S.r.l..

As far as retail sales are concerned, resellers can be distinguished in terms of whether or not they belong to the official Apple distribution programme. In particular, the following categories of resellers can be identified:

- Apple Authorised Resellers, with a standard distribution agreement with Apple, who are supplied directly by Apple or by wholesale distributors
- Apple Premium Authorised Resellers, which are part of a network of resellers specialising in Apple products, adhere to a sales promotion programme for Apple products and provide customer support services. These resellers also source directly from Apple or wholesale distributors
- Unauthorised resellers who do not adhere to Apple's official distribution programmes, but who legitimately sell Apple products, source those products from Apple's wholesale distributors.

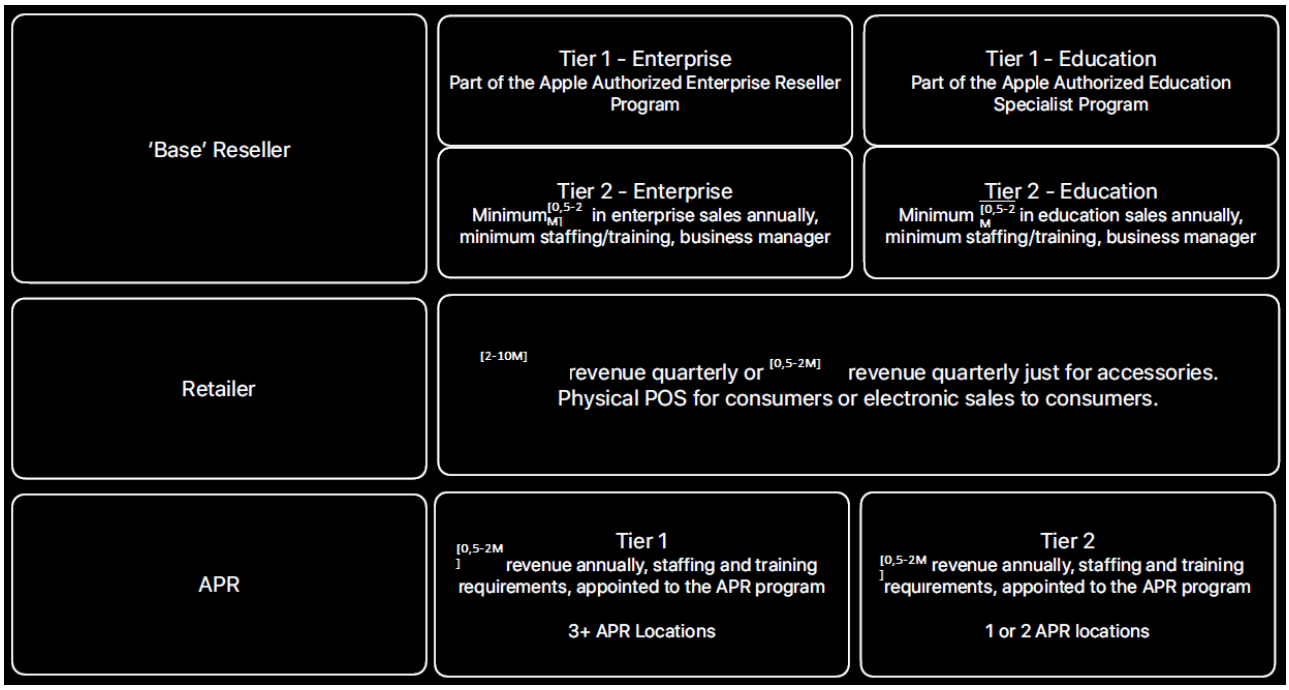
While all resellers can freely sell Apple and Beats Wir ed products in physical and online shops, Apple has an official reseller programme. Resellers who enter into a distribution agreement with Apple (hereinafter referred to as 'official resellers') are offered discounts and rebates in order to incentivise them to support their offerings through staff training, logistics services and on-site consulting services. These discounts are offered to both official resellers who purchase Apple products directly from Apple and those who purchase Apple products indirectly through wholesale distributors. These resellers also have access to Apple's marketing resources and merchandising.

Official resellers are referred to as Apple Authorised Resellers (AAR), a designation held by Amazon EU as of May 2012. Official resellers also include Apple Premium Resellers (APRs), which 'constitute a distinct category of AARs with a special commitment to providing a premium in-store experience for consumers looking to purchase Apple products'[54]. Finally, official resellers are also 'Retailers', which include large organised retailers, consumer electronics specialists, wholesalers,

[54] Decision of the European Commission of 25 July 2014, Case M.7290 - Apple/Beats

large and tailers. Each category of official reseller is identified according to specific characteristics (Figure 1).

Figure 4: Apple reseller



Source: AGCM - Investigation 2020

However, the choice to appoint an official reseller is at the discretion of Apple, which will assess "what seems most appropriate for the customer, the reseller, and Apple itself." Thus, as opposed to a selective distribution system, where access to the system should be based on qualitative criteria that, if met, allow access to the program, access to the Apple partnership remains in Apple's absolute discretion.

Into this segment of sales channels comes Amazon. The Amazon group also operates at different levels of the production and distribution chain. In particular, the company Amazon Services Europe S.à.r.l., offers marketplace services to third-party sellers,6 who use these brokerage services to make online sales. The company Amazon EU S.à.r.l., on the other hand, operates as an online seller and is therefore a retailer operating on the Internet through the marketplace. The Amazon group also operates as a manufacturer of technology products, such as Kindle tablets and Echo and FireTV audio-video devices.

The situation, however, is not as rosy as it seems. According to C. Hoffman, in fact, "Amazon's poor social behaviour and market dominance during and after the pandemic is a threat to our

economies and society." The Global Union (2020) report highlights some key points of Amazon's threat. First, the issue of growth is raised. From 2013 to 2019, the company's revenues grew by an average of 46 percent per year, compared to significantly smaller rates (around 10 percent) of companies such as Microsoft and Apple[55]. The explanation goes back to Amazon's particular strategy of tolerating losses at the expense of growth, using Amazon Web Services (AWB) to try to offset losses. Proceeds used, more often than not, to finance loss-making operations in other markets in order to maintain low prices and cheap labour. All of the firm's activities have benefited from the upward shift in online shopping, enabling an unprecedented consolidation of power.

An unclear turn of the enterprise was seen on March 17, 2020, when Amazon announced that it would discontinue supplies of nonessential items from third-party sellers.

However, the company did not discontinue the supply of nonessential items from its own inventories. This behaviour, framed as deeply irresponsible, created deleterious situations for many third-party sellers. By freezing FBA services, moreover, Amazon prevented the same sellers from removing their goods from warehouses. Only those with the infrastructure to use their own warehousing and selling systems were able to mitigate the losses[56].

The sharp and sudden increase in orders then led the company to rapid and massive hiring, but failed to ensure an adequate level of protection for employees. Employees' protests to safeguard their health proved futile, which, on the contrary, saw the company use an iron fist through warnings and dismissals. An almost surreal situation that led to the resignation of Vice President Tim Bray, with a letter condemning the company's actions. At the same time, the company declined to disclose the number of infected workers, which was feared to have reached 900. Given the company's very high number of employees and workers, negligence in terms of workplace safety could potentially have been instrumental in the spread of the virus.

Further allegations against Amazon revolve around the recurring failure to make tax payments, to the point that over a decade the company paid only 12.7 percent of profits compared to a tax rate in the United States of 35 percent. The multinational corporation's vast financial resources enabled it to make bargain-basement acquisitions during the pandemic to bail out struggling companies. Case in point was the acquisition of Deliveroo, facilitated precisely by the crisis. This

[55] Amazon Annual Report 2020, Annual reports, proxies and shareholder letters
[56] AGCM, Bollettino 23/2021 of Jun 7, 2021, Intese e Abuso di Posizione Dominante - A528 - Fba Amazon Provvedimento n. 29674

shows how the low economic climate allows Amazon to profit from anticompetitive acquisitions that would be severely hampered in different situations.

In order to counter tax avoidance, anti-competitive behaviour with respect to small and medium-sized enterprises, and precarious working conditions in companies, new legislative and social and labour organization initiatives to counter the monopoly will have to be given vigour. Just in recent days we are witnessing a reorganization of workers into a new labour movement to improve working conditions. Numerous strikes are shaking the international scene, involving the entire Amazon supply chain and reaching 75 percent adherence in Italy. A situation that portends an air of change for the company's post-pandemic future.

3.5 The negotiation of the agreement between Amazon and Apple and the limitations on third-party sellers on Amazon.co.uk

The collaboration between Amazon and Apple is long-standing and, in any case, predates 2018. Prior to this date, Amazon and Apple, specifically the Apple-ID and Amazon-EU companies, had entered into a contract called the "Apple Authorized Reseller Agreement." Under the terms of the agreement, Amazon was an "Apple Authorized Reseller"[57], that is, a reseller with whom Apple has an authorized reseller agreement in place in the territory of the European Union. As an official reseller of Apple-branded products, as we have seen in the previous section, Amazon receives benefits, for example, discounts, in order to boost sales of Apple products and the fight against counterfeiting, and can source from Apple's authorized distributors or directly from Apple.

In 2017, the two companies begin to discuss contract renewal, and on this occasion Apple's request to control third-party retailers' access to Amazon's marketplace (so-called gating) emerges. The gating of third-party retailers is, in fact, one of Apple's main requests, along with the request to monitor the presence of unauthorized or counterfeit products[58].

On October 31, 2018, Apple and Amazon entered into the Global Tenets Agreement (GTA) and the agreement amending the existing distribution agreement in Europe ("Amendment to the Apple

[57] 2017/12/12 Apple negotiation summary (privileged and confidential)- for business feedback_EU.docx
[58] 2017/12/12 Apple negotiation summary (privileged and confidential)- for business feedback_EU.docx

Authorized Reseller Agreement of October 31, 2018, "EU Agreement"), with validity in every nation where the two groups have an official distribution agreement, including Italy.

Under the provisions of the GTA, Amazon and Apple aim to establish a strong and lasting business relationship aimed at creating a unique and premium shopping experience. To this end, it is stipulated (Article 1(b) (c 111) that Apple will identify for each geographic location a number of official Apple resellers who will be able to sell Apple products in the identified Amazon marketplaces, at a minimum number of 2 resellers for each Apple product. Any changes to the list of resellers authorized to sell on Amazon.co.uk are subject to Apple's written consent, taking into account the allocation of products made to such resellers, sales territories and other relevant terms.

As far as Italy is concerned, the 2014 distribution agreement is therefore contextually amended to take into account the provisions of the new global framework. Included in the GTA is a list of twenty sellers allowed to sell through Amazon.it, retailers previously analysed and authorized by the two groups. The decision to limit the number of retailers is not dictated by qualitative characteristics, but is purely quantitative, amounting to 20 or so retailers, who will be selected one by one, "handpicked"[59].

In practice, the operators who can access the Amazon.co.uk marketplace identified in the GTA and EU Agreement are a subset of Apple's official resellers, listed in a list that identifies the business names of operators who can access the marketplace.

In addition, there is a divergence between the two companies in their choice of the 20 retailers: Amazon attempts to choose from the official retailers those that have the most sales in the marketplace in each of the 100 countries, whereas those proposed by Apple are insignificant in terms of sales.

In addition, as of January 1, 2019, Amazon cannot allow sellers other than those identified by Apple to access its local marketplaces, including Amazon.co.uk, being excluded both official Apple resellers other than those specified in the contract and unofficial resellers who freely purchase Apple and Beats products excluded from the selective distribution system.

[59] AGCM Investigation - doc. ISP.72 - Amazon's internal email of 21 September 2018, at 10.24 a.m.

In addition, the GTA provides that Apple can decide which products can be placed in the Amazon.co.uk marketplace (authorized products) by Amazon EU and by sellers authorized to sell on Amazon.co.uk, which Amazon will have to remove from the marketplace 129 concerns 'Article 2.8, although there is no selective distribution system and "any retailer has the ability to resell Apple products (online and/or in physical outlets), without the need for an authorization from Apple.

What's more, since advertising is an integral part of the shopping experience, aimed at helping customers find the products they are looking for, the GTA includes limitations on the subject of advertising carried out on Amazon's marketplace. Specifically, Article 3.1 of the GTA stipulates that the featured advertising spaces ("top banners") and the first two sponsored spaces in search results shall bear only authorized Apple products. Likewise, the first page of search results on specific text strings ("Brand queries") and Apple product description pages shall not display sponsored products of other brands competing with Apple, identified in a specific list.

Concurrently with the Covid-19 health emergency in March 2020, Amazon and Apple are considering a temporary expansion of the number of authorized operators on the Amazon marketplace. However, there are not a few criticisms and difficulties with only temporarily expanding the list. Some Amazon employees, however, appear opposed to only a temporary extension, as it would conflict with the argument that selection is based on qualitative and objective criteria.

From reading the agreement between Amazon and Apple, in my opinion, it seems to come across as unfair and almost "threatening" behaviour on the part of Apple toward Amazon. In fact, one of the main effects directly attributable to the GTA concerns the drastic decline in the volume and value of Apple and Beats products sold by third-party operators, an effect also acknowledged by Amazon itself in some of its internal documents.

A further effect of the agreement relates to the level of prices offered by third parties on Amazon.co.uk, leading to a deterioration of price competitiveness on the Amazon marketplace relative to competitors.

Arguably, the positive effect of an agreement made in this way, but not sufficiently offsetting the negative effects, is the fact that it lends itself to be a valuable tool to support the fight against counterfeiting, along with the Brand Registry program, launched in 2017 and available free of

charge to brand owners whose products are for sale on Amazon, regardless of the existence of a direct business relationship between the brand owner and Amazon. This is because, continuous product scanning, extensive retailer monitoring, and customer reviews enable Amazon to block fraudulent accounts of fraudulent entities before they were able to offer products for sale on Amazon.

Instead, Amazon's Brand Registry program services provide brand owners with (i) accurate brand representation, ensuring greater control over Amazon product pages that use identified brands; (ii) search tools (global search, image search, search by ASIN ID number) and reporting tools to identify instances of potential infringement; and (iii) support tools from Amazon's team. Brands included in the Brand Registry program are also granted greater control over photos, videos, text, and other information included on Amazon product detail pages associated with their brand so that they can ensure that product information is accurate.

In 2018, Amazon also launched an innovative function of serializing individual product units of brands, which can virtually eliminate counterfeiting. This led to the launch of a new service called Transparency that relies on assigning unique serial numbers to products, whereby brands can apply a unique 2D code (similar to a QR code) to each unit they produce, thereby enabling Amazon, other retailers, relevant authorities, and ultimately customers to determine the authenticity of each product.

In 2019, Amazon expanded Transparency's operations to Europe and other countries, including Canada and India. For products that adhere to the Transparency program[60], which therefore have a serial identification number, Amazon is able to verify their authenticity through its unique code, whether the product is handled through its logistics centres or shipped by a third-party seller directly to a customer.

3.6 The contested conducts and violation of Article 101 TFEU

The commercial agreement outlined in the previous paragraph would appear to prevent access to the marketplace sales brokerage services of Amazon, as a primary industry player with extremely

[60] https://brandservices.amazon.com/transparency

high market share[61], for a set of consumer electronics retailers who do not adhere to Apple's official distribution programs, but who lawfully sell Apple and Beats products having purchased them through Apple's wholesaler channel.

This foreclosure of access to Amazon's marketplace services, therefore, is likely to create a significant barrier to market outlet for online sales of electronics products for unofficial retailers, reducing the online supply of Apple and Beats products. For this reason, the agreement violates Article 101(1)(b) TFEU in that it is intended to limit or control outlets.

This agreement appears to have even more severe foreclosure effects when one considers the current market environment, in which the use of e-commerce and distance shopping has become paramount. In this sense, the excluded parties, usually small and medium-sized domestic enterprises, unable to make use of the marketplace services provided by Amazon, are unable to reach a large portion of customers who purchase electronic products online.

In addition, the agreement, by limiting the number of businesses making sales on Amazon, and thus Amazon's competitors and Apple's official retailers, could also result in reduced incentives to compete effectively on the price of Apple and Beats products.

The need to protect the consumer shopping experience and brand reputation in the online segment would be particularly pronounced in the context of marketplaces, where the identity of the actual retailer is not

clearly evident and where attempts to free ride on the reputation of established manufacturers are frequent. For these reasons, Apple, on its side, considers limiting the number of resellers on Amazon to be a legitimate request, which aims to pursue legitimate goals such as: improving the distribution of Apple products, protecting the consumer shopping experience, and resolving issues inherent in conduct fraudulent or counterfeit-related products that pose security concerns.

Moreover, the restrictions under consideration could create obstacles to the integration of European markets by preventing parallel trade in the various national marketplaces, preventing retailers from selling through Amazon sites Apple and Beats products in the territory of states other than the state of establishment. According to it, what emerges is that the conducts under consideration have an anticompetitive object. In fact, according to EU case law, in principle,

[61] Provvedimento AGCM n. 27623 del 10 aprile 2019, caso A528 – FBA Amazon

agreements aimed at preventing or restricting parallel trade are directed at preventing competition, without the existence of an anticompetitive object being subject to proof that the agreement entails inconveniences for end consumers, since Article 101 TFEU is not intended to protect only the interests of competitors or consumers, but rather the structure of the market and, in so doing, competition as such.

These restrictions consist of a limitation of online sellers of Apple and Beats products through a foreclosure of access to services provided by Amazon, i.e., the main operator of marketplace intermediation services in Italy. They do not, in fact, concern products sold by Apple to Amazon, but rather marketplace services provided by Amazon to third parties, which cannot simply be traced back to the vertical distribution contract. In this sense, Amazon is not only the provider of marketplace services to third-party sellers, which are a means of carrying out the online sale of products, but it is also the seller of Apple and Beats devices, as well as Amazon devices, on its own behalf.

However, even if one were to consider the agreement between Apple and Amazon vertical, it would not qualify for exemption because it contains one of the key restrictions listed in 'Article 4 of Regulation 330/2010, specifically a restriction on the customers to whom the buyer can sell the contracted goods or services. From a vertical perspective, where Apple is the supplier and Amazon the buyer, in fact the agreement restricts the customers to whom Amazon can sell its marketplace brokerage services. The fact that the restriction does not relate to the supply contract, but to other services rendered by the buyer aggravates the restriction because it lacks any instrumentality link between the restriction and the cause of action of the contract, going not only to violate the (b) and (d) of Article 101, TFEU but subparagraph (e), which expressly prohibits making the conclusion of contracts conditional on the acceptance by the other parties of additional services, which, by their nature have no connection with the object of the contracts themselves.

Apple and Amazon are active as competitors in the retail sale of consumer electronics products on the Internet. On the relevant market, in fact, Apple criticizes that the Authority focused on its business only in the online channel while neglecting the totality of its sales channels, losing objectivity in its assessment. In other words, in Apple's view, the relevance of retail sales on physical stores would have been completely overlooked, even though it is a prevalent mode of

sales of Apple and Beats products, due to an erroneous definition of the relevant market for retail sales of consumer electronics in Italy as limited to online sales only. Thus, considering also sales in physical stores of Apple/Beats products sold in Italy, Apple estimates that online sales by third-party retailers through Amazon.co.uk account for less than 1 percent, in each of the various markets/product categories. This would therefore demonstrate the irrelevance of the restriction.

In fact, both companies sell Apple and Beats products to the public; in addition, Amazon produces some devices that compete with Apple, such as tablets and audio devices that it sells on the Internet. Third-party sellers using the marketplace are also active in selling Apple and Beats products.

These restrictions would appear to be grafted into an agreement of a reciprocal nature: on the one hand, Apple grants Amazon official distribution of Apple products and, on the other hand, Amazon grants Apple exclusive marketplace services to official Apple resellers only (among which Amazon itself is identified). In addition, Apple and Amazon are also competitors in the production of electronics products, as they both make goods in the same product categories, such as tablets and audio-video devices.

Restricting access to Amazon's marketplace for unofficial resellers of Apple and Beats products also does not appear justified in light of the circumstance that there is no foreclosure of Amazon's marketplace for Apple's official third-party resellers, thus not being a restriction that would find its origin and justification in Apple's distribution contracts with its official resellers.

Moreover, precisely because of its business model, Amazon has no interest in limiting the number of sellers selling Apple products, since its own profitability depends not only on direct sales but also on sales commissions for brokered sales, thus having "a financial incentive to support and promote Sellers.

The assortment of products, especially those with the greatest public appeal such as Apple's, is therefore an essential element in Amazon.co.uk's success, both with respect to direct sales and intermediate sales.

In conclusion, the contractual restrictions on Amazon's marketplace sales would appear to constitute a violation of Article 101 TFEU, insofar as they are likely to unjustifiably limit the ability of retailers who are not members of Apple's official distribution program to access the intermediation services offered by Amazon and, through it, to reach a substantial and diverse

portion of its customer base. Moreover, as noted above, these same restrictions could limit incentives to compete effectively on price for Apple and Beats products, as well as hinder the integration of European markets and limit parallel trade.

Indeed, Apple is believed to have exploited the circumstance that Amazon is also the leading provider of marketplace services to achieve a result that it could not otherwise validly have achieved in bargaining with retailers, as a clause prohibiting retailers in an open distribution system from using third-party platforms to sell online would have been a fundamental restriction of competition.

3.7 Judgment and Concluding Remarks

Although a ruling has been issued, getting one's own conclusive idea on such a complex, constantly evolving and open-ended topic as oligopolies is not an easy thing to do.

More modern times are certainly characterized by the development of globalization, a phenomenon that has inevitably transformed the terms of competition protection. Recognizing globalization as the set of phenomena associated with economic, social and cultural integration among different areas of the world, it has strong implications for the current development of oligopolies, both positive and negative.

The positive implications, are undoubtedly those related to the phenomenon of standardization; this, in fact, allows the Competition Authorities to immediately have a clear picture of the work of a company operating as an oligopoly in one country, being able to implement an immediate comparison with other operators, offering the same service in another country.

However, the absence of barriers and the ever-increasing deregulation of trade, in fact, open the doors for managers of large companies to trans-national arrangements that can range from mergers to joint ventures. This high level of concentration, only translates into greater difficulty for antitrust authorities to intervene against industrial giants, which also expand through agreements that escape antitrust scrutiny.

The phenomenon of globalization is accompanied by the development of online businesses and, as a result, hi-tech oligopolies. The hi-tech and technology industry is saturated with a few well-

known names such as Google, Amazon, Apple and Facebook, i.e., the new oligopolies that act as barriers to the entry of new competitors into the industry.

In light of this, a multitude of factors must be taken into account in assessing the gravity of an infringement, principally, the nature of the restriction of competition as well as the role and representativeness in the market of the companies involved, and the context in which the infringements were implemented.

In this particular case, with regard to the nature of the restriction, it is considered that the two companies have put in place a cartel that incorporates a restriction under Article 101(1)(b) and (d) TFEU, as this cartel had the effect of reducing the supply by retailers of Apple and Beats products, reducing cross-border sales, and resulted in an increase in the prices charged by third-party retailers on the Amazon.it marketplace for Apple and Beats products.

With reference to the role and representativeness of the companies involved, the importance in terms of the size and notoriety of the Amazon and Apple Groups among businesses and consumers is undisputed, both in the relevant markets and, more generally, in the various markets in which the companies attributable to the two Groups operate. Moreover, Amazon is an indispensable counterpart for access to the Amazon.it marketplace and thus to a key distribution channel.

In addition, it should be added that the restrictions at issue in the proceeding, as evidenced by the documents in the record, on the one hand, were explicitly requested by Apple, believed to be conditions for entering into the distribution agreement with Amazon, and originated from Apple's stated desire to limit the number of resellers of Apple and Beats products and competing advertising on Amazon's marketplace; on the other hand, Amazon has limited access to its marketplace, to the detriment of third parties, in order to obtain considerable individual benefits in terms of better conditions of supply of products to be sold directly, including greater discounts on the purchase of Apple and Beats products, obtained at the exclusion of third-party resellers and for the constant monitoring of the platform597.

In light of this, it is inevitable to conclude that the line taken by the Authority is the right one: there is therefore a violation of Article 101 of the Treaty on the Functioning of the European Union consisting of agreeing and implementing contractual clauses that prevent resellers who

legitimately engage in the business of reselling genuine Apple and Beats products from accessing the intermediation services of the Amazon.it marketplace[62].

Therefore, the demands for the immediate cessation of the competition-distorting behaviours put in place by Apple and Amazon, as well as the administrative and pecuniary sanction imposed on both companies, are also legitimate.

In any case, even if it is easy to find the two companies guilty in this situation, we should not forget that thanks to the Internet, multi-sided marketplaces have sprung up, platforms that act as intermediaries between customers and companies; for these platforms, big data is also crucial. Data and its analysis can lead to the development of new services and the creation of much more specific and targeted products. To end consumers, they present themselves as a great advantage, but because of the difficulty in processing all this information, for this very reason the Antitrust Authority may go so far as to force the dissemination of these collections and make them public, in order to make markets more competitive.

The phenomenon of mergers and acquisitions for the Antitrust Authority is a no small issue and a difficult one to interpret; it is very difficult for the Antitrust Authority to assess when an acquisition in the high-tech world is anti-competitive and when it is a killer acquisition, but it is up to the Authority to find the right balance.

[62] AGCM - I842 - Vendita Prodotti Apple E Beats Su Amazon Marketplace - Provvedimento n. 29947, Dec. 2021

Conclusion

In this paper, the fundamental elements for understanding the Amazon - Apple case, the main focus of this thesis, are presented.

The study of the abuse of a dominant position of a leading company in the online market is constantly evolving. The same analysis carried forward or backward in time may have different outcomes, which explains the difficulty of the topic and the treatment of this branch of law.

It should also be pointed out that the market is constantly evolving and the competitive environment is becoming increasingly complex, with legislation that in turn has to keep pace through continuous updating. With improvements in technology and the development of digital markets, it has become even more complicated for antitrust to make decisions regarding market distortions.

As mentioned above, the case concerning the online sales system of Apple and Beats branded products on the Amazon platform was chosen to present most of these issues.

The conduct reported consists of unfair conduct arising from a commercial agreement between the Amazon and Apple groups, whereby the sale of Apple and Beats products on the Amazon marketplace would be entrusted exclusively to Amazon and other official Apple resellers, to the exclusion of other economic operators legitimately selling such products.

This agreement would, in fact, appear to preclude intermediation services for the sale on Amazon's marketplace, to a set of resellers of consumer electronics products who do not adhere to Apple's official distribution programmes, but who lawfully sell Apple and Beats products having purchased them through Apple's wholesaler channel.

This foreclosure of access to Amazon's marketplace services is therefore likely to create a significant barrier to entry into the market for online sales of electronics products for non-official retailers, reducing the online supply of Apple and Beats products. For this reason, the agreement is in breach of Article 101(1)(b) TFEU as it aims to limit or control outlets.

In light of this, the assessment of the gravity of an infringement must take into account a multiplicity of factors, principally, the nature of the restriction of competition and the role and

representativeness on the market of the undertakings involved, as well as the context in which the infringements were implemented.

In this specific case, with regard to the nature of the restriction, it is considered that the two undertakings have put in place an arrangement constituting a restriction under Article 101(1)(b) and (d) TFEU, insofar as this arrangement has had the effect of reducing the supply by retailers of Apple and Beats products, reducing cross-border sales and leading to an increase in the prices charged by third-party retailers on the Amazon.it marketplace for Apple and Beats products.

With reference to the role and representativeness of the companies involved, the importance in terms of size and reputation of the Amazon and Apple groups among businesses and consumers is undisputed, both in the relevant markets and, more generally, in the various markets in which the companies belonging to the two groups operate. Moreover, Amazon is an indispensable counterpart for access to the Amazon.it marketplace and thus to a fundamental distribution channel.

In conclusion, the Authority's ruling holds that there is an infringement of Article 101 of the Treaty on the Functioning of the European Union, consisting in the agreement and implementation of contractual clauses preventing resellers of Apple and Beats products from accessing the intermediation services of the Amazon marketplace. Therefore, the requests for the immediate cessation of the competition-distorting conduct by Apple and Amazon, as well as the administrative and pecuniary sanction imposed on both companies, are also lawful.

As I pointed out in Chapter Three, in my opinion, the ruling issued by the Antitrust Authority could not have been different. However, we must not forget that technological and process innovation, globalisation, the internet, Big Data and customer profiling, as well as the possibility of reaching people anywhere in the world, have given rise to multi-sided markets, platforms that act as intermediaries between customers and companies, offer the possibility of offering personalised services, and encourage the development of new services and the creation of much more specific and targeted products.

In theory, all this represents an advantage for end consumers, but it remains the task of the Authority to find the right balance between these new channels and ways of doing business and the difficulty of processing all this information, user privacy and competitive markets.

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